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McConnell v. FEC, Corporate Political Speech, and the Legacy of the *Segregated Fund Cases*

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I.

SINCE 1978, the Supreme Court's decision in *First National Bank of Boston v. Bellotti*[1] has been the starting point for discussion of the constitutional rights of corporations to engage in political speech. Widely treated as the foundational case in corporate political speech doctrine,[2] *Bellotti* invalidated Massachusetts' ban on corporate expenditures on ballot measures and effectively held that corporations have the same speech rights as natural persons.[3] Although *Bellotti* is treated as a cornerstone of corporate political speech doctrine, the Supreme Court's most recent campaign finance decision—*McConnell v. Federal Election Commission*[4]—confirms the doctrine's deeper roots: a trio of cases decided well before *Bellotti*, including *United States v. CIO* (1948),[5] *United States v. Autoworkers* (1957),[6] and *Pipefitters v. United States* (1972).[7] In these three cases (the "*Segregated Fund Cases*"), the Court established a framework for how to treat corporate (and union) political speech that is both strikingly contradictory to *Bellotti* and far more influential to the shape of modern campaign finance law.

In contrast to *Bellotti*, the *Segregated Fund Cases* treat the identity of the speaker as crucial. Corporations (and unions) do have free speech rights, but they can be barred from using general treasury funds to finance political speech and forced to use separate segregated accounts to raise money from members. The basis for the distinction is that treasury funds reflect the economically motivated decisions of investors or members who do not necessarily approve of the political expenditures, while segregated funds—such as a political action committee (PAC)—raise and spend money from knowing, voluntary political contributors. Although individuals are free to contribute their own "general treasury" funds to political campaigns, corporations (and unions) are subject to this special financing restriction that preserves the voluntariness of political money. As the Court in *McConnell* reminds, it "has been this Court's unanimous view" that the "ability

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[1] 435 U.S. 765 (1978).

[2] *Bellotti* usually appears as the first case on corporate political speech in constitutional law textbooks and treatises. *See, e.g.*, Laurence H. Tribe, American Constitutional Law 795 (2d ed., 1988); Geoffrey R. Stone et al., Constitutional Law 1340 (4th ed., 2001); John E. Nowak & Ronald R. Rotunda, Constitutional Law 1266 (6th ed., 2000); Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 1385 (14th ed., 2001); Samuel Issacharoff et al., The Law of Democracy: Legal Structure of the Political Process 499 (Rev. 2d ed., 2002). A notable exception is Daniel Hays Lowenstein & Richard L. Hasen, Election Law: Cases and Materials 819 (2d ed., 2001), which mentions the *Segregated Fund Cases* prior to excerpting *Bellotti*.

[3] *Bellotti* explicitly claimed to avoid deciding whether corporations have rights equal to natural persons. *See Bellotti*, 435 U.S. at 776. Nevertheless, the logic of the Court's insistence that the identity of the speaker was irrelevant to the First Amendment analysis was to leave all political speakers, be they corporate or natural persons, with precisely the same constitutional protection. *See id.* at 777.

[4] 124 S.Ct. 619 (2003).

[5] 335 U.S. 106 (1948).

[6] 352 U.S. 567 (1957).

[7] 407 U.S. 385 (1972).

to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy."[8]

This commentary analyzes the influence of the *Segregated Fund Cases* on corporate political speech rights and shows how the principles established in those cases reverberate through campaign finance legislation and Supreme Court decisions. The Bipartisan Campaign Reform Act (BCRA) and *McConnell*, which upheld the BCRA's ban on corporation (and union) general treasury funds being used to finance "electioneering communications" (broadcast ads run just prior to elections that mention a candidate's name) and requiring such ads to be paid for with money raised through segregated funds, are just the latest in a long series of federal election laws and Supreme Court decisions to rely on the *Segregated Fund Cases* framework. *Bellotti*, meanwhile, has been consistently read to be limited to its facts: a complete ban on corporate political speech for ballot measures, with no segregated fund option. With regard to speech about candidates for elective office—the focus of federal law for nearly a century—*McConnell* confirms that the *Segregated Fund Cases*, not *Bellotti*, provide the dominant architecture for the doctrine. Although *Bellotti* receives all the attention, the *Segregated Fund Cases* have been quietly shaping the law of corporate political speech for over a half-century.

II.

