NONPARTICIPATORY ASSOCIATION AND COMPELLED POLITICAL SPEECH:

CONSENT AS A CONSTITUTIONAL PRINCIPLE IN THE WAKE OF *CITIZENS UNITED*

FRANCES R. HILL*

I.
INTRODUCTION

In *Citizens United*, the Supreme Court put nonparticipatory association and compelled political speech at the heart of campaign finance jurisprudence.[1] In its zeal to abolish distinctions between natural persons and corporations in

* Professor of Law at the University of Miami School of Law. J.D., Yale Law School; Ph.D., Harvard University.

1. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

campaign finance law, the Court amplified the political speech rights of corporations and constrained the associational and political speech rights of the shareholders and members who form and fund corporations.

Before *Citizens United,* federal election law prohibited the use of corporations' general treasury funds for independent expenditures that expressly supported or opposed the election of clearly identified candidates for public office.[2] The only way for a corporation to expressly support candidates was through the corporation's political action committee ("PAC").[3] In effect, federal election law operated as a clause in corporate articles or bylaws that protected shareholders and members from managerial discretion in using corporate assets to support or oppose political candidates through independent expenditures. *Citizens United* removed this implicit term from the articles or bylaws of every corporation and association in the country and thereby changed the relationship between organizations and their members.[4] Following *Citizens United,* independent expenditures that expressly advocate the election or defeat of a particular candidate may be funded directly from a corporation's general treasury. Members and shareholders have no effective means of consenting or not consenting to the decisions made by organization managers with respect to the use of general treasury funds.[5]

The changes *Citizens United* made to the terms of association are profound for shareholders or members who affiliated with an association for purposes other than political expression. An individual who buys stock in a business corporation is likely to have made the investment for the straightforward purpose of earning a return on the investment, not for the purpose of supporting or opposing a particular candidate. An individual who makes a contribution to a tax-exempt entity may be presumed to have done so to support the organization's exempt purpose, whether to protect the environment, maintain a local park, or improve conditions in the local business community. These shareholders and members now find that virtually all associations can allocate

2. *See* Federal Election Campaign Act (FECA) § 316, 2 U.S.C. § 441b (2006), *invalidated in part by Citizens United v. Fed. Election Comm'n,* 130 S. Ct. 876 (2010) (striking down restrictions on independent expenditures but not with respect to contributions to candidates).

3. Corporate-controlled PACs are funded by contributions, subject to limitations as to the amount, the frequency of solicitation, and the persons whom the PAC can solicit. In these senses, corporate-controlled PACs preserve an element of volition absent from the managers' use of the corporation's general treasury funds for express advocacy. For regulations defining the operation of corporate or union-controlled PACs, see generally 11 C.F.R. § 114.6(a) (2010), 11 C.F.R. § 114.6(b) (2010); 11 C.F.R. § 114.7 (2010) ; 11 C.F.R. § 114.8 (2010) . The name of a controlled PAC must include the name of its sponsoring organization. 2 U.S.C. § 432(e)(5) (2006); 11 C.F.R. § 102.14(c) (2010).

4. The terms "members" and "shareholders" are used in a generic sense and not in a technical sense throughout this Article, which does not address the important issue of the diverse relationships between types of entities and those persons that support, identify with, affiliate with, contribute funds to, or acquire some form of financial interest in the entity.

5. *Citizens United,* 130 S. Ct. at 913, *overruling* McConnell v. Fed. Election Comm'n (2003) with respect to independent expenditures but not with respect to contributions to candidates.

organizational resources to supporting or opposing candidates in election campaigns, regardless of whether the candidates' positions are consistent with the exempt activity of the organization or the commercial activities of the business corporation.[6]

These changes are also profound for members who did affiliate with an association for the purpose of political expression, but not necessarily for the purpose of supporting or opposing particular candidates. It is entirely possible to support a cause and to pay dues or make contributions to support legislative lobbying or issue advertisements without wanting to support or oppose particular candidates for public office, or even wanting to support any candidates at all. An association may be devoted to a single cause, or even to a single approach to a single cause, but a candidate necessarily takes positions on many issues. Even a strong supporter of a particular cause may not attract the votes of ardent supporters of that cause if those supporters object to the candidate's position on other issues. In order to understand the nature of compelled political speech arising from this change in the terms of association, it is necessary to remember that the choice a given voter makes about which candidate to vote for—or even whether to vote at all—is a highly complex decision made by individual voters in different ways, weighing different factors.[7]

