

Democracy, Paternalism, and Campaign Finance¹

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1.

The Bipartisan Campaign Reform Act (BCRA) of 2002 put limits on corporate spending during campaign seasons.² More specifically, the act required that corporate treasury funds not be used to pay for “electioneering communications,” defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary election or 60 days of a general election. In its *Citizens United v. FEC* decision of 2010 the Supreme Court struck down these requirements as excessive burdens on the freedom of speech, triggering strong criticism from President Obama, *Occupy* protesters and many others.³

Were the restrictions excessive? The main steps to the Supreme Court’s conclusion were as follows. Restrictions on the expenditures of individual citizens are prohibited, as established in *Buckley v. Valeo*; and corporate expenditures are relevantly similar to individual expenditures; therefore, restrictions on corporate expenditures are prohibited.⁴ The case thus raises two questions.

¹ Versions of this paper were presented at the Society for Applied Philosophy Conference, Oxford; the Pacific APA Conference, Seattle; the Center for Ethics at the University of Colorado, Boulder; and the University of Chicago Divinity School. I’m grateful to audiences on all of these occasions for their criticisms and suggestions. For very helpful written comments, special thanks to Josh Anderson, David Boonin, Mike Huemer, Gerald Lang, Helen Norton, and two anonymous referees. Thanks also to John Griffin for helping me find some of the studies referred to here, Jacob Briskman for helpful conversations about the issues, and Chris Heathwood for urging me to write up my views.

² Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), Pub. L. No. 107–155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.). On some readings the act applied to non-profits as well as for profit corporations – I discuss just the latter. I also set aside unions, whose spending was restricted by BCRA too.

³ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

First, are corporate expenditures relevantly similar to individual expenditures? Second, should there in fact be restrictions on individual expenditures?

In this paper, I will focus mainly on the second, broader and more basic, question, arguing that there should be some limits on individual expenditures and thus, *a fortiori*, on corporate expenditures as well. But I'll also note some places where the case for limits on corporate speech in particular seems especially strong. I will primarily be concerned with whether it is *morally* permissible to put limits on expenditures, though what I have to say also bears on the legal question of whether it is *constitutionally* permissible. I'll focus on US law but establish more generally applicable principles.

I will offer a qualified defense of expenditure limits. The limits I will defend incorporate some important distinctions that several campaign finance reform proposals have tried to respect.⁵ These "targeted limits," as I'll call them, restrict electioneering communications which are made in the time period just before an election and focus primarily on particular candidates, rather than particular issues. Throughout, where I discuss expenditure limits, I'll have in mind limits with these particular features. We'll see that such targeted limits are especially attractive.

I proceed as follows. First, I'm going to present that main reasons for allowing expenditures, based on speaker and listener interests. Second, I'll explain why although these reasons have some force, there is a good case for limits: the "anti-distortion argument." Third, I'm going to present what I think is the most forceful objection to that argument: the "paternalism objection." Finally, I will argue that the paternalism objection can be resisted, at least as applied to targeted limits.

2. The Case for Expenditures

⁵ Though, as I clarify later, there is room for debate about the exact way to incorporate these distinctions. See note 56 below and accompanying text.

I have said that I'm going to consider "expenditures." Let me explain a little bit more what I have in mind. The *Buckley* court distinguished between campaign "contributions" and "independent expenditures" (which I'm referring to as just "expenditures").⁶ The former are donations given directly to a candidate, which she may use as she pleases. The latter are expenditures on political expression (such as buying television advertisements) made independently of any coordination with the candidate. *Buckley* established that limits on contributions are constitutionally permitted and they remain in place (including limits on individual contributions and a ban on corporate contributions). Since those limits are already accepted, I focus here on the case for limits on independent expenditures. I'll begin by explaining the main case for protecting expenditures. Along the way, I'll consider some ways in which the argument for corporate expenditures tracks or differs from the argument for individual expenditures.

2.1 Speaker Interests

We can distinguish two central interests that people have in being able to make expenditures: their interests as "speakers" and their interests as "listeners." Each of these interests plays a role in the case for expenditures and I'll consider them in turn.

People in general have an interest, "as speakers," in expression that communicates their ideas, and so on.⁷ Their interest in expressing *political* views deserves special protection by the government because expressing political views is one central way of participating in the political process and we think that in a democracy citizens must have the opportunity to participate in the political process.

What does this have to do with *spending* on political ads? The *Buckley* court pointed out that almost no political expression is possible in the modern world without being able to spend money to

⁶ *Buckley v. Valeo*, p. 46; p. 51.

⁷ For a more extensive discussion of speaker interests see Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989).

promote one's views.⁸ For instance, suppose that I want to criticize President Obama's health care plan. One thing I can do is talk to my friends or shout my ideas in the park. But to gain any reasonable audience I will need to, say, produce a pamphlet and this requires me to spend money on printing and so on. Similarly, restricting people from buying ads, paying others to produce ads, and so on, would prevent people from engaging in spending that is a means of getting their views across.

Thus, people's interests as speakers provide a justification for allowing individual campaign expenditures. What about the expenditures of associations of individuals (especially corporations)? The interest individuals have in political expression makes it important that they not only be able to express views as individuals but also be able to associate with others to express views as a group.⁹ First, individuals may be able to reach a much wider audience by joining together than they would acting separately. Second, the message that they are able to communicate by associating with others may be different. For instance, the message expressed when each of several environmental activists says that *she* is concerned about deforestation is different from the message expressed when the Sierra Club, of which all these individuals are members, expresses that *it* is concerned with deforestation. For instance, the latter communication associates the position on deforestation with the credibility the club may have established on other issues.

