

THE RIGHT TO “DO POLITICS” AND NOT JUST TO SPEAK: THINKING ABOUT THE CONSTITUTIONAL PROTECTIONS FOR POLITICAL ACTION

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INTRODUCTION

For a half century, campaign finance jurisprudence has turned on the Supreme Court’s distinction between political contributions and campaign expenditures. In *Buckley v. Valeo*,¹ the Court upheld the Federal Election Campaign Act’s limits on political contributions to candidates for federal office and struck down various provisions that had limited campaign expenditures made by candidates, campaigns, and individuals.² In upholding the contribution limits, the Court concluded that contributions implicate rights of speech and association, but only up to a point.³ It was “speech by proxy” through which the donor surrendered control of the use of the funds, and therefore the precise message funded, to the recipient. By contrast, the expenditure is purer expression, because the funder and the spender are the same and the money spent travels from the wallet of

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1. 424 U.S. 1 (1976).

2. *Id.* at 143.

3. *See id.* at 20–21 (finding that “a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication,” because the contribution serves as a general expression of support but “does not communicate the underlying basis for the support”); *id.* at 22 (noting that the Act’s \$1000 limitation on independent expenditures did not prevent “like-minded persons [from] pool[ing] their resources in furtherance of common political goals,” but it did preclude “most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association”).

the spender directly to the airwaves or into the mailbox. Under *Buckley*, Congress has more leeway to limit campaign contributions and less leeway to regulate expenditures—particularly where the expenditures are independent of candidate control or influence.

This framework has withstood the critiques directed against it for many years.⁴ Four of the current Justices of the Supreme Court have declared their readiness to reconsider the distinction between contributions and expenditures,⁵ yet the criticisms of *Buckley* continue to be conducted within the very terms it set. The arguments remain primarily about adjustments in the balance to be struck between government regulatory interests and First Amendment speech protections.⁶ Proponents of de-regulated politics propose to protect more speech by granting greater First Amendment protections to contributions. Supporters of more active regulation of campaign spending come at the problem the other way, disputing the privileged speech value of the independent expenditure. More speech or less speech: this is how the choice is portrayed.⁷

4. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (“[T]he majority’s refusal to apply strict scrutiny to contribution limits rests upon *Buckley*’s discounting of the First Amendment interests at stake. The analytic foundation of *Buckley*, however, was tenuous from the very beginning”)

5. See, e.g., *id.* at 407 (Kennedy, J., dissenting) (noting the current framework “would be unfortunate . . . if evolved from a deliberate legislative choice; but its unhappy origins are in [the] earlier decree in *Buckley*, which by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system, one which distorts the meaning of speech”); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 631 (1996) (Thomas, J., dissenting) (starting, in a dissent joined by Chief Justice Roberts and Justice Scalia: “I would reject the framework established by *Buckley v. Valeo* Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: both forms of speech are central to the First Amendment”).

6. See, e.g., *Nixon*, 528 U.S. at 405 (Breyer, J., concurring) (suggesting that if *Buckley* was interpreted as “den[ying] the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance,” then “the Constitution would require [the Court] to reconsider *Buckley*”); *id.* at 410–12 (Thomas, J., dissenting) (suggesting that *Buckley* discounts First Amendment interests).

7. The literature on the contribution/expenditure distinction is voluminous. For a sampling of views on various sides of the issue, see generally Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era*, 40 FORDHAM URB. L.J. 723, 741–42 (2012); Lillian R. BeVier, *Mandatory Disclosure*, “*Sham Issue Advocacy*,” and *Buckley v. Valeo: A Response to Professor Hasen*, 48 UCLA L. REV. 285 (2000); James Bopp, Jr. & Susan Lee, *So There are Campaign Contribution Limits that are Too Low*, 18 STAN. L. & POL’Y REV. 266 (2007); Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner’s Perspective on Campaign Finance Reform*, 29 YALE L. & POL’Y REV. 235 (2010).

There is more, however, to the deficiencies of *Buckley*. It did not capture the range of First Amendment interests at stake; “speech” does not exhaust that range. Neither does its cousin—expressive association. The missing dimension of the First Amendment analysis is the interest in political action: the business of building coalitions and acting in concert with allies and others to achieve common political goals. This interest—one could call it “doing politics”—is irreducible to speech interests alone.

The constitutional lens through which the *Buckley* debate has been conducted leaves insufficient space for this critical interest in “doing politics.” Restoring the interest in “doing politics” to the discussion would contribute to understanding the unsatisfactory, inconsistent, and confused applications of the current doctrine,⁸ and would bring to light the costs exacted by the current doctrine’s singular focus on speech interests as a concern separated from the larger sphere of political action.