The history of campaign finance law is marked by a long-standing concern with the corrupting potential of politically active corporations. After corporations first became heavily involved in financing presidential campaigns during the years surrounding the presidency of Theodore Roosevelt, corporations were thought by reformers to pose two types of threats of corruption to elections. One, their amassed wealth could drown out other political voices and thus give big business undue influence in shaping policy ("corporate power" corruption). Two, political spending by corporations was thought to be managerial misuse of shareholders' money, which was invested for economic purposes not political ones ("other people's money" corruption). Such concerns led to a nationwide movement to ban corporate campaign contributions in the Progressive era, the success of which is evidenced in the federal Tillman Act of 1907 and similar laws adopted in the states.[9]

Although corporations challenged the corporate bans in state and federal courts, the courts uniformly upheld them.[10] The Supreme Court did not weigh in on the constitutionality of the laws until mid-century in the *Segregated Fund Cases*. These cases were ostensibly about labor unions and their role in campaign finance, but the Court repeatedly emphasized throughout that its reasoning applied with equal force to corporations. Indeed, from the time labor unions were added to the federal ban on corporate contributions and expenditures during World War II, campaign finance legislation and case law have tended to equate unions with corporations and subjected them to nearly identical treatment.[11] Unions, like corporations, pose similar risks of "corruption": (1) of gaining undue influence thanks to their amassed wealth; and (2) of improperly using "other people's money" (in unions, members' dues) for political purposes.[12] As one of the cases would quote Senator Robert Taft, "'the conditions are exactly parallel, both as to corporations and labor organizations.'"[13] This shared potential for corrupting elections has long linked the legal rights of unions and cor-

[8] *McConnell*, 124 S. Ct. at 694.

[9] *See* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, Geo. L.J. (forthcoming 2004).

[10] *See, e.g.*, People v. Gansley, 158 N.W. 195 (MI 1916); State v. Fairbanks, 115 N.E. 769 (IN 1917); United States v. United States Brewers' Association, 239 F. 163 (W.D. PA. 1916).

[11] *See* generally David J. Sousa, *"No Balance in the Equities": Union Power in the Making and Unmaking of the Campaign Finance Regime*, 13 Studies in American Political Development 374 (1999).

[12] *See* United States v. CIO, 335 U.S. 106, 115 (1948) ("It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose.").

[13] *See* Pipefitters v. United States, 407 U.S. 385, 406 (1972).

porations to political participation, and the *Segregated Fund* cases ultimately set up a framework around which corporate political speech doctrine would also be built.

The Congress of Industrial Organizations (CIO) and its president, Philip Murray, decided to test the constitutionality of the contribution ban—codified in section 610 of title 18 of the United States Code.[14] The union endorsed a House candidate in the union newspaper, the *CIO News*, which was financed by general treasury money. The CIO and Murray were indicted for violating the ban, but the Supreme Court held in *United States v. CIO* that the ban could not be read to apply to corporate/union political speech where the members of those entities can be said to consent to such expenditures. Although section 610's phrasing was extremely broad—barring "any contribution or expenditure in connection with" a federal election[15]—Justice Stanley Reed's plurality opinion read an exception into section 610 for political funds raised through voluntary contributions from members. Because the *CIO News* was an in-house publication not intended to be distributed to the public at large, "[i]t is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests . . . "[16] In an angry concurrence, Justice Wiley Rutledge, who thought the law should be stricken in its entirety for singling out corporations and unions, criticized Justice Reed's creative statutory construction as an "invasion of the legislative function by rewriting or emasculating the statute."[17]

Although *CIO* was crafted as a case of statutory interpretation, the Court explained that its narrowing construction was required to avoid declaring the law unconstitutional. According to Justice Reed, reading the law more broadly to permit the prohibition of voluntary political funds would raise the "gravest doubts"[18] about the law's constitutionality. In this and each of the *Segregated Fund Cases* to come, the Court used the language of statutory construction but, as others have noted, "constitutional values largely determined the cases' outcomes."[19]

CIO was followed by *United States v. Autoworkers* (1957),[20] which also suggested that member consent could be used to distinguish protected from unprotected political speech by unions and corporations. At issue was a United Automobile Workers television advertising campaign that endorsed congressional candidates. The Court voiced support again for an exception to section 610 for political spending that was voluntarily supported by union or corporation members. Although the factual record was too incomplete for the Court to determine the nature of the ads' financing, the Court remanded the case to the District Court with pointed instructions to discern if the ads had been "paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis."[21]