This means that protecting speaker interests can support not only expenditure rights for individuals but also for associations. This case for protecting the political speech of associations seems clear in the case of associations, such as the Sierra Club, which clearly advocate in light of the views of their individual members. Since people join the Sierra Club in order to promote their political views (about the environment), the speech of the Sierra Club is likely to serve their individual interests in disseminating those views. In these cases, the expression of the association is very plausibly a means for those individuals to express themselves.

⁸ "...virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley v. Valeo*, p. 19.

⁹ See, for discussion of the importance of association to individual advocacy, *NAACP v. Alabama*, 357 U.S. 449 (1958), p. 460.

Does this argument apply to (for-profit) corporations? Justice Kennedy suggested that it does because corporate speech advances the expressive interests of shareholders.¹⁰ There are three important objections to this suggestion.¹¹ First, people typically invest in corporations for financial reasons, unconnected to their political views. This is especially likely in a world where people often make investment decisions through intermediaries, such as the fund managers of mutual funds, and may have little awareness of what speech those investments are supporting. Given these motivations, it doesn't seem that people are using investments in corporations as a means of advancing their expressive goals. Second, when corporations speak, they are bound by fiduciary duty to make decisions by considering just the financial interests of their shareholders.¹² Those decisions are not made, in particular, by considering the shareholders' view of the common good. This suggests that corporate speech is not a vehicle for expressing their view. Third, it is not clear that there is such a thing as "the shareholders' view of the common good."¹³ Shareholders in any given corporation are likely to be a heterogeneous group with conflicting political opinions and interests. This means that there is probably no plausible method of aggregating their perspectives to arrive at a single view that could reasonably be attributed to the group as a whole.¹⁴

These problems suggest that the speaker interests argument *for* corporate expenditures is comparatively weak. They also suggest that there are distinctive reasons telling *against* having corporate speech. In particular, they raise concerns about compelled speech. We have seen that the importance of speaker interests tells against restricting their expression. It also seems to demand that they be able to control the message that they express and not be forced to adopt a message that they

¹⁰ *Citizens United v. FEC*, p. 876; p. 884.

¹¹ For further discussion of these problems see Anne Tucker, "Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in *Citizens United*," *Case Western Law Review*, vol. 497 (2011), pp. 528-34.

¹² See, for example, Del. Code Ann. tit. 8, § 141(a), 151-153, 157, 161, 166 (2001 & Supp. 2008).

¹³ See Iman Anabtawi, "Some Skepticism about Increasing Shareholder Power," *UCLA Law Review*, vol. 53 (2006), pp. 561-599, for the claim that shareholders do not even have fundamentally shared interests; p. 561; p. 564.

¹⁴ For a detailed explanation of the problems with aggregating heterogeneous views and interests to arrive at a group perspective (discussing, in this case, congress) see Kenneth A. Shepsle, "Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron," *International Review Review of Law & Economics*, vol. 12, no. 2 (1992), pp.239-256.

disagree with.¹⁵ If, as the speaker interests argument *for* expenditures assumes, spending money to fund expression is itself a means of speaking, then shareholders whose money is used to fund political messages, the argument goes, are being forced to engage in political expression that may conflict with their beliefs.

The important question about this argument is whether this speech is genuinely coerced. Justice Kennedy argued that it is not because, first, shareholders can vote in board elections, thus having some influence on spending decisions, and, second, because they have the exit option of selling their shares if they disagree with a corporation's expenditures. I'm not going to address this issue in detail here, because there is a lot to be said, and it would distract too much from my central argument. There remains substantial disagreement about it.¹⁶

2.2 Listener Interests

People also have interests, "as listeners," not in contributing expression, but in hearing expression. Protecting speech is important, in light of listener interests, because of its potential capacity to provide information. This justification is often thought to be especially important when it comes to *political speech*, which discusses political issues and candidates. It is important in a democracy, the reasoning goes, for citizens to be exposed to all of the available arguments and positions on political issues and to have good information about the candidates they are being asked to vote on.

¹⁵ See, for example, *Wooley v. Maynard*, 430 U.S. 705 (1977) for the constitutional (anti-) compelled-speech doctrine.

¹⁶ For a reply to Justice Kennedy's claims see Anne Tucker, "Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in *Citizens United*," p. 512; pp. 533-541. See also, for some proposals about how corporate governance could be structured to make spending more responsive to the views of dissenting shareholders, Lucian Bebchuk and Robert Jackson, "Corporate Political Speech: Who Decides?" *Harvard Law Review*, vol. 124 (2010), pp. 83-117.

This reason for protecting speech is often appealed to as an argument against campaign finance reforms. For instance, the *Buckley* court rejected caps on campaign expenditures by individuals because “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”¹⁷ The court reasoned that caps on individual expenditures would limit the total *amount* of political speech because it would reduce the amount of TV ads and so on that could be bought for campaign purposes. And a reduction in the amount of speech is often to the detriment of citizens because it can reduce the range of arguments and views they are exposed to: it “necessarily” restricts “the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹⁸ Thus, the court concluded, caps on individual expenditures should be rejected because they may harm citizens’ ability to make an informed vote.

Now, the court probably overreached in saying that reductions in the overall quantity of speech *necessarily* harm voters by reducing the quality of debate that they are exposed to. Perhaps the additional speech would have presented new and critical ideas but perhaps it would have just rehashed old views and presented them in unhelpful soundbites. What matters for our purposes is that additional speech certainly *can* play an important informational role, and that creates a significant *prima facie* case for protecting it in case it turns out to be important.

One, more specific, version of the listener interests argument suggests that not only does free political discussion provide listeners with potential arguments, and so on, to consider, but is more likely to help them have *true* beliefs about politics. This claim is usually defended by relying on the metaphor of the “market place of ideas.”¹⁹ The idea is that there is an analogy between the benefits of competition between products in the market and the benefits of competition between

¹⁷ *Buckley v. Valeo*, p. 14-15.