Citizens United is thus an important case in the jurisprudence of association. Members and shareholders will now find that the money they contributed to, or invested in, an organization is being used to finance political speech with which they may not agree. The majority opinion does not address this change in the scope of managerial discretion as an element of the right of association. Instead, it treats corporate decisions relating to political speech as indistinguishable from other corporate decisions over which corporate managers exercise control.[8] The

6. Whether various types of corporate entities will, in fact, use general treasury funds to finance independent expenditures will become apparent in future elections. It will also become apparent whether the limitations on the use of general treasury funds for independent expenditures will cause increased rent-seeking, a form of monetizing public office, by officeholders seeking to finance their political campaigns. Enhancing opportunities for rent-seeking increases the influence of those who finance candidates relative to those who vote for candidates. Rent-seeking raises practical problems relating to lobbying that are beyond the scope of this Article, but not beyond the scope of legitimate concerns arising from the Court's decision in *Citizens United*. For an analysis of the economics of rent-seeking, see FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997).

7. For an analysis of voting decisions, see SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN POLITICAL CAMPAIGNS (1991).

8. Both taxable business corporations and nonprofit advocacy organizations operate through managerial control, relatively weak boards, and shareholders or members with few rights to participate in organizational governance. While shareholders in business corporations vote for members of their boards and on certain issues specified in the corporations' organizing documents, most nonprofit advocacy organizations have no members with similar voting rights. The boards of nonprofit advocacy organizations are self-perpetuating institutions that elect their own successors, or reelect themselves. For an analysis of managerial control that remains useful for understanding both business corporations and nonprofit advocacy organizations, see generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

Citizens United majority thus ignored the role of member and shareholder consent in organizations' decisions relating to the use of general treasury funds to finance independent expenditures. Political speech has become another area of nonparticipation in organizational decision-making, and the resulting speech is a form of compelled political speech from the perspective of shareholders.[9]

Citizens United is also important for the jurisprudence of association because of what the Court did not do. The Court in *Citizens United* never paused to consider whether nonparticipatory association was consistent with the First Amendment values they claimed to be protecting.[10] The Court never asked whether the shareholders and members should be considered speakers with protected First Amendment rights. It did not locate the First Amendment in the Constitution, and did not understand the Constitution as a document intended to establish a legitimate government based on consent. It did not consider the implications of nonparticipatory association and compelled political speech for the rights of individuals as voters. The Court never stopped to consider whether its decision might have implications for the nature of the relationship between voters and elected representatives.

The *Citizens United* majority was able to ignore the need for consent by association members while enhancing the control of organizational managers because the jurisprudence of association currently does not acknowledge and protect both the rights of the association and the rights of those who associate. Any theory of association consistent with the constitutional principle of consent should consider associations as both entities and aggregates. It should grapple with a range of difficult questions about the entity itself and the aggregate character of associations. Does the association's right of political speech derive from the First Amendment rights of its members? Or do organizations enjoy First Amendment rights of political speech wholly separate and independent from those of its members? Do individuals have their First Amendment rights of political speech diminished by the act of joining an association? What are the means through which members can express consent to the role of associations in campaign finance?

This Article suggests that the implications of *Citizens United* for the jurisprudence of association become clearer and more concrete if one treats consent as a constitutional principle. Treating consent as a constitutional

9. For a critical analysis of managerial control of corporate political speech, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010).

10. For a strong argument that First Amendment speech jurisprudence should be based on democratic legitimation, see Robert Post, *A Progressive Perspective on Freedom of Speech*, *in* THE CONSTITUTION IN 2020 179, 179–86 (Jack M. Balkin & Reva B. Siegel eds., 2009). Post reasons that "[d]emocracy is most fundamentally about self-government. It is about ensuring that the people are sovereign, that government is responsive to their wishes, and that citizens experience the government as their own. This view of democracy implies that First Amendment jurisprudence must ultimately be based on the political ground of popular sovereignty, rather than on the cognitive ground of accurate popular decision making." *Id.* at 181.