Justice Felix Frankfurter's opinion for the Court presented a lengthy history of federal efforts to single out corporations and unions for special campaign finance rules—an account that served dual purposes. One, Justice Frankfurter portrayed federal discrimination against corporations and unions in campaign finance law as an established, longstanding tradition. Two, Justice Frankfurter, ever fearful of judicial entanglement in the "political thicket,"[22] suggested that the history of congressional, but not judicial, action in the area testified to the "wisdom of . . . [the] self-imposed inhibition" against interfering with an Act of Congress unless absolutely necessary.[23] Legislative judgments to single out corporations and unions for special restriction warranted judicial deference.

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14 John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz. L. Rev. 373, 387 (1980); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 Berk. J. of Emp. & Lab. L. 1, 34 (1999).

15 18 U.S.C. sect. 610 and recodified as 2 U.S.C. sect. 441b (2003).

16 *CIO*, 335 U.S. at 123.

17 *Id.* at 130 (Rutledge, J., concurring in the result).

18 *Id.* at 121.

19 Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 Hastings L. J. 1, 2 (1989).

20 352 U.S. 567 (1957).

21 *Autoworkers*, 352 U.S. at 591.

22 *See* Colegrove v. Green, 328 U.S. 549, 556 (1946).

23 *Autoworkers*, 352 U.S. at 590.

Both *CIO* and *UAW* endorsed the rights of unions and corporations to make political contributions and expenditures so long as the funds could be said to reflect the voluntary support of their members. But they did not make clear what concrete organizational steps corporations and unions could take to raise political money and spend it free from fear of criminal prosecution for violating section 610. Nevertheless, many labor unions and a handful of corporations relied on the judicially crafted exception for voluntary funds and established separate segregated entities, such as political action committees, to solicit political contributions.[24] Kept apart from general treasury funds, though managed by the same officials, segregated funds enabled unions and a few corporations to continue their political participation even under the cloud of ambiguity concerning the scope and effect of the consent requirement.

The strongest statement of the segregated fund exception was the third case in the series, *Pipefitters v. United States* (1972),[25] which gave the Court's official approval to corporate and union establishment of segregated funds. The Court, per Justice William Brennan, overturned criminal indictments of union officials who had managed a segregated union fund and were charged with conspiracy to violate section 610. Nixon's Department of Justice argued that the political fund was not sufficiently separate from the union because union officials managed the political fund and solicited contributions from union members at work. The Court held that a political fund "must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments."[26] Moreover, the Court held that the ban did not apply to "political funds financed in some sense by . . . voluntary donations."[27] The Court explained that the "dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member."[28] Where the contributors gave voluntarily and with knowledge of their right to refuse—here contributors had signed authorization cards to that effect—corporations and unions were free to create segregated political funds.

The *Segregated Fund Cases* effectively established a constellation of principles on corporate/union political speech. One, corporations and unions enjoyed First Amendment speech rights; laws that completely barred corporate and union election speech were almost certain to be deemed constitutional violations. Two, courts should defer to legislative judgments about the wisdom of singling out corporations and unions for special treatment in campaign finance law. Three, corporations and unions could be barred from using general treasury funds on political speech to the extent such funds did not reflect members' consent. Four, where corporations and unions can be said to be using funds voluntarily contributed by members—such as with a segregated fund—the First Amendment protects the speech.

III.

In the 1970s, the Federal Election Campaign Act (FECA) and its various amendments codified into federal election law the *Segregated Fund Cases* framework for corporate/union political speech. In what would become section 441b of the federal election laws, the FECA provided that corporations and unions were barred from using general treasury funds to influence federal elections, but could establish separate segregated funds to raise and spend campaign money. Section 441b also created clear reporting requirements, barred coercive solicitations, and permitted corporations and unions to pay the administrative costs of segregated funds. The legislators behind the FECA's segregated fund rules did not envision them as innovative but sought instead "to codify the court decisions."[29]

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[24] *See* Edwin M. Epstein, *The PAC Phenomenon: An Overview*, 22 Ariz. L. Rev. 356, 357 (1980).

[25] 407 U.S. 385 (1972).

[26] *Id.* at 414.

[27] *Id.* at 409.

[28] *Id.* at 414–415.