¹⁸ *Ibid.*, p. 19.

¹⁹ As discussed by Justice Holmes: “...when we look back at all that used to be seen as the truth, we know that we must keep a free market of ideas open. The best test of truth is the ability to get accepted in the market.” *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, O.W., dissenting), p.626.

ideas in public debate about politics. Just as the best products tend, over time, to win out over lower quality ones, so too will the true political claims become more dominant than the false ones, if they are all allowed to compete for people's acceptance. Restrictions on expression prevent new ideas entering the arena of political discussion and thus may hinder this process of competition. This rationale too provides a *prima facie* case for protecting any additional speech since it can add to the ideas that compete in the political "marketplace."

Listener interest arguments for expenditures can also be used, as they were in *Bellotti* and, ultimately, *Citizens*, to reject limits on expenditures by corporations.²⁰ Just like the speech of individuals, corporate campaign speech presents ideas and arguments about the candidates which may aid citizens in making their decisions about whom to vote for and contribute to public discussion. Thus the *Bellotti* court claimed that corporate speech ought to be protected because it gives "the public access to discussion, debate, and the dissemination of information and ideas."²¹ Furthermore, corporations may have expertise in particular areas, which potentially makes their speech in those areas especially valuable, and it may be useful for listeners to hear not just the views that corporations express but to know that those views are associated with a particular corporation, whom they, say, especially trust or distrust.²²

3. Anti-Distortion

We have seen that expenditures have an important role to play in democracies given both speaker and listener interests in expression. But unlimited expenditures also present a significant threat to the democratic process.

A basic premise of representative democracy is that a properly functioning government should represent the will of the people. Representing the people's will consists in acting on their view of the

²⁰ *First National Bank of Boston v. Bellotti*, 435 U. S. 765 (1978).

²¹ *Ibid.*, p. 783.

²² See Martin Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* (New York: NYU Press, 2011), p.63; p.81.

common good. A government fails to be representative when it acts on views of the common good that are not held by the people or by only a narrow section of the public.

Unlimited expenditures, according to the anti-distortion argument, threaten to prevent the government from being representative (I will call this “distortion”).²³ We saw in the previous section that plausibly, and according to the main arguments in favor of allowing expenditures, the more money spent on political expression the more political expression there is. It follows that someone who is able to spend more is thereby able to produce more speech. The concern of the anti-distortion argument is that a greater ability to speak gives someone a greater ability to *influence* political outcomes.

We can distinguish two different ways in which the ability to spend more might allow an actor to exert greater political influence and thus produce distortion. First, it may have an impact on *electoral* outcomes, on *which candidates* get elected, and, second, it might have an impact on *legislative* outcomes, on what those candidates *do* once in office. It is distorting for money to influence electoral outcomes because this means that candidates will be elected who are more likely to represent a narrow section of citizens rather than the public as a whole. It is also distorting for money to influence legislative outcomes because this means that policies are being made which reflect the views or interests of a narrow section of the population rather than the people’s view of the common good.

Will unlimited expenditures produce electoral distortion? I will return below to the issue of how exactly the ability to spend might translate into influence but the basic argument that it will is clear enough: by spending more, as we’ve seen (and as the pro-expenditure arguments assume), actors can produce more expression. Thus, those who can spend more, the argument goes, have a greater ability to persuade others about how to vote, for instance by creating the impression that their views are especially widely endorsed.

The important empirical issue here is whether one can really persuade more people by spending more money on advertising and so on. Earlier political science literature expressed a lot of

²³ I draw here on Lawrence Lessig “Democracy After Citizens United,” *Boston Review* (September/October, 2010).

skepticism about this claim.²⁴ According to that literature, spending either has virtually no impact on voters or it affects them only by providing them with more information, in which case it is good for the democratic process because it provides information and does not produce distortion. These studies were limited because, first, they focused on advertising in highly competitive states, where spending on behalf of candidates is likely to be even.²⁵ And, second, this research measured advertising exposure by relying on self-reports of media consumption. Individuals who report exposure to advertising are distinctive in several relevant ways, for instance in showing especially high levels of political knowledge and interest. Thus, the studies may have failed to control for the effects of these characteristics.²⁶

Recent literature suggests a different picture to the earlier studies.²⁷ According to several recent studies, advertisements (as well as campaign events and so on) do persuade voters to choose particular candidates.²⁸ And they have this effect independently of any information they impart about the candidate's positions, partisanship, and so on. Huber and Arcenaux, for instance, studied the effects of media during the 2000 presidential election on voters in non-battleground states.²⁹

²⁴ See, for instance, Craig Brians and Martin Wattenberg, "Campaign Issue Knowledge and Salience," *American Journal of Political Science*, vol. 40, no. 1 (1996), pp. 172-193.

²⁵ These limitations are explained in Gregory Huber and Kevin Arcenaux, "Identifying the Effects of Presidential Advertising," *American Journal of Political Science*, vol. 51, no. 4 (2007), pp. 957-977; pp. 958-959. See also John Zaller, "The Myth of Massive Media Impact Revived," in *Political Persuasion and Attitude Change*, ed. D. Mutz, P. Sniderman and R. Brody (Ann Arbor: University of Michigan Press, 1996).

²⁶ See Stephen Ansolabehere, Shanto Iyengar, and Adam Simon, "Replicating Experiments Using Aggregate and Survey Data," *American Political Science Review*, vol. 93, no. 4 (1999), pp. 901-10.

²⁷ For a survey, describing the shift in the field towards the acceptance of persuasive effects, see D. Sunshine Hillygus, "Campaign Effects on Voter Choice," in Jan Leighley ed. *The Oxford Handbook of American Elections and Political Behavior* (New York: Oxford University Press, 2012), pp. 326-345.