In bringing out more clearly this interest in “doing politics,” it is instructive to review a major legislative and regulatory struggle of recent years: distinguishing the truly independent expenditure from the “sham” one that the candidate has somehow coordinated with the spender.⁹ The question here has been how far the candidate or her agents can go in collaborating with allies before effective politics become the regulatory problem of illegal “coordination.” Over a number of years, and increasing in urgency upon the enactment of the Bipartisan Campaign Reform Act (McCain-Feingold), Congress, the Federal Election Commission (FEC), and the courts attempted to shape workable coordination rules. Political actors generally supportive of regulatory reform, such as organized labor, questioned the effect of these rules on coalition building and associational activity.¹⁰ A large part of the problem seems to stem from the absence

8. Compare *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (“[I]ndependent expenditures do not lead to, or create the appearance of, quid pro quo corruption.”), with *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (holding that due process required a state trial court judge to recuse himself from participation in a case where one party had made significant independent expenditures in support of the judge’s campaign).

9. See generally *Citizens United*, 558 U.S. 310 (assessing the constitutionality of the Bipartisan Campaign Reform’s Acts expenditure limits as applied to a non-profit corporation that released a documentary critical of then-Senator Hillary Clinton); *McConnell v. FEC*, 540 U.S. 93 (2003) (determining the constitutionality of the Bipartisan Campaign Reform Act, which, among other things, attempted to distinguish between independent expenditures and coordinated contributions, and afforded different regulations for each).

10. See generally AFL-CIO, Comments on Proposed Rulemaking (Jan. 13, 2006), available

of clarity about the interests at the heart of the dispute—the interest in “doing politics.”

I. THE CONTRIBUTION/EXPENDITURE DISTINCTION AND THE PROBLEM OF COORDINATED EXPENDITURES

The privileged place of the expenditure rests on the premise that it is the spender’s speech.¹¹ The spender’s speech is “independent” speech—speech entirely the speaker’s own in content and in distribution that is not directed by, made at the request or suggestion of, or in concert or consultation with the candidate. Once the speech is funded at the direction of or in close consultation with the candidate, its character changes entirely and it becomes functionally indistinguishable from the contribution provided to the candidate for use as she pleases.¹²

This latter type of contribution—in form an expenditure, but in function just like a contribution—is known as a “coordinated expenditure.”¹³ Much of the legislative and regulatory mission of recent years has been directed toward distinguishing the coordinated expenditure from the truly independent one and thus toward determining which expenditures share the constitutionally less protected status of contributions.¹⁴ To supporters of stricter limits on campaign spending, the regulation of coordinated expenditures has been lax, and the failure of regulators to police them has opened up a massive loophole in the law through which expenditures flow on sham claims of independence.¹⁵ One way or the other, organizations with

at http://www.fec.gov/pdf/nprm/coord_commun/comm25.pdf; AFL-CIO, Comments on Proposed Rulemaking (Oct. 11, 2002), available at http://www.fec.gov/pdf/nprm/coord_and_ind_expenditures/afl-cio.pdf.

11. See *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976) (explaining that “expenditures for express advocacy of candidates made totally independently of the candidate and his campaign” fall firmly under the protection of the First Amendment right to “speak one’s mind . . . on all public institutions” and are less dangerous because the potential for abuse is diminished by their independent nature (citation omitted)).

12. See *id.* at 46 (“[E]xpenditures controlled by or coordinated with the candidate and his campaign . . . are treated as contributions rather than expenditures . . .”).

13. See *id.* at 47 (describing the Act’s contribution ceiling as a measure to “prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions”).

14. See, e.g., Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.); Coordinated Communications, 71 Fed. Reg. 33190-02 (June 8, 2006) (“The Commission’s rules set out a three-prong test for determining whether a communication is ‘coordinated’ with, and therefore an in-kind contribution to, a Federal candidate or a political party committee.”).

15. E.g., Daniel W. Butrymowicz, Note, *Loophole.com: How the FEC’s Failure to Fully*

plenty of money find ways to collude (i.e., coordinate) with candidates or parties. But they deny it, of course.¹⁶

Proponents of de-regulated politics reply that the government inquiry into coordination, particularly its more subtle forms, would simply erase the difference between contribution and expenditure.¹⁷ After all, flat-out collusion is never really the issue. It may happen, but if it does, few would deny that the expenditure loses its protected character. The clash over the appropriate regulatory treatment of coordination focuses much more on the means by which candidates or parties steer expenditures by others that are nominally “independent.” Maybe the independent expenditure is mapped out by individuals who previously worked for the candidate or party, or by the same media firm that works for the candidate. Or the candidate and the party have had contact over the normal course of a political relationship, creating an opportunity for strategically useful information to pass from the candidate to the spender. If these are cases of illegal “coordination,” skeptics of regulation argue, then Congress will have a vast, unjustifiable authority to regulate expenditures.¹⁸

The controversy continues with little sign of abating. And here we see a problem with a speech-centered analysis. In effect the choice presented by the *Buckley* framework is between pure speech, fully protected, and a less pure version—less pure because the speech has been put to the service of political action and is intertwined with the candidate. Speak at a distance, and you are safe; speak to or with allies at close quarters, and regulatory pressures intensify.