[29] *See* 117 Cong. Rec. 43379 (remarks of Rep. Hansen); 117 Cong. Rec. 43381 (remarks of Rep. Hays); 117 Cong. Rec. 43383–43385 (remarks of Reps. Steiger and Gude).

The codification of the *Segregated Fund Cases* framework made federal law much more clear and provided a dependable foundation for corporations to form segregated funds. Although the Court had already insisted that the First Amendment protected political money raised voluntarily from members of unions and corporations, most businesses were hesitant to rely on a few judicial rulings and risk prosecution (and, perhaps more importantly, risk losing valuable federal contracts). But the FECA and the supporting regulations adopted by the Federal Election Commission (FEC) provided all the necessary encouragement. Whereas business political committees spent $1.4 million on federal elections in 1968, a decade later the amount skyrocketed to $37 million.[30] By 1980, there were 1,153 corporate-affiliated PACs, which provided nearly a third of federal campaign spending.[31]

The huge growth of PACs indicates that, whatever else one might say about the FECA, it clearly was not designed to limit corporations and unions from exerting influence on election campaigns. Rather, the unique appeal to Congress of the *Segregated Fund Cases* framework was that it enabled lawmakers to claim to be cleaning up a corrupt system while facilitating the flow of corporate and union PAC dollars to federal campaigns. The segregated fund rules restrained corporate/union spending to the extent they barred the use of general treasury funds and required political money to be raised through segregated funds (which necessarily raised transaction costs and lowered the total money flowing to campaigns). Yet corporations and unions still had ample access to campaign money through their employees and members.

Despite rewriting much of the FECA in *Buckley v. Valeo* (1976)—certainly the most important Supreme Court ruling on the constitutionally permissible contours of campaign finance law—the case did not touch upon section 441b. Meanwhile, in *Abood v. Detroit Board of Education* (1977) the Supreme Court used the "other people's money" rationale to hold that labor unions cannot use the state-mandated dues of dissenting members to finance political speech or lobbying.[32] Though not ordinarily treated as a campaign finance case, *Abood* nevertheless affirmed a way of looking at union political activity that was evocative of the *Segregated Fund Cases* in guarding against misuse of members' money.

By the time the Supreme Court heard arguments in *First National Bank of Boston v. Bellotti* (1978),[33] the *Segregated Fund Cases* framework was the primary legal guideline for regulating corporate political speech in both federal law and Supreme Court case law. One might have imagined that the segregated fund framework and the cases establishing it would play a major role in the case, no matter how the Court ruled on Massachusetts' ban on corporate spending in ballot measure campaigns. Yet, the *Segregated Fund Cases* were barely mentioned and, more importantly, the constellation of principles established by the trio was ignored entirely.

In striking down the Massachusetts law, *Bellotti* articulated a set of reasons that contradicted quite directly those underlying *CIO, Autoworkers,* and *Pipefitters*. Whereas the earlier cases effectively permitted singling out corporations and unions for special treatment, according to *Bellotti*, the corporate nature of the speaker was irrelevant. Free speech rights, the Court held, do not turn on the identity of the speaker; whether a corporate person or a natural one, the right to engage in political speech was the same. Because speech is valuable to listeners regardless of the speaker's identity, corporations could not be subject to special restrictions on their political speech.[34]

Although the Massachusetts law did not have an exception for segregated funds—and thus the Court did not have occasion to rule on the constitutionality of such a requirement—the *Bellotti* Court went out of its way to reject

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[30] *See* Epstein, *supra* note 24 at 357.
[31] *Id.* at 356.
[32] 431 U.S. 209 (1977). *See also* Ellis v. Railway Clerks, 466 U.S.435 (1984) (extending *Abood* to private sector unions). For an analysis of how *Abood* can be useful in understanding corporate political speech rights, *see* Adam Winkler, *Beyond* Bellotti, 32 Loy. L.A. L. Rev. 133, 202–210 (1998).
[33] 435 U.S. 765 (1978).
[34] *Id.* at 777 (arguing that political speech is "the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual").

the argument that corporate use of general treasury funds amounted to a misuse of "other people's money." Shareholders, the Court reasoned, "normally are presumed competent to protect their own interests."[35] If they believe that corporate political expenditures "have been made for improper corporate purposes or merely to further the personal interests of management," shareholders can bring a derivative suit or, better yet, sell their shares.[36] As a result, there is no reason to require explicit expressions of their support for corporate political expenditures: general treasury funds are presumed to be spent with the consent of shareholders.