²⁸ See Huber and Arcenaux, "Identifying the Effects of Presidential Advertising." See also Ted Brady, *Campaigning for Hearts and Minds: How Emotional Appeals in Political Ads Work* (Chicago: University of Chicago Press, 2006) and Daron Shaw, *The Race to 270: The Electoral College and the Campaign Strategies of 2000 and 2004* (Chicago: University Of Chicago Press, 2006). For dissenting studies see, for instance, James E. Campbell, *The American Campaign: U.S. Presidential Campaigns and the National Vote* (College Station: Texas A&M University Press, 2000) and Steven Finkel, 'Rexamining the "Minimal Effects" Model in Recent Presidential Elections,' *Journal of Politics*, vol. 55, no. 1 (1993), pp. 1-21 .

²⁹ *Ibid.*

They found that these voters were persuaded by advertising to vote for Bush or Gore independently of what they learned about the candidates' positions on social security and so on.

Even if spending does not distort electoral outcomes, for instance because there is relatively even spending on behalf of all the main candidates, it might still distort legislative outcomes. The argument is this. If ads and so on have the ability to persuade, then candidates will succeed only if large expenditures are made on their behalf. This creates legislative distortion because candidates will reward wealthy supporters, with legislation that promotes their views and interests, rather than the public's view of the common good.

Do those who support campaigns receive these benefits?³⁰ There is a significant body of work suggesting that they don't. A widely cited and representative study is Ansolabehere, deFigueiredo, and Snyder's "Why Is There so Little Money in U.S. Politics?"³¹ They find that the effect of contributions on political outcomes is likely to be small if present at all.³² They study, in particular, the roll-call voting patterns of senators and find that these are best explained by the impact of partisanship, ideology, and the preferences of the districts senators represent, rather than who contributed most to their campaigns.

The studies just discussed have focused on *contributions* rather than, our concern here, *expenditures*. There have been relatively few studies about expenditures, and since post-*Citizens United* unlimited corporate spending is relatively recent, it is too early for there to be a clear verdict on its impact. So it is important that there be more studies of expenditures, especially in the post-*Citizens United* world. Still, someone might say that the studies of contributions should make us skeptical that expenditures will have a large impact. And they might add that expenditures are especially unlikely to result in

³⁰ A similar summary of the literature may be found in Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - and a Plan to Stop It* (New York: Twelve, 2011).

³¹ Stephen Ansolabehere, John de Figueiredo, and James Snyder, "Why is There So Little Money in American Politics?" *Journal of Economic Perspectives*, vol. 17 (2003), pp. 105-130.

³² Though for a dissenting view that contributions do have some effect, namely by reducing incumbency advantage, see Thomas Stratmann and Francisco J. Aparicio-Castillo, "Competition policy for elections: Do campaign contribution limits matter?" *Public Choice*, vol. 127 (2006), pp.177-206.

distortion because they are made independently of campaigns, and so are unlikely to result in *qui-pro-quo* deals, in which candidates promise to reward financial supporters with preferred legislation.³³

All of this may make legislative distortion through spending seem unlikely. But in fact the argument that spending creates legislative distortion can still be defended once we notice some key distinctions.

First, even if expenditures are less likely to produce explicit *quid-pro-quo* agreements between candidates and wealthier supporters they can still affect what candidates support. Candidates know that to succeed they will need to gain the support of those can spend substantially in support of their candidacy and to avoid provoking others from running ads against them. This means that they have strong incentives to adopt positions that mesh with what wealthy individuals and corporations favor. So they are likely to adopt those positions even in the absence of explicit *qui-pro-quo* agreements.³⁴

Second, the studies discussed above, as I said, focus on roll-call votes. To draw conclusions from them about legislative outcomes, we must assume that legislative outcomes are determined solely by which way senators vote. In fact, however, the legislative process has many other stages which affect what gets passed. These processes determine what gets voted on in the first place. To make it to the point where senators vote on it, a bill must be considered and proposed by individual legislators, discussed in informal settings, pass committee stages, get referred to the floor and so on. Schlozman, Verba and Brady, for instance, write: “The impact (of supporter money) would be manifest in less visible ways [than in roll-call voting] – for instance, in the particular issues to which legislators devote time and attention, in the lobbyists to whom legislators and their staff grant face time, or in such low-key actions as planning legislative strategy or specifying details.”³⁵ So, even if there isn’t apparent distortion in the way that senators vote on particular bills, there may well be distortion at the level of which bills and issues get voted on or discussed at all on the floor.

³³ As asserted in *Buckley v. Valeo*, p. 46; p. 51.

³⁴ See Michael S. Kang, “After Citizens United,” *Indiana Law Review*, vol. 44 (2010), pp. 243-254; p.246.

³⁵ Kay Schlozman, Sidney Verba and Henry Brady, *The Uneven Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (Princeton: Princeton University Press, 2012), p. 307.

Does substantial legislative distortion in fact happen through these processes? It is difficult to observe distortion of candidates' preferences and to get clear data about the entire lengthy legislative process (beyond roll-call votes). More work will need to be done to confirm whether distortion is taking place. The attitudes of legislators and the outcomes they produce do, however, provide some evidence that some distortion exists. These attitudes and outcomes seem to better represent the views of small groups of citizens than the public as a whole. Gilens, for instance, looks at policy areas where there are differences in the preferences of citizens at different levels of income. He finds that in these areas policy outcomes are strongly correlated with the preferences of high-income citizens and have almost no relationship to the preferences of low- and middle-income citizens.³⁶ On economic issues, foreign policy, and moral/religious issues, government seems to be significantly more responsive to the views of the most affluent.³⁷ Though drawing the link conclusively would require much more investigation, Gilens suggests that a "highly plausible" explanation for these disparities is that the affluent have a greater voice in political outcomes because of the dependency of candidates on them.³⁸ Gilens' study is based on elections prior to 2010 and so the trends he identifies may well be even more pronounced in the post-*Citizens United* period.