Regulate the Internet Undermines Campaign Finance Law, 109 COLUM. L. REV. 1708, 1708–10 (2009).

16. See, e.g., Rachel Marcus & John Dunbar, *Rules Against Coordination Between Super PACs, Candidates Tough to Enforce*, THE CENTER FOR PUB. INTEGRITY (Jan. 13, 2012, 6:00 AM), <http://www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce> (describing the FEC’s investigation of Congressman Joe Schwarz for improper coordination with Republican Main Street Partnership PAC).

17. E.g., Brad Smith, *Clearing Up Confusion About American Crossroads and the Content Standard Coordinated Expenditures*, CENTER FOR COMPETITIVE POL. (Dec. 21, 2011), <http://www.campaignfreedom.org/2011/12/21/clearing-up-confusion-about-american-crossroads-and-the-content-standard-coordinated-expenditures/>.

18. See, e.g., Center for Competitive Politics, Comments on Proposed Rulemaking at 5 (Jan. 13, 2006), available at http://www.fec.gov/pdf/nprm/coord_commun/comm02.pdf; Nat’l Republican Campaign Comm., Comments on Proposed Rulemaking at 2 (Oct. 11, 2002), available at http://www.fec.gov/pdf/nprm/coord_and_ind_expenditures/nrcc.pdf.

In recent years, following the enactment of McCain-Feingold in 2002, the escalated rulemaking and enforcement of “coordination” rules has illustrated the difficulties resulting from slighting the interest in political action.

II. THE FIGHT OVER “COORDINATION”

McCain-Feingold directed the repeal of the existing coordinated expenditure rules and ordered a fresh FEC rulemaking process to replace it.¹⁹ Congress specifically instructed the FEC to address cases where spenders republished the candidate’s own materials or used common vendors or former candidates and party employees to skirt the requirement of true independence.²⁰ Moreover, Congress barred the new regulations from “requir[ing] agreement or formal collaboration” between the candidate and spender in order “to establish coordination.”²¹ As a result, it would be enough that strategically useful information passed—by whatever manner of suggestion, by “wink or nod”—from the candidate to the spender.²²

In the litigation over McCain-Feingold, the coordinated expenditure provision came under attack along with others, but the usual opponents of regulated campaign finance found an ally on this issue in organized labor. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a long-time proponent of campaign finance reform, raised concerns that the direction given to the agency was too vague and could result in constitutionally intolerable interference with normal—and indispensable—political communications and association. In its brief to the Court in *McConnell v. FEC*,²³ the AFL-CIO raised the issue through a series of questions:

Does a political party “request or suggest” expenditures by third parties when a party official publicly identifies the party’s principal campaign themes and the states where the party hopes to prevail?

19. Bipartisan Campaign Reform Act of 2002 § 214(b). *See also* 11 C.F.R. §§ 109.1–109.37 (2013); 11 C.F.R. § 100.23 (2002) (repealed).

20. Bipartisan Campaign Reform Act of 2002 § 214(c).

21. *Id.*

22. *See McConnell v. FEC*, 540 U.S. 93, 221–22 (2003) (“[E]xpenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash.’ For that reason, Congress has always treated expenditures made ‘at the request or suggestion of’ a candidate as coordinated.” (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 (2001))).

23. 540 U.S. 93 (2003). The Court consolidated a number of cases in *McConnell*, and the AFL-CIO was appearing as an appellant from *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) and as an appellee from *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

Is the result different if the same message is delivered in a “private” strategy session, and, if so, how many party activists must be present before a meeting loses its private character? Has a union official acted “in cooperation . . . or concert with” a political party if he meets with the party’s congressional leadership to plan strategy in support of the party’s legislative agenda, including union expenditures in support of that agenda? If a trade association lobbyist participates in planning party activities during the early stages of a campaign season, will the use of information she has learned about the party’s plans turn all of her group’s subsequent independent expenditures into contributions because of improper “consultation”?²⁴

The AFL-CIO also argued that without a requirement of “agreement or formal collaboration,” the rule Congress contemplated could not pass constitutional muster: “[W]ithout proof of ‘agreement or formal collaboration,’ the statutory provisions clearly reach a broad range of conduct, including mere consultation with a candidate or party, which is constitutionally protected.”²⁵