About the only point of agreement between *Bellotti* and the *Segregated Fund Cases* was that corporations and unions were assumed to have a baseline First Amendment right of free speech. Otherwise, *Bellotti* rested on an analysis of corporate speech seemingly at odds with the *Segregated Fund Cases*—even though the *Bellotti* Court did not purport to overturn the earlier cases or even to limit their reach. The Court left it to commentators and future cases to unravel the knotted doctrine.

IV.

In the wake of *Bellotti*, almost all academic commentary on corporate political speech emphasized the 1978 ruling and, much as the Court had done, ignored the *Segregated Fund Cases* and their continuing influence on federal election law. The oversight was not surprising. *Bellotti* dealt directly with corporate speech rights, while the *Segregated Fund Cases* only involved corporations indirectly through the lens of labor unions. *Bellotti* purported to state constitutional rules, while the *Segregated Fund Cases* offered halting analyses characterized as statutory interpretation (even though the interpretations were necessitated, according to the Court, by the Constitution). *Bellotti* was everything the *Segregated Fund Cases* were not: big, bold, and clear. It offered much more for hungry constitutional law scholars to chew on. Nevertheless, the *Segregated Fund Cases* framework remained intact in federal election law and in the years following *Bellotti* would continue to be far more determinative of the trajectory of the law of corporate political speech.

In its very next corporate politics decision after *Bellotti*, *Federal Election Commission v. National Right to Work Committee* (*NRWC*) (1982),[37] the Court upheld the FECA's requirement that corporate PACs solicit only from members with "some relatively enduring and . . . significant . . . attachment."[38] Although natural persons and non-corporate entities (other than unions) are entitled to solicit anyone to contribute to a PAC, the Court held that it should defer to "congressional judgments" about whether "the differing structures and purposes of different entities . . . require different forms of regulation."[39] Relegating *Bellotti* to a footnote, *NRWC* distinguished the already well-known case as limited to corporate speech about referendums, not candidates.[40] More importantly, the reasoning of (then Associate) Justice William Rehnquist's majority opinion rejected the *Bellotti* notion that the corporate identity of the speaker was irrelevant. In fact, it was paramount to the *NRWC* majority: "the special characteristics of the corporate structure require careful regulation."[41] The governmental interest in combating electoral corruption may "be accomplished by treating unions, corporations, and similar organizations differently from individuals."[42]

In 1986, the Court decided *Federal Election Commission v. Massachusetts Citizens for Life* (*MCFL*)[43], which invalidated the application of the segregated fund requirement to an incorporated ideological non-profit that received no money from business corporations. The Court agreed with *NRWC* that the special characteristics of the corporate structure require careful attention,[44] but here one of the traditional concerns about corporate corruption was absent:

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35 *Id.* at 794–95.
36 *Id.* at 795 (contending that a dissenting shareholder "is free to withdraw his investment at any time and for any reason").
37 459 U.S. 197 (1982).
38 *Id.* at 204.
39 *Id.* at 209–210 (internal quotations omitted).
40 *Id.* at 210 n.7.
41 *Id.* at 209–210.
42 *Id.* at 211.
43 479 U.S. 238 (1986).
44 *Id.* at 627–28.

there was "no potential for the unfair deployment of wealth" because "[i]ndividuals who contribute [to MCFL] are fully aware of its political purposes."[45] The Court once again relegated *Bellotti* to a footnote and distinguished it away, this time as a case involving the unique circumstance of a complete ban on corporate and union political speech.[46]

While *NRWC* and *MCFL* were in tension with *Bellotti, Austin v. Michigan Chamber of Commerce* (1990)[47] exposed the extent of the strain and would come to be the most forceful and direct exposition of the *Segregated Fund Cases'* framework in constitutional doctrine. Upholding a Michigan law requiring that corporations and other entities that receive business money finance express advocacy for candidates through separate segregated funds, *Austin* strongly endorsed the principle that corporations are subject to distinctive treatment under the First Amendment. Corporate general treasury funds could be prohibited from political advocacy because they have "little or no correlation to the public's support for the corporation's political ideas."[48] The state could treat corporations differently from individuals because the "state-conferred benefits" of limited liability and favorable treatment of assets gave corporations the "ability to attract capital" from shareholders in the "economic marketplace" which might be then misused "to obtain an unfair advantage in the political marketplace."[49] Where, however, corporations set up segregated funds to raise voluntary political contributions, independent expenditures on behalf of candidates "reflect actual support" and do not amount to a misuse of "other people's money." Under *Austin*, then, it is precisely the unique attributes of the corporate form that warrant special treatment of corporate politics, and that special treatment may come in the form of segregated fund requirements. And *Austin* could not be minimized by terming it a case of statutory construction (as the *Segregated Fund Cases* were); its constitutional grounding was unambiguous.