The concerns about electoral and legislative distortion that I have raised apply both to individual and corporate expenditures. However, they are particularly pronounced in the case of corporate expenditures for two reasons. First, the sheer amount of money that *some* corporations are able to spend is especially large. The most profitable corporations are able to spend much more than most individuals are. For instance, Dow Chemical donated \$1.7 million to the Chamber of Commerce in 2010, which went on to spend \$42 million on the 2010 midterm elections, while the median annual income for an individual in the US in 2011 was \$46,300.³⁹ The anti-distortion

³⁶ Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012), especially chapt. 3.

³⁷ *Ibid.*, chap. 4.

³⁸ *Ibid.*, p. 239.

³⁹ "Top Corporations Aid U.S. Chamber of Commerce Campaign," *New York Times*, Oct. 21st, 2010; "Lobbyist Fires Warning Shot Over Donation Disclosure Plan," *New York Times*, April 26th, 2011.

argument, as we've seen, asserts that the ability to spend correlates with the ability to exert political influence. If this is so, then the wealthiest corporations are able to exert substantial influence.

Second, this concern that corporate influence may produce substantial distortion is exacerbated when we consider the source of decision making within corporations, including decisions about expenditures. We saw earlier that corporations are legally required to make spending decisions in light of the financial interests of shareholders (and not the political opinions of board members, managers, or shareholders themselves). Thus, not only can large corporations gain great influence, but their views may not reflect any individual's conception of the common good.⁴⁰

In sum, we have seen that there remains a lot more empirical work to be done to determine whether expenditures create electoral or legislative distortion. We have also seen, I think, that there is a sufficiently strong case that unlimited expenditures will create distortion to treat that as at least a working assumption here. At the minimum, the case for distortion seems to be strong enough that it is worth considering what follows if it does exist.

How shall we weigh the anti-distortion concern against the considerations in favor of spending in the previous section? To some extent, these considerations can be reconciled. The speaker interests argument suggested that expenditures are important because they allow individuals to participate in the political process. But if it is true that greater speech allows some people greater influence than others, then having some caps on expenditures may in fact be needed to ensure that everyone has a reasonable opportunity to participate in the political process.⁴¹ The marketplace of

⁴⁰ It may be that in practice corporate board members and managers (to whom spending decisions may be delegated by the board) frequently use treasury funds to support ads promoting their own political views. For evidence of this see Rajesh Aggarwal, Felix Meschke, and Tracy Wang, "Corporate Political Contributions: Investment or Agency?" working paper *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670 (accessed Dec. 1st 2012). But if this is happening there is still a concern about distortion due to the disproportionate money spent in light of these individuals' ideas and, of course, it would also raise a serious further concern about misappropriation of shareholder funds.

⁴¹ For a more extended argument for caps based purely on individual rights to equal participation see Joshua Cohen, "Money, Politics, Political Equality," in *Facts and Values*, eds. Alex Byrne, Robert Stalnaker, Ralph Wedgwood, Festschrift for Judith Jarvis Thomson (Cambridge: MIT Press, 2001).

ideas argument assumes that ideas which are closer to the truth will gradually become more widely accepted than others as long as people hear both sides. But if money creates influence then some views may become more widely accepted just because they have wealthier supporters, not because there are better arguments for them. Caps can help ensure that people don't vote based on views that are a product of a "marketplace" that has been skewed in this way.⁴²

We also saw that there is always a *prima facie* case for more expenditures based simply on their potential to provide views that voters wish to consider. This rationale is in greater tension with anti-distortion considerations, but even here having caps of some kind seems to strike a reasonable balance. We want to allow spending so that voters will be able to hear any distinctive arguments and views that individuals and corporations have to offer, without those views being so disproportionately backed with money that distortion is produced. Thus, caps on individuals and corporate spending seem to strike a reasonable balance between the considerations we have looked at.

Now, BCRA in fact imposed not merely *ceilings* but outright *bans* on corporate speech.⁴³ If the compelled speech objection that I consider earlier is sufficiently strong then perhaps this more drastic step is warranted, but I won't pursue that question here. The *Citizens* decision ruled out imposing even ceilings, so it would be an important result to discover that at least they could be justified. In what follows, I will consider and defend ceilings, rather than bans, on both individual and corporate spending.

See also Ronald Dworkin, "The Curse of American Politics," *New York Review of Books*, Oct. 17, 1996, pp. 19-24.

⁴² On which point see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652; p. 660 (1990), *overruled by Citizens United v. FEC*,

⁴³ Some people will find the description of BCRA as imposing a "ban" misleading. Even under BCRA it was possible for individual members of a corporation to aggregate their private contributions (separate to the corporation's treasury funds) within a "separate segregated fund" (commonly known as a "political action committee," or PAC). According to a common argument, the ability of PACs to make expenditures means corporations speech was already adequately protected under BCRA. See, for instance, *Austin v. Michigan Chamber of Commerce*, p. 660, and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, p. 203-204. If this is correct, then the argument in favor of restricting expenditures from corporate treasury funds is further strengthened.