The AFL-CIO’s questions, coupled with the attention paid to ongoing “consultation” with allies, suggest the nature of the interest most threatened by free-ranging anti-coordination rules. It is a speech interest, yes, in part, but also a strong associational interest: the interest in effective coalitions and alliances with those, including candidates and parties, who broadly share the AFL-CIO’s goals. Moreover, investigative inquiry into “coordination” is not without consequence: it further burdens the associational right, compounding the doctrinal infirmities the AFL-CIO identified. The AFL-CIO argued that regulatory enforcement can be “crippling” and “intrusive,” involving “extensive discovery into the inner workings of [an] organization” and requiring the release of “extraordinarily sensitive political information [including] plans and strategies for winning elections, materials detailing political and associational activities, and personal information concerning hundreds of employees, volunteers and members.”²⁶

The AFL-CIO lost its point with the Court. The five Justices voting to uphold the better part of the reform were not troubled by

24. Brief of AFL-CIO Appellants/Cross-Appellees at 36–37, *McConnell*, 540 U.S. 93 (No. 02-1755).

25. *Id.* at 43.

26. *Id.* at 35 n.22 (quoting *AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 51 (D.D.C. 2001)).

the congressional initiative on coordination.²⁷ Specifically, the Court dismissed the AFL-CIO's fear that without limiting any eventual rule to agreements or formal collaboration, the FEC was sure to go too far.²⁸ The Court concluded that Congress has latitude to determine that any independence a spender claims is "total."²⁹ Any limitation to agreements or formal collaboration would tie the regulators' hands and defeat their inquiry into subterranean or surreptitious maneuvers—the sort of inquiries the AFL-CIO described as "crippling" and "intrusive."³⁰

This was not the last word on the subject. The FEC promulgated rules, reform organizations twice sued and won, and the rules were twice revised.³¹ In the course of litigation, it became clear that the courts were limited by *Buckley's* conceptual apparatus in defining the full range of interests implicated in these contested rules.

The FEC responded to the congressional directive in McCain-Feingold by relaxing the regulation of communications disseminated more than four months prior to an election.³² In those cases, the communication would not be considered "coordinated"—that is, treated as a contribution subject to investigation and limits—unless the spender expressly advocated the election or defeat of a clearly identified candidate.³³ Mere reference to a candidate, coupled with criticism of her position, would not be enough.³⁴ The district court in *Shays v. Federal Election Commission*³⁵ rejected this approach, on the ground that "coordinated communications expenditures [are] contributions regardless of their content or when they are broadcast."³⁶ On appeal, the District of Columbia Circuit Court declined to go that far: The FEC could appropriately create "space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral

27. See *McConnell*, 540 U.S. at 221–22 (“[W]e cannot agree with the submission that [the] new [standard] is overbroad because it permits a finding of coordination or cooperation notwithstanding the absence of a pre-existing agreement.”).

28. *Id.* at 221–23.

29. *Id.* at 223.

30. *Id.* at 221–23.

31. A reform organization sued the FEC in 2002, see *Shays v. FEC (Shays I)*, 414 F.3d 76 (D.C. Cir. 2005), and again in 2006, see *Shays v. FEC (Shays II)*, 528 F.3d 914 (D.C. Cir. 2008).

32. See *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421-01 (Jan. 3, 2003).

33. *Id.*

34. *Id.*

35. 337 F. Supp. 2d 28 (D.D.C. 2004).

36. *Id.* at 64.

campaign.”³⁷ Thus, though the FEC had failed to give a “coherent explanation” for the line it drew, there *was* such a line—one that “separates election-related advocacy from other activity falling outside [Federal Election Campaign Act’s] expenditure definition.”³⁸

The circuit court weighed the interest in ordinary course politics against the government’s interest in regulating campaign finance, but it did not precisely identify the former. This political interest follows in part from *Buckley*—a right to speak on issues that are not deemed sufficiently “election-related” to warrant the imposition of regulatory limits.³⁹ But there is also an interest, which *Buckley* only weakly expresses,⁴⁰ in a “space” for political activity—“collaboration between politicians and outsiders on legislative and political issues”—that, even with some election-related impact, should be able to proceed without threat of regulatory limit or intervention.⁴¹ The circuit court in *Shays* could not give this “space” its full articulation, hampered by the speech focus of *Buckley*; the court’s analysis was confined to the accepted boundaries of the *Buckley* argument, turning on whether the speech in question was more “express” advocacy than “issues” advocacy. In the end, the issue before the court in *Shays* was speech and only speech, and in particular the nature of the speech, which in turn determined the level of protection to which the speech was entitled.

Eventually, the successive rounds of litigation concluded and the coordination rules were settled. Yet, the arguments over the rules’ sufficiency have not ended. As the campaign laws have frayed, worn somewhat thinner by Supreme Court adjudication,⁴² and as forms of political action have changed with the advent of PACs and a freshly assertive community of tax-exempt organizations like Crossroads GPS,⁴³ these arguments have acquired fresh intensity. Critics believe that the rules are weak, bordering on useless, and that what is needed

37. *Shays I*, 414 F.3d 76, 99 (D.C. Cir. 2005).