Justice Thurgood Marshall's majority opinion in *Austin*, following the trend begun in NRWC, quickly dispatched with *Bellotti*, but scholarly commentary was equally quick to recognize the profound contradictions of the two cases.[50] Such was the prominence of *Bellotti*, however, that Justice Powell's opinion seemed a stronger precedent than *Austin*, even though *Austin* was decided a decade later and relied upon a segregated fund framework with a now long-standing historical basis in election law. In part, the suspicion that *Austin* was a weak precedent reflected assumptions about the impact of post-*Austin* shifts in the Court's personnel. Could this opinion upholding restrictions on corporate speech survive the more business-friendly Court that followed the retirement of *Austin*'s author, Justice Marshall, and his liberal cohort Justice Brennan?

V.

The question of *Austin*'s force as precedent remained despite the Court's decision in *Federal Election Commission v. Beaumont* (2003),[51] handed down just 6 months prior to *McConnell v. FEC. Beaumont* upheld the application of section 441b to non-profit advocacy corporations. Justice David Souter's majority opinion repeated the *Segregated Funds Cases'* principle of judicial deference to congressional judgments,[52] and articulated a strong defense of the long history of subjecting corporations to special campaign finance rules. Although corporations enjoyed First Amendment rights, the Court explained that those rights "derived largely from those of their members" and a ban on direct treasury spending on politics still "leaves individual members of corporations free to make their own contributions."[53] Justice Souter added that failing to impose the segregated fund rules in the case of organizations

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[45] *Id.* at 629.
[46] *Id.* at 628 n.12.
[47] 494 U.S. 652 (1990).
[48] *Id.* at 1397.
[49] *Id.* (internal quotations omitted).
[50] *See, e.g,* Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 Cap. U. L. Rev. 381, 404 (1992); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 613 (1991); Winkler, *supra* note 32 at 147.
[51] 123 S. Ct. 2200 (2003).
[52] *Id.* at 2210 n. 9.
[53] *Id.* at 2210 n. 8.

that accept corporate contributions would enable easy circumvention of the ban on general treasury funds being used for federal campaigns. In sum, the segregated fund option "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members."[54]

Beaumont, which was nothing short of a ringing endorsement of both the *Segregated Fund Cases'* framework and of *Austin*, was an ominous sign for the *McConnell* plaintiffs—at least so it seemed until the day of extended oral argument on the BCRA. In a surprising moment, Chief Justice Rehnquist—a longtime supporter of campaign finance law—suggested that *Austin* may have been wrongly decided and the entire segregated fund framework might be unconstitutional. Four other justices had previously expressed their unhappiness with *Austin* (Kennedy, Thomas, Scalia, and O'Connor); thus, it suddenly appeared that a majority was now in place to end the era of the *Segregated Fund Cases* in federal election law.

The Chief Justice, as forewarned by his remarks during oral argument, did switch his vote, but the BCRA's electioneering communications provisions, including the segregated fund requirement for corporations and unions, were upheld. Justice Sandra Day O'Connor, who dissented in *Austin*, matched the Chief Justice with an abrupt about-face of her own, voting now to uphold the corporate/union provisions. Known for her pragmatic inclination to protect settled expectations and stick to precedent in big controversies,[55] Justice O'Connor may have feared the institutional impact of overruling *Austin*: upending the longstanding segregated fund framework embodied in half a dozen decisions and in the basic structure of the FECA itself. Not just one case, but a half-century of election law would be tossed aside in favor of a new regime of corporate and union political participation of uncertain shape and effect.