4. Paternalism and Democracy

Much of the opposition to spending limits is said to rest on concerns about *paternalism*, even when those limits are justified on anti-distortion grounds.⁴⁴ Critics say that the anti-distortion argument is paternalistic in the assumptions it makes about citizens. In particular, objectors complain about the assumption that citizens will be moved to vote for some candidates rather than others just because more money has been spent on those candidates. For instance, Justice Scalia insisted (in his *McConnell* dissent) that “The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If this premise is wrong, our democracy has much greater problems than merely the influence of amassed wealth. Given the premises of democracy there is no such thing as *too much* speech.”⁴⁵ In this passage, Scalia somewhat misrepresents the case for restricting expenditures: no one claims that we should impose restrictions to reduce the *total* quantity of speech. Rather, they are concerned that the *relative* voice of some is too great. But he suggests that this argument too is unacceptable. Similarly, Justice Kennedy emphasized in *Citizens* that limits on corporate speech are unjustified because “the people” should be trusted “to judge what is true and what is false.”⁴⁶ According to their objection, it is paternalistic to assume that citizens can be moved to vote one way rather than another just by spending more because in making this assumption we fail to *trust* citizens.⁴⁷

Notice that the paternalism objection does not simply assert that money doesn’t distort the electoral process, though Scalia and Kennedy say that also. Whether money distorts is an empirical issue which requires more investigation. The paternalism objection simply denies that the

⁴⁴ See, for example, Kathleen Sullivan’s summary of the argument against limits in “Two Concepts of Freedom of Speech,” *Harvard Law Review* vol. 124 (2010), pp. 143-177.

⁴⁵ *McConnell v. Fed. Election Comm’n*, pp. 258–59.

⁴⁶ *Ibid.* at 906.

⁴⁷ For a similar argument that campaign finance reform rests on a lack of trust in voters see Daniel Ortiz, “The Democratic Paradox of Campaign Finance Reform,” *Stanford Law Review* 50 (1997), pp. 893-914.

government may make the assumption that money distorts because to make it is to fail to trust citizens.

Is the anti-distortion argument paternalistic in its assumptions? As the quotes from Scalia and Kennedy indicate, their concern about paternalism is ultimately grounded in concerns about *democracy*. Their concern is that in a democratic system citizens must be trusted to evaluate political arguments and exercise political power. This is not an idiosyncratic view about democracy. It is common in First Amendment theory to think that a commitment to democracy puts limits on paternalistic justifications for speech, as in Meiklejohn's declaration that "When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones."⁴⁸ Thus, it is best to understand the objection that expenditure limits are paternalistic as ultimately an objection that limits are undemocratic. A regulation is "paternalistic," in the relevant sense, if it is inconsistent with the trust that citizens should be shown in a democracy.⁴⁹

What is it about democracy that requires trusting citizens, especially in the context of speech regulation? In a democracy, power is supposed to be held by the people, who are to participate as equals in the process of political decision-making. Minimally, this requires regular elections in which officials are elected by majority vote. But discussions of anti-paternalism assume that there is more to democracy. In particular, they assume, as I will put it, that a democratic system is at least "minimally deliberative." In a minimally deliberative system the role of a citizen is not simply to vote. Rather, citizens vote *on the basis of reasons*. Citizens are assumed to have the capacity not just blindly to express a preference but rather, to reflect on what the best (or most just) policies would be by considering the arguments for and against the various policy options. They are to evaluate and weigh the various reasons supporting different policy choices and to make political decisions on that basis.

⁴⁸ Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Clark: Law Book Exchange, 1948), p.26.

⁴⁹ Ortiz' "The Democratic Paradox of Campaign Finance Reform" also presents the apparent lack of trust in voters as seemingly undemocratic.

Political power is to be ultimately exercised by citizens exercising these “evaluative capacities,” as I’ll call them.

The minimally deliberative view seems to support some sort of anti-paternalism. It seems to require, for instance, that the government not censor arguments because it considers them unsound. Doing so would be clearly in conflict with the requirement that citizens are to be viewed as the proper judges of what is and isn’t a good reason for public policies. On the minimally deliberative view of democracy, censorship is unacceptable because it fails to respect the reason of citizens as the proper source of power.

Even fervent defenders of expenditure limits seem to accept the minimally deliberative view and the idea that it requires certain kinds of trust in citizens. For instance, Dworkin insists that citizens must be trusted to “make up their own minds,” to use their evaluative capacities, and that this puts constraints on paternalistic motivations that put those capacities into doubt: “Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions.”⁵⁰ This suggests that we shouldn’t think, as Sullivan proposes, that the clash between supporters and detractors of regulation is at base about the importance of anti-paternalism.⁵¹ Both sides seem to be committed to strict anti-paternalism. What they disagree about is whether campaign finance regulations are in fact paternalistic and in conflict with the more basic values of the minimally deliberative view of democracy.

Now, to clarify, I don’t mean to suggest that the “minimally deliberative view” is a complete theory of democracy, and I’m not going to offer any fuller defense of it here. It is at most one component of a full theory. My suggestion is just that it is a shared background assumption in thinking about the regulation of political speech and that this assumption underlies hostility to

⁵⁰ Ronald Dworkin, *Freedom’s Law* (Cambridge: Harvard University Press, 1997), p.200.

⁵¹ Sullivan suggests that the “libertarians,” who reject limits on corporate speech, can be ideologically distinguished from their “egalitarian” opponents by their greater commitment to the idea that “government is forbidden to intervene [in speech] for paternalistic or redistributive reasons,” in “Two Concepts of Freedom of Speech.”

paternalism. Thus, thinking about what the minimally deliberative view requires should provide us with a neutral standpoint from which we can determine the best understanding of paternalism in this context. If expenditure limits conflict with minimally deliberative view of democracy they face a serious problem. I will now argue that they don't.

5. Targeted Limits Defended

We have seen why and how democracy, on the minimally deliberative view, requires that citizens be trusted. I will now consider whether that sort of trust is incompatible with the anti-distortion argument. I'm going to defend a series of distinctions between more and less paternalistic regulations which, I'll argue, show that the anti-distortion argument for targeted limits is at most minimally paternalistic.