38. *Id.* at 100, 102.

39. *Id.* at 80.

40. See *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (“The First Amendment protects political association as well as political expression.”).

41. *Shays I*, 414 F.3d at 99.

42. See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

43. Matea Gold, *Secret Donors Pour Millions of Dollars into Crossroads GPS*, L.A. TIMES (Apr. 17, 2012), <http://articles.latimes.com/2012/apr/17/news/la-pn-secret-donors-pour-millions-of-dollars-into-crossroads-gps-20120417>.

is a set of restrictions on all the channels of communication between super PACs, tax-exempts, and the candidates and parties that may facilitate “collusion.”⁴⁴ Their goal is “total independence.”⁴⁵

But the nature of the interest identified by the AFL-CIO in the *McConnell* litigation bears closer examination. At issue was the associational interest inherent in political organizing and concerted action—an interest in action and not merely in expression. And the standard debate on campaign finance, so preoccupied with the values of “speech,” takes limited account of the associational interest and may even be hostile to it.⁴⁶ What constitutes organizing and concerted action in the eyes of one observer may strike another as merely the elements of a conspiracy.

III. “COORDINATION,” ASSOCIATION, AND CONCERTED POLITICAL ACTION

Returning to the basic contribution and expenditure distinction, it becomes possible to see the secondary position of the associational interest in the *Buckley* framework, i.e., the interest that seems closest in substance and spirit to the interest in concerted political action. A contribution to a political organization is an act of pooling and managing resources with others; it presents just the feature of association—the drive to concerted action. The Court in *Buckley* was more concerned with contributions as acts of speech, and as a diluted form of such expression or speech by “proxy,” which could be subject to greater regulatory control.⁴⁷ For the Court, the associational element was important only insofar as it was a form of *expression*, the vehicle by which support is symbolically communicated:

44. See, e.g., Trevor Potter & Bryson B. Morgan, *Campaign Finance: Remedies Beyond the Court*, 27 DEMOCRACY J. 38, 40 (Winter 2013) (“[T]he FEC regulations that govern whether a group is considered to ‘coordinate’ its expenditures with a candidate or political party are so permissive that they have proven more apt as a source of comedic inspiration than anything else.”).

45. See, e.g., *id.* (claiming that new FEC regulations or a statutory definition of coordination could achieve “whole, total, true” independence).

46. As Steven Bilakovics describes this spirit of anti-politics, “‘Politics’ has probably always been something of a dirty word. In America today it seems exclusively and irretrievably so.” STEVEN BILAKOVICS, *DEMOCRACY WITHOUT POLITICS 1* (2012). He describes “general contempt of contemporary politics” and rejection of “the available practices of politics . . . as a means to make things better.” *Id.*

47. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (“While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.”).

The Act’s contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. *In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act’s contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates.* And the Act’s contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy.⁴⁸

According to the Court, this is a less serious problem from a constitutional point of view than limits on “independent expenditures”:

By contrast, the Act’s \$1,000 limitation on independent expenditures “relative to a clearly identified candidate” precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. The Act’s constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression “is simultaneously an interference with the freedom of (their) adherents.”⁴⁹

The Court acknowledged the core associational value—that the contribution “enables like-minded persons to pool their resources in furtherance of common political goals”—but it decided that even if the contributions hamper this collective political endeavor, “the contributor [is still] free to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates.”⁵⁰ In other words, in place of money, the contributor can enjoy membership (does the Court mean here yet another form of expression by affiliation?) or donate time.

48. *Id.* at 22 (emphasis added).

49. *Id.* (citations omitted).

50. *Id.*

But as Theda Skocpol has astutely observed, “money is important for association building” and without it, or without enough of it, we have diminished associational participation in civic and political life—a problem exacerbated by reforms structured with a bias toward “elevating the thinking individual over all kinds of group mobilization.”⁵¹ And from a progressive perspective, Skocpol worries that “intentionally or not, late-twentieth century . . . reforms have pushed our polity away from true popular mobilization in politics,” which has “further[ed] the tilt toward the rich and those with advanced degrees.”⁵²

To the extent that coordination rules convert expenditures into contributions, moving the money spent into less protected communications, they do so on the premise that organizations engaged in coordination are simply enhancing their election-related speech.⁵³ But, as the AFL-CIO pointed out, an organization may make a wide variety of contacts in the course of building, maintaining, or expanding its program of concerted political action.⁵⁴ This is political activity that we might define as an associational whole greater than its constituent speech parts. Not all these contacts have as their goal or end-point an advertising campaign, and not all public communications that emerge after these contacts are directed toward elections rather than, say, communication with officials and the public about public policy matters.⁵⁵

One can imagine a hypothetical enforcement official wincing at this statement and complaining, not unreasonably, that political communications may be undertaken for a variety of purposes, and that if the multiplicity of function or motive is enough to scuttle inquiry or enforcement, then the rules will be largely worthless. Communication between a donor and a party may serve other shared

51. THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* 206, 282 (2004).

52. *Id.* at 282–83 (2004).