principle provides a conceptual framework for challenging the use of the First Amendment as the constitutional predicate for nonparticipatory association that results in compelled political speech. Treating consent as a constitutional principle leads one to ask who is a speaker under the First Amendment. Do individuals lose their rights of political speech when they invest in business corporations or contribute to nonprofit organizations? How can individuals use associations to amplify their voices in political campaigns? Treating consent as a constitutional principle also leads to questions about the relationship between political speech during campaigns and the nature of representation once the election is over. If voters have little role as speakers during election campaigns, does this dilute the power of their vote as a mechanism for holding elected representatives accountable and thereby ensuring the legitimacy of government?[11] What is the operational relationship between consent and legitimate government?

Consent is not the only constitutional principle important to understanding the relationship between campaign finance and government legitimacy. As Justice Souter has emphasized, the Constitution embraces a multiplicity of desirable values, not all of which are simultaneously achievable.[12] As he notes, "[t]he Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another."[13] While the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech,"[14] "no law" does not mean exactly, literally, and absolutely "no law." The First Amendment Speech Clause is necessarily read as part of both the First Amendment, which includes the Assembly Clause, and the Constitution as a whole.[15] While Justice Souter focused on the publication of the Pentagon Papers

11. For an analysis of inequality of wealth expressed through campaign contributions and expenditures, see J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609, 609 (1982) (expressing concern that "the voices of individual citizens are being drowned out in elections campaigns"). Judge Wright said of political campaigns: "If the ideal of equality is trampled there, the principle of 'one person, one vote,' the cornerstone of our democracy, become a hollow mockery." *Id.*

12. Justice David H. Souter, *Harvard's 359th Commencement Address*, 124 HARV. L. REV. 429, 433 (2010).

13. *Id.* at 435.

14. U.S. CONST. amend. I.

15. In developing his analysis, Justice Souter rejected what he labeled the "fair reading model," which he described as "the notion that all of constitutional law lies there in the Constitution waiting for a judge to read it fairly." Souter, *supra* note 12, at 434. As an example of the limits of the fair reading model and of the importance of understanding the role of constitutional values, Justice Souter examined the interpretation of the First Amendment in the Pentagon Papers case. He argued that the Court did not base its decision in that case on a literalist or absolutist reading of the First Amendment, stating that "[t]he court did not decide the case on the ground that the words 'no law' allowed of no exception and meant that the rights of expression were absolute." *Id.* at 433. According to Justice Souter, "[t]he court's majority decided only that the government had not met a high burden of showing facts that could justify a prior restraint." *Id.* He concluded:

in his First Amendment analysis,[16] the same approach applies to understanding the First Amendment in the context of campaign finance. Nothing in the Constitution supports a reading of the First Amendment Speech Clause that does not take into account consent and other Constitutional values as well.

This Article explores the relationship between nonparticipatory association and compelled speech through a framework based on consent as a constitutional principle. Part II discusses consent as a constitutional principle. Part III discusses the attenuated development of the jurisprudence of association. Part IV analyzes the concept of participatory association and its relationship to compelled political speech. Part V analyzes *Citizens United* in terms of the failure of associational consent. Part VI explores potential operational remedies to the negation of consent in *Citizens United.* Part VII concludes with a brief observation on developing a jurisprudence of participatory association based on consent.

II.
CONSENT AS A CONSTITUTIONAL PRINCIPLE

As a constitutional principle, consent is the basis of government legitimacy. In operational terms, the constitutional principle of consent requires that citizens have meaningful opportunities for participation in shaping government policies either individually or through organizations that express their points of view. This Part explores the principle of consent in the text of the Constitution and in the operation of constitutional government over time. Treating consent as a constitutional principle means understanding consent as a permanent part of constitutional structure. Consent did not begin and end with ratification of the Constitution. Consent is a continuing process based on participation in government and in the organizations through which Americans attempt to influence the operation of their government.

The Constitution begins with an assertion and affirmation of consent: "We the people of the United States . . . do ordain and establish this Constitution for the United States of America."[17] The purposes to which the people consented are public purposes—"to form a more perfect Union" and "to establish justice, insure domestic tranquility, provide for the common defense, promote the

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> Even the First Amendment, then, expressing the value of speech and publication in the terms of a right as paramount as any fundamental right can be, does not quite get to the point of an absolute guarantee. It fails because the Constitution has to be read as a whole, and when it is, other values crop up in potential conflict with an unfettered right to publish . . . . The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises.