The first distinction I'm going to suggest is closely related to Scanlon's distinction "between expression which moves others to act by pointing out what they take to be good reasons for action and expression which gives rise to action by others in other ways".⁵² The minimally deliberative view of democracy requires the government to put trust in citizens' capacities to evaluate political considerations. Thus the government may not, for instance, restrict citizens from hearing a political argument on the grounds that citizens evaluating the argument will be unable to spot a crucial flaw in it. But it is compatible with the government putting significant trust in citizens' capacities to evaluate reasons that the government not put much trust in other belief forming processes. For instance, suppose that the government restricts the use of subliminal advertising in political campaigns on the grounds that citizens subjected to those ads are likely to accept the positions endorsed independently of their merits. The assumption behind these regulations is not that citizens are considering reasons offered by the ads but doing so badly. Rather, the assumption is that citizens subjected to the ads are

⁵² Thomas Scanlon, "A Theory of Freedom of Expression." *Philosophy and Public Affairs*, vol. 1, no. 2 (1972).

forming their beliefs through some other process that causes them to change their beliefs without considering any reasons for them.

Regulating speech on these grounds implies little or no lack of trust in citizens' evaluative capacities or the beliefs they form by using those capacities. It just assumes that beliefs formed through some other, irrational, process should not be trusted. I thus suggest that we need to distinguish between regulations that rest on concerns about the beliefs citizens form by using their evaluative capacities and regulations that rest on concerns about the beliefs citizens form through some other process. It is much less paternalistic, much less undemocratic, to regulate on the latter basis.

What assumptions does the anti-distortion argument make about people's belief forming capacities? That argument does not suppose that people will be especially moved by the arguments of wealthy corporations. Instead, it assumes that their speech will be especially influential by some other mechanism. The assumption is that people have non-evaluative belief forming processes which cause them to adopt certain positions just because those positions are backed by greater resources. There is disagreement about what exactly those processes are, but one commonly cited example is the "availability heuristic". People using this heuristic tend to believe an argument or rely on certain evidence just because they have been exposed to it more often than other sources.⁵³ This is not an evaluative process. When someone adopts a view just because of repeated exposure to it, they are not adopting it as a result of considering the reasons behind it; some other mechanism is causing them to form the belief. So it seems that the first distinction I have drawn can be used to defend the anti-distortion argument. That argument does not rest on any mistrust of citizens' evaluative capacities and so implies no lack of trust in those capacities.

Still it might be replied that the anti-distortion argument must assume a more subtle form of mistrust of citizens' evaluative capacities. It is true, the reply goes, that citizens are susceptible to

⁵³ See, for instance, Molly J. Walker Wilson & Megan P. Fuchs, "Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns," *Cardozo Law Review*, vol. 30 (2009), pp. 2147- 2221.

certain irrational processes of belief formation, such as being affected by repeated exposure to a position. But they are capable of taking into account these effects themselves and taking steps to counteract them. For instance, they can try to seek out less prominent sources of information to balance out messages that are backed by large spending. Anti-paternalism requires trusting citizens to make these compensations themselves if they please.

To see the force of this response, consider limits on speech outside of the campaign context. Suppose that a wealthy corporation launches a campaign outside of the election season which is designed to, say, increase support for cuts on corporate taxes. At first sight, the money corporations are able to spend on speech about these issues should enable them to gain the kind of disproportionate political influence that can produce distortion. So it seems that the anti-distortion argument should lead us to endorse not just targeted limits but also more expansive reforms that limit corporate (and individual) political speech outside of the campaign context. Yet nearly everyone rejects sharp caps on spending on political speech outside of the election context, even where motivated by a desire to increase representation.⁵⁴

Thus to defend the anti-distortion argument we will need to explain why it justifies only limits on campaign season expenditures. The two further distinctions I am going to introduce will allow us to do so.

The second distinction I propose is suggested by Justice Brandeis' widely endorsed remarks in *Whitney*.⁵⁵ He claimed that "the fitting remedy for evil counsels is good ones." An exception can be made though, he said, if the evil speech is likely to produce harms that will occur "before there is opportunity for full discussion." His suggestion was that it is less objectionable, and presumably less paternalistic, to assume that citizens might be misled by false speech when they do not have a sufficient opportunity to correct themselves by further considering the issue, hearing other points of view and so on.

⁵⁴ A point made by, for example, Kathleen M. Sullivan, "Political Money and Freedom of Speech," *U.C. Davis Law Review*, vol. 30 (1997), pp. 663-90; p. 673.

⁵⁵ *Whitney v. California*, 274 U.S. 357 (1927).

Now, an important feature of BCRA was that it only limited expenditures on ads to be aired within a very short period before an election: within 30 days of a primary and within 60 days of a general election. To justify expenditure limits that are targeted in this way, the anti-distortion argument need not assume that citizens can't correct for their irrational tendencies. Rather, it need only assume that citizens are unable to do so within a very limited time frame, as is the case when there is less than 60 days before an election. Now, there is room for debate about exactly how much time is needed and I won't attempt here to defend 60 days as the exact amount. My suggestion is just that we can assume that *some* amount of time is needed and thus justify limits within that period. This assumption is at most minimally paternalistic: just as it is permissible to assume that citizens need enough time to defend themselves against "evil counsels" we can also assume that they need time to correct for irrational tendencies. This provides part of the response to the concern I raised earlier, that the anti-distortion argument might justify expenditure limits outside of the campaign.⁵⁶

The third distinction I want to draw rests on two different kinds of activity that citizens have to engage in when deciding how to participate in the political process. The first kind of judgment are those about matters of policy, especially judgments about matters of basic political morality and policy, such as whether there is a right to health care. The second kind that citizens must make are judgments about which politicians to support, given their more basic views about political morality and policy.