53. See *Buckley*, 424 U.S. at 47 (“[I]ndependent expenditures . . . provide little assistance to the candidate’s campaign The absence of prearrangement and coordination of an expenditure . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”). See also *McConnell v. FEC*, 540 U.S. 93, 222–23 (2003) (“Plaintiffs do not present any evidence that [the Federal Election Campaign Act’s definition of coordination] has chilled political speech.”).

54. Brief of AFL-CIO Appellants/Cross-Appellees, *supra* note 24, at 7–8.

55. See, e.g., Letter from Am. Civil Liberties Union to Sens. Sheldon Whitehouse and Lindsey Graham at 3 (Apr. 9, 2013), available at https://www.aclu.org/files/assets/4-9-13_-_campaign_finance_hearing_final.pdf.

goals, like the passage of legislation, but it may also, as a matter of fact, aid in coordinating election-related messages. The presence of other benefits achieved from the communication does not excuse the speaker for ignoring the electoral gain. To adopt willful blindness on this point would only encourage political actors to construct communications they can defend as primarily or at least partly dedicated to other, non-campaign objectives.

This issue, not alone among campaign finance regulatory issues, requires the balancing of risk and reward. The reward is a flexible standard for judging coordination, allowing for tougher enforcement and engendering a healthier wariness within the regulated community about testing the boundaries of the law. The risk is raising the cost of association understood as political action and making it that much harder for alliances to be assembled and effectively managed. The law as now constructed, and the proposals for strengthening it, are highly attuned to the reward, but—so critics might say—less informed about or sensitive to the risks.⁵⁶ A campaign finance jurisprudence that assigns so little weight to the associational interest in political action, effectively defining it as a form and, for that matter, a lower-rung form of the expressive interest, does not satisfactorily frame for decision this question of balancing risk and reward.

By design, the enforcement of the coordination rules is necessarily, on contemporary enforcement theory, invasive. Coordination rules are meant to ferret out the sharing of information—the rules speak of information transmitted about a candidate or party’s “plans, projects, activities or needs”—and to determine whether this information was material somehow to the fashioning of election-related speech.⁵⁷ Moreover, under these rules, investigators also consider the identities of individuals involved in communications and whether they had prior staff or professional relationships with the candidate or party.⁵⁸ As the AFL-CIO pointed out, active investigative inquiry into these matters is in and of itself “intrusive.”⁵⁹ Such is the case whenever the questions asked about political communications are who said what, when, and to whom.

56. See, e.g., *id.* at 3–4 (urging Congress to be wary of crafting rules that “chill[] legitimate issue advocacy”).

57. See 11 C.F.R. § 109.21 (2013) (defining a “coordinated communication”).

58. *Id.*

59. Brief of AFL-CIO Appellants/Cross-Appellees, *supra* note 24, at 34.

The question about the current campaign finance doctrine's treatment of associational interests does not arise only in relation to the operation of so-called outside groups, the super PACs and tax-exempt advocacy groups. In recent years, the Supreme Court has held that parties can spend freely on elections only if they do so independently of their candidates.⁶⁰ And McCain-Feingold, of course, through its prohibition on party soft money, limited the resources parties had available to spend without limit when adopting this posture of "independence."⁶¹ Strange as it may seem, parties are also subject to coordination rules—that is, with their own candidates.⁶² Perhaps there is no better illustration of the weak standing of the associational interest—the interest in "doing politics"—as defined for our purposes here.

IV. THINKING ABOUT THE INTEREST IN "DOING POLITICS"

The constitutional jurisprudence of the day takes political action and effectively compresses it into individual speech units.⁶³ Political activity is valuable insofar as it accommodates acceptably each of these speech units; it is made up of them and serves to organize and transmit them.⁶⁴ Hence the associational interest we recognize is an expressive one. We associate to communicate views, and the association per se is, as an interest, purely instrumental in character. But, as Professor George Kateb has written, "to instrumentalize a right is to invite abridgements of it."⁶⁵

The question presented by these considerations is now to reconceive First Amendment rights to encompass more than speech rights, or association in its role as an expressive activity. Any reimagining requires breaking free of the ingrained prejudice against political action—politics as activity rather than as just a forum for the expression of competing points of view.⁶⁶ It is not surprising that in the

60. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996).

61. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 323(a)(1), 116 Stat. 81 (codified as amended in 2 U.S.C. § 441i).

62. 2 U.S.C.A. § 441a(d)(3)(B)(4) (West 2013).