Justice O'Connor's majority opinion, co-authored with Justice John Paul Stevens, was hardly edifying in its discussion of the constitutionality of the segregated fund restriction. The Court offered no defense of the special rules for corporations and unions and no analysis of how the underlying rationales of combating corporate/union power and misuse of "other people's money" justified the BCRA. Rather, the majority claimed to uphold the segregated fund requirement because the plaintiffs had not directly challenged their constitutionality[56] and thus *stare decisis* controlled. "The ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view . . . ."[57]

What role did *Bellotti* play in the *McConnell* opinion? Typecast again in the role of footnote, its rule and reasoning distinguished away.[58]

Justice Anthony Kennedy's dissent, which was joined by Chief Justice Rehnquist and Justice Scalia, argued that it was unconstitutional to require corporations and unions to finance political speech through separate segregated funds—what he termed "compulsory ventriloquism."[59] For the Chief Justice to agree amounted to a repudiation not just of his vote with the majority in *Austin* but of his votes in virtually all of the corporate political speech cases of the past twenty years, including *NRWC* (which he authored). Justice Kennedy, noting the obvious disparity between *Bellotti* and *Austin*, dismissed the majority's reliance on *Austin*, which he termed an "anomaly" "unfaithful to our First Amendment precedents."[60]

The dissent had it precisely backwards. It is *Bellotti* that stands alone in the doctrine on corporate and union political speech, while *Austin* follows the contours of the *Segregated Fund*

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54 *Id.* at 2211.
55 *See* Robert W. Van Sickel, Not a Particularly Different Voice: The Jurisprudence of Sandra Day O'Connor 132 (Peter Lang 1998); Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 9, 62, 124 (Harvard 1999); Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia, and Kennedy*, 49 Rutgers L. Rev. 219, 232 (1996).
56 *McConnell*, 124 S.Ct. at 694.
57 *Id.*
58 *Id.* at 696 n. 88.
59 *Id.* at 768 (Kennedy, J., dissenting in part and concurring in part).
60 *Id.* at 763, 764 (Kennedy, J., dissenting in part and concurring in part).

Cases closely. Indeed, over the past half-century, corporations and unions have been singled out repeatedly for special restrictions in campaign finance law and *Bellotti* is simply the only case in the body of relevant cases to rule otherwise.

VI.

Even in this era of the *Segregated Fund Cases*, *Bellotti* retains a modicum of doctrinal import: it still means that a complete ban on corporate speech about ballot measures, with no segregated funding option, violates the First Amendment. But the Court's analysis of corporate political speech rights in *Bellotti* is a singular oddity in the larger body of relevant cases on the constitutionality of corporate political speech restrictions.

McConnell confirms that corporations are subject to a set of doctrinal principles which both guarantee baseline corporate speech rights and permit special restrictions, such as segregated funds, to insure the voluntariness of political expenditures. This set of principles had its roots in the *Segregated Fund Cases* decided between 1948 and 1972, the impact of which on federal campaign finance law is easy to understate. The core approach to regulating corporate and union campaign financing—in both Congress and the Courts—borrows not from *Bellotti* but from the *Segregated Fund Cases*.

Proponents of progressive campaign finance reform were heartened by the *McConnell* ruling and for good reason. A hard-fought law was upheld in the main and the Court's pronouncements on legislative discretion to enact campaign finance laws to combat corruption were soothing recitations of older standards thought to be up for grabs. Yet, to the extent *McConnell* promotes a continuation of the *Segregated Fund Cases* framework for regulating corporate and union campaign financing, the story for proponents of limiting corporate and union influence is mixed at best. On the one hand, *Bellotti*'s rule that the identity of the speaker is irrelevant was not adopted by the Court, thus forestalling a torrent of corporate general treasury funds to flood the coming election cycle. On the other, the baseline free speech rights of corporations and unions were once again affirmed, so long as those entities use segregated funds.

This is the ultimate irony of the *Segregated Fund Cases*. While permitting the adoption of special restrictions on corporate and union political participation, the cases have also allowed corporations and unions to remain active in financing campaigns through their PACs. Early indications suggest that the BCRA's electioneering provisions will not diminish corporate and union influence on public policy, but will merely shore up the requirement that such influence be purchased through readily available segregated funds.[61] The *Segregated Fund Cases* thus both permitted special restrictions on corporate/union speech and legally secured the influence of corporations and unions in federal campaigns.

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[61] *See* Tom Ichniowski, *High Court Decision Should Boost PACs*, Engineering News-Record, Dec. 22, 2003, at 9. *See generally* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999) (recognizing the inevitable flow of political money to channels remaining open after the adoption of reform).