Campaign finance law has often incorporated this distinction. It has been common to distinguish ads that center on matters of policy and political morality, "issue ads;" and ads that focus on which candidate to vote for, "electioneering" ads; with restrictions centered on the latter. Thus, an ad which argued that children need to be better protected from the effects of smoke would be an issue ad and unregulated, whereas an ad saying "Defend Freedom, Make Sure Obama is Kept Out of Office" would be an obvious electioneering ad and subject to potential restriction. The precise

⁵⁶ These time constraints may also help to prevent forced speech: with sufficient time dissenting shareholders can make clear where their views differ or not from those of corporations they hold shares in.

definition of an electioneering ad for use in practice by regulators has varied. One definition, for example, identifies them by their use of “magic words;” such as “vote for,” “elect,” and so on.⁵⁷ There are obviously hard questions of institutional decision here in making the distinction in a way that prevents people from disguising electioneering ads as issue ads but let us set those difficulties aside for the moment and consider whether the distinction is morally significant.⁵⁸

Here’s an example that illustrates the target of regulations that focus on electioneering ads. In the fall of 2010 John Snow was running to represent his rural district for a fourth term as a state senator in North Carolina.⁵⁹ He was a well-established figure in the district and held roughly centrist views closely allied with those of his constituents. But Snow was attacked by a series of ads that portrayed him as a radical liberal and eager to spend heavily on government projects. For instance, an ad accused him of voting to spend \$218,000 on a Shakespeare festival, even though in fact the relevant vote had been to cut the budget for the festival down to that sum from a previously higher number. Unable to spend enough to reply to the accusations in time, Snow lost his seat due to the misleading portrayal of him as a heavy spender. The attack ads were funded with money from independent groups, including corporations.

This example illustrates the sort of problem targeted limits are supposed to prevent. But is this sort of problem widespread? Huber and Arcenaux find that electioneering ads generally persuade citizens to support particular candidates not by informing them about the candidate’s position but by changing their “candidate affect”: their feelings about the candidate’s personal characteristics.⁶⁰ By singling out ads advocating for or against specific candidates, targeted limits attempt to prevent this kind of distortion in the electoral process from taking place. They attempt to

⁵⁷ For instance, *Buckley v. Valeo* suggested the “magic words” approach, whilst BCRA made the distinction according to whether an ad referred to a “clearly identified candidate for federal office.” §434(f)(3)(A). See also the wider issue ad exemption the Court read into BCRA in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

⁵⁸ I don’t mean suggest that those problems are easily solved, they just require a more extensive treatment elsewhere.

⁵⁹ I take the proceeding version of events from Jane Mayer, “State for Sale,” *New Yorker*, Oct. 10th 2011. If you doubt it just consider this an illustrative hypothetical example.

⁶⁰ Huber and Arcenaux, “Identifying the Effects of Presidential Advertising,” p. 958; pp. 969-971.

prevent voters from being persuaded to abandon a candidate, who would in fact represent their basic views well, just because of personal attacks on that candidate (or persuaded to support a candidate who would represent them less well, just because of personal defenses of the candidate).

Thus, to justify BCRA, the anti-distortion argument need only raise doubts about the effects of spending on citizens' judgments about candidates, not basic values or policies. I suggest that a commitment to democracy (in particular to minimally deliberative democracy) requires more significant trust in citizens' capacities to form basic political judgments than in their capacities to translate those judgments in choices for particular candidates.

Consider term limits, which are commonly accepted in liberal democracies. In the United States, for instance, someone may hold the Presidency for no more than two terms. This might seem clearly undemocratic. Suppose that someone has already served two terms yet remains extremely popular. A majority of people, perhaps a large majority, might wish to re-elect this person and yet the term limit prevents them from doing so. Why isn't this clearly undemocratic?

The justification for term limits lies in offsetting the advantages of incumbent candidates. We are concerned that incumbent candidates will sometimes be especially popular merely because they have already served so long.⁶¹ But what is wrong with this? If the people still want this person to continue serving, isn't it paternalistic to deny them this choice? The plausible argument for term limits is that even if people still want that individual to serve, the fact that her incumbency is increasing her chances of success means that she is less likely to be winning because of the majority's more basic political values. An incumbent might win the vote even though some other challenger would better represent the values that the majority is committed to. We find term limits acceptable

⁶¹ How does this happen? Incumbents may gain "from cognitive biases in favor of stability...through which people stick with earlier choices without adequately considering alternatives. In addition, incumbents have well-documented advantages in political competitions because of agenda control, greater media coverage, and control over the instruments of power." Tom Ginsburg, James Melton, and Zachary Elkins, "On the Evasion of Executive Term Limits," *William & Mary Law Review*, vol. 52 (2011), pp.1807-1872.

because we think it is more important that government represent people's basic political values than that the most popular leaders get elected.

So I suggest that while democratic values may require significant trust in citizens' ability to judge matters of basic political morality they may require less trust in citizens' ability to make other judgments, in this case about which candidates would best promote those values. It seems much more acceptable to restrict the airing of "Swift Boat Veterans for Truth," targeting Kerry the candidate, than an NRA ad arguing that the right to bear arms is fundamental, even if we think both make misleading arguments. This third distinction also suggests that the anti-distortion argument for BCRA type limits is not, or only minimally, paternalistic. It also helps show that it is possible to support limits on campaign spending without being committed to limits on political speech outside of the campaign context, thus staving off a potentially serious objection to limits on campaign spending.

To sum up, we have seen three distinctions which suggest that targeted regulations may be justified by the anti-distortion argument without being objectionably paternalistic. First, those justifications do not cast doubt on citizens' abilities to reliably form beliefs using their evaluative capacities; they cast doubt on the reliability of other processes that affect citizens' beliefs. Second, the harms those justifications seek to prevent are likely to occur in too short a space of time for individual citizens to have the opportunity to correct them themselves. Third, the justifications do not rest on doubts about citizens' capacities to form correct beliefs about political morality and policy; they cast doubt on citizens' abilities to translate those beliefs about policies into choices for politicians to represent those views.

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