Id. The same approach applies to understanding the First Amendment in the context of campaign finance.

16. *Id.* at 433–34.

17. U.S. CONST. pmbl.

general welfare, and secure the blessings of liberty to ourselves and our posterity."[18] This was an ambitious agenda when the Constitution was ratified and remains so today. In its first sentence, the Constitution asserted that both the document itself and the government established by it were based on the consent of the people.

The affirmation and assertion of consent in the first sentence of the Constitution was by no means unprecedented, or even particularly innovative, when the drafters of the Constitution met in Philadelphia. The Declaration of Independence stated that it was "self-evident" that governments should be understood as "deriving their just powers from the consent of the governed."[19] As Pauline Maier has observed, by the time the Declaration of Independence was written, "the ideas in the Declaration's second paragraph were so broadly shared that their statement seemed commonplace . . . ."[20] Quoting Thomas Jefferson's comment that the Declaration of Independence was "to be an expression of the American mind," Maier concludes that "as a statement of political philosophy, the Declaration was therefore purposely unexceptional in 1776."[21]

The Declaration of Independence not only based the legitimacy of government on consent, but also affirmed the right of the people to continue to consent or not as they saw fit. Among the "self-evident truths" enumerated in the Declaration of Independence was the assertion:

> That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute a new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[22]

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18. *Id.*

19. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The context of this affirmation of consent as the foundation of government legitimacy is familiar but bears repeating:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Id.

20. Pauline Maier, *The Strange History of "All Men Are Created Equal,"* 56 WASH. & LEE L. REV. 873, 877 (1999) [hereinafter Maier, *Strange History*].

21. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE xvii (1997) [hereinafter MAIER, AMERICAN SCRIPTURE].

22. DECLARATION OF INDEPENDENCE para. 2. The text continues with a Lockean limitation balancing change with continuity when possible:

> Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience has shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

Thus consent, as the Founders understood it, is a principle of active and continuing participation that established government legitimacy.

The Declaration of Independence was not the only document that invoked the principle that consent is the basis of legitimate government. Pauline Maier traces the influence of the Virginia Declaration of Rights, which was regarded at the time as a more eloquent and comprehensive statement of consent and fundamental rights, on the drafting of new state Declarations or Bills of Rights based on the principle of consent.[23] The new state constitutions drafted after independence had been declared also expressed principles of consent and participation, but did not treat the Declaration of Independence as having set forth a new theory of legitimate government.[24]

The drafters of the Constitution also grounded the legitimacy of their revised plan of self-government on that same principle of consent. The Constitution provided for initial ratification,[25] the ratification of amendments,[26] and convening another constitutional convention.[27] The text of the Constitution thus expressly embraces a principle of continuing consent.[28] The ratification of the Constitution through conventions in each of the states was intended to demonstrate that consent, and hence the legitimacy of the new government.[29] Pauline Maier describes the process of ratification as "how 'We the People' decided whether or not to ordain and establish the Constitution of the United States."[30] Akhil Amar similarly describes ratification as "a deed—a *constituting*" by the people.[31] Ratification was debated in conventions in the various states. Amar describes these conventions as representing the people

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Id. This language invokes the concepts and language of JOHN LOCKE, TWO TREATISES OF GOVERNMENT 406–28 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Akhil Amar argues that the Constitution was more radical than the Declaration of Independence because it did not require evidence of "a long train of abuses" as a precondition to changing the government. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 12–13 (2005),

23. Maier, *Strange History, supra* note 20, at 877–79.

24. MAIER, AMERICAN SCRIPTURE, *supra* note 21, at 163–64. *See also* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic,* 85 VA. L. REV. 1421, 1432–22 (1999).

25. U.S. CONST. art. VII. Akhil Amar describes the Preamble and Article VII as "bookends." AMAR, *supra* note 22, at 29

26. U.S. CONST. art. V ("The Congress . . . shall propose Amendments to this Constitution").

27. *Id.* ("The Congress . . . [shall propose amendments or] shall call a Convention for proposing amendments").