63. See, e.g., *Shays I*, 414 F.3d 76, 102 (D.C. Cir. 2005) (framing the issue before the Court as one concerning speech, and in particular the nature of the speech and the level of protection to which it is entitled).

64. See, e.g., Robert F. Bauer, McConnell, *Parties, and the Decline of the Right of Association*, 3 ELECTION L.J. 199, 199 (2004).

65. George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 53 (Amy Gutmann ed., 1998).

66. FRANK J. SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM 147 (1964) ("In

courts, or the academy, those who make their living through oral and written expression have a particular view of politics—that is, of good politics—rooted in their professional experience. Within this community, naked appeals to self-interest, deal-making, and the bewitchments of expensive, slickly produced media campaigns are somewhat distasteful. People are not reasoning together; they are not moving one another to consensus following an informed “debate on the issues.” Politics is understood to call on baser instincts or on strategies best pursued in the shadows, even if to some degree necessarily so.⁶⁷ But there are higher and lower forms of politics, and persuasive speech occupies the high rung while political action in its various gritty forms is found well below it.

Beyond this resistance to political action as almost morally suspect and certainly inferior to the operation of the free speech market, the character of political action is oversimplified to its detriment. It includes speech, but more than speech: Action and speech are inextricable in the realm of politics. One cannot be divorced from the other in this realm, one in which individuals interacting as equals strive in concert to fashion what is new.⁶⁸ People talk and argue with each other, build and re-build coalitions, both temporary and more enduring ones; they speak while they organize, and organize through speech, and this political space is alive with noise and energy. Often, case law assumes that politics exists to serve speech,⁶⁹ whereas, in the sense intended here, speech serves politics, and action and speech are the constituent and interdependent parts of political life. Hannah Arendt reminds us that the “promise of politics” resides in part in rescuing for action its proper place: In the Greek conception of the polis, “speech itself was from the start considered a form of action.”⁷⁰

the most general way one can, however, point to the widespread American suspicion of and distaste for politics and politicians as the basic element of the American political culture.”).

67. See, e.g., BERNARD WILLIAMS, *Politics and Moral Character*, in MORAL LUCK 55 (1981) (“It is widely believed that the practice of politics selects at least for cynicism and perhaps for brutality in its practitioners.”).

68. See HANNAH ARENDT, *THE PROMISE OF POLITICS* 125–26 (2007).

69. See, e.g., Bauer, *supra* note 64, at 199 (noting that the Court in *Buckley* assessed “[r]estrictions on expenditures—on direct speech”—under strict scrutiny, whereas “[c]ontribution restrictions, more immediately significant in the Court’s view to the exercise of associational rights” were treated differently); *id.* at 201 (discussing the *McConnell* Court’s refusal to “reevaluate the associational issues,” which the parties raised more directly in *McConnell* than in *Buckley*).

70. ARENDT, *supra* note 68, at 125.

Of what does this action consist? It is in essence an effort to “initiate a sequence, to forge a new chain,” and the political leader is the one who, in the launch of initiative—in taking action—“[seeks] out companions to help him carry it out.”⁷¹ Central to this concept is the assembly of men and women, which is a coming together, to pursue collective purposes. Unlike the unitary focus on speech—on self-expression—action must be pursued through the citizens in active engagement with one another, for, once again in Arendt’s words, “it is only action that cannot even be imagined outside the society of men.”⁷² It is a realm of freedom, properly valued (rather than questioned skeptically) on its own terms. It is the antithesis of mere rule, through which an elite issues orders to followers expected to obey them. As Arendt explained: “[T]he commonplace notion . . . that every political community consists of those who rule and those who are ruled . . . rests on a suspicion of action.”⁷³

In contemporary terms, political action might be imagined as the means by which strategies are formulated and executed.⁷⁴ Political strategy, in turn, depends on speech: speech among those who are devising the strategy, and speech as a means of executing the strategy in various ways to enlist the support of others. In a speech-centered vision of politics, the strategic uses of speech are questioned as tools of manipulation and misrepresentation.⁷⁵ If speech is reasoned discourse, disciplined by particular conventions of logic and evidence, then politically strategic speech presents in all its rhetorical flourishes, its appeals to emotion, and its frequent evasions and hair-splitting, the antithesis of what a healthy polity needs. Yet moral qualms about strategy, while reflecting in part a healthy suspicion of politics, can slide easily into derogation of the political sphere and fail to grasp the indispensability of action to concrete political achievement.

71. *Id.* at 126.

72. HANNAH ARENDT, *THE HUMAN CONDITION* 22 (2d ed. 1998).

73. *Id.* at 222.

74. GEORGE BEAM & DICK SIMPSON, *POLITICAL ACTION: THE KEY TO UNDERSTANDING POLITICS* 17 (1984).

75. *See* BENJAMIN GINSBERG, *THE AMERICAN LIE* 193 (2007) (“[Many candidates for high office] habitually stretch the truth as it serves their political purposes. . . . [P]oliticians construct a variety of imaginative fibs to present self-serving conduct as actually serving broader public purposes, to build or demolish political coalitions or to mobilize and energize their supporters.”). *See also* BRYAN GARSTEN, *SAVING PERSUASION* 2 (2009) (“In trying to persuade, democratic politicians may end up manipulating their audiences, or they may end up pandering to them.”).

The disregard of action in a speech-centered view of the First Amendment is not without a political bias consequence. Giving pride of place to “reasoned discourse” is advantageous to those with the skills to speak persuasively or the means to produce much of the speech that they hope is persuasive. In other words, the financial and educated elites stand to do well when jurisprudence favors speech at the expense of action, and when jurisprudence values persuasion over strategic uses of speech as an imperative of effective action. And even where the courts have looked out for the little guy, seeking in campaign finance to protect the rights of those of lesser means, the outcome has been quite different than expected.⁷⁶ The doctrine of free speech designed in part to benefit the “little guy” has become, contrary to original judicial intent, a constitutional shield for the “big guy.”⁷⁷

A shift in First Amendment theory toward the affirmative recognition of political action does not require superimposing on the constitutional text an alien conception. Recent scholarship has sought to recover something like this complex compound of speech and action in addressing the early history and then gradual decay of the rights to assembly and petition.⁷⁸ Each of these rights has virtually vanished from contemporary jurisprudence—thirty years have passed without a Supreme Court decision based on the right of assembly.⁷⁹ In each case, a conception of collective political action has been subordinated to the primacy of the right to speech.⁸⁰ Moreover, neither is fairly represented by a right to association, which is defined in modern terms by its expressive function and uninformed by any notion of the independent value of action.

Yet the right to petition, before it faded from the case law, offered a perfect “hybrid” right combining speech and action—a right that blended “speech, mass assembly, and association as part and parcel of... law reform efforts.”⁸¹ The right of assembly, before its

76. Robert Bauer, Remarks at the University of Pennsylvania Journal of Business Law Symposium: First the Little Guy, Then the Big Guy (Feb. 8, 2012), *available at* <http://electionlawblog.org/?p=47501>.

77. *Id.*

78. *See generally* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) (discussing the importance of the freedom of assembly to social movements in earlier American history and its gradual decay over the past few decades).

79. JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 62 (2012).

80. *See supra* notes 11–12, 27–30 and accompanying text.

81. RONALD KROTOSZYNSKI, RECLAIMING THE PETITION CLAUSE 11, 82 (2012).

annexation to speech rights, encompassed “far more than the right to hold a meeting.”⁸² As a “right to gather and exist in groups,”⁸³ the right of assembly partook of the same character as petitioning—an activity involving the coming together of individuals who shared and pursued the same political objectives. Both the rights to assemble and petition were integral to movement politics, particularly the abolition and women’s movements of the nineteenth century.⁸⁴ And movement politics depend on a sustained, strategically pursued commitment to effective political action.⁸⁵ This constitutional heritage is available for reclamation by building into the scope of First Amendment interests a right to political action.

CONCLUSION

Writing in 1997, when an early version of McCain-Feingold was under consideration but the reform was still five years off, John B. Judis worried that organized politics was receiving inadequate attention. Organizations, he wrote, are “really the only way for individuals who are not billionaires to exert power.”⁸⁶ To counter inequality in the economic system, “average citizens . . . had to organize in labor unions, civil rights organizations, civic organizations, and other associations, and they had to work through the political parties.”⁸⁷

So, Judis concluded, political reform, far from seeking to eliminate or curb organized interests, should be structured to encourage them—so that “organized interests of workers and citizens can contend equally with those of business and the wealthy.”⁸⁸ What he describes as law’s proper aim takes fully into account how political strategies are developed in consultation among allies who then proceed to act in pursuit of their common goals. Their interest lies very specifically in this action—in a right to act, and not just to speak.

82. INAZU, *supra* note 79, at 33.

83. *Id.*

84. Inazu notes the multiple and interrelated purposes served by activities organized through and in support of movement politics. The “open air” campaigns developed by suffragettes attracted national press, facilitated the acquisition of organizing capabilities, and established a sense of partnership and solidarity among the participants. *Id.* at 45.

85. James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 292–93 (1990).

86. John B. Judis, *Goo-Goos Versus Populists*, 30 THE AMERICAN PROSPECT 12, 13 (1997).

87. *Id.* at 14.

88. *Id.*

To recognize this right to act—to “do politics”—will require the re-evaluation of deeply held assumptions about politics, and a reworking of the framework that has prized only the most isolated form of speech, the speech disconnected from action, and accorded the weakest protections to the type of speech that links us together and presents itself in the form of concerted political enterprise. To value action, we have to value, not distrust, collective political action and the strategies through which it is effected.