28. *See* AMAR, *supra* note 22, at 471. Amar describes the Preamble as "the Founder's foundation" and ratification as "the real constitutional drama." *Id.* at 468. To him, the Constitution is "a democratic and intergenerational project." *Id.* at 476.

29. *See id.* at 7–8 (quoting Federalist Papers Number 40 as stating that without the approval of "the people themselves," the Constitution would "be of no more consequence than the paper on which it is written").

30. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION ix (2010). [hereinafter MAIER, RATIFICATION] (providing a detailed analysis of the ratification processes in Pennsylvania, Massachusetts, Virginia, and less detailed discussions of ratification processes in the other states).

31. AMAR, *supra* note 22, at 5.

"more directly than ordinary legislatures" but noted the difference between the conventions and a referendum.[32] While women, slaves, and Native Americans played no part in this process, or in the political life of the new republic, the process of ratification was still more participatory and gave more operational meaning to the concept of consent than had any other process to date, including the processes by which most state constitutions had been adopted. Ratification was achieved through a process involving sharp disagreements and vigorous debate.[33] The Founders and the people of the United States at the time of ratification were thus committed to the constitutional principle of consent, which was expressed through active and continuing participation and provided the basis for legitimate government. The result was, in Amar's words, that "[p]reamble-style popular sovereignty was an ongoing principle."[34]

In his important and provocative study of consent and the Constitution, Larry Kramer claims that the people of the United States were quite aware of their role in founding and shaping their government:

> Americans of the Founding era reveal how they understood their role in popular government in ways that we, who take so much for granted, do not. The United States was then the only country in the world with a government founded explicitly on the consent of its people, given in a distinct and identifiable act, and the people who gave that consent were intensely, profoundly conscious of the fact. And proud. This pride, this awareness of the fragility and importance of their venture in popular government, informed everything the Founding generation did.[35]

Kramer emphasizes the continuing role of the people in interpreting and implementing the Constitution.[36] He states that when the drafters of the Constitution referred to "the people," they were referring to actual living, participating, debating, disputing, contentious people and "not conjuring an empty abstraction or describing a mythic philosophical justification for

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32. *Id.* at 7.

33. *See* MAIER, RATIFICATION, *supra* note 30, at 1787–88 (2010).

34. AMAR, *supra* note 22, at 10.

35. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 5 (2004) [hereinafter KRAMER, THE PEOPLE THEMSELVES]. Akhil Amar also emphasizes the role of the people as conscious political actors in a historical transformation. *See* AMAR, *supra* note 22, at 13 ("Americans understood this transformation even as they were doing the transforming and marveling at their own handiwork.").

36. KRAMER, THE PEOPLE THEMSELVES, *supra* note 35 at 8. For a discussion of what he sees as the disengagement of the people from active participation in democratic governance at the very time that democratic institutions are spreading around the world, see Larry D. Kramer, *Political Organization and the Future of Democracy*, *in* THE CONSTITUTION IN 2020, *supra* note 10, at 167, 167–78. Kramer expresses the concern that "[l]eaders in the twenty-first century reach out to constituents primarily through the national media, apparently content to establish 'personal' contact through forms of address that are, in fact, one-sided and anything but personal." *Id.* at 176. Kramer concludes that "[p]olitics today has thus become a remote, passive activity for most of us." *Id.*

government."[37]

The importance of consent as a constitutional principle did not end with ratification. In a process that continues today, consent was expanded over time to more issues, through more political structures that involved more Americans, including those who had been excluded from the community of political participation at the time of the Founding. Maier analyzes the process through which consent, participation, and equality became the central tenants of the general understanding of the Declaration of Independence and how this understanding of the Declaration of Independence was read back into the Constitution.[38] While acknowledging the central role of Lincoln in adapting the Declaration of Independence to a new time and making it an "American Scripture," a statement of core political values, Maier notes that "[t]he values he emphasized—equality, human rights, government by consent—had in fact been part and parcel of the Revolution . . . ."[39] Maier describes the process of adapting the Declaration of Independence as a collective work of the American people, "a continuing act of national self-definition."[40]

This process of continuing consent continues today. As Justice Brennan explained some twenty-five years ago, the Constitution is a document that should be understood in terms of "contemporary ratification."[41] This means that ordinary people play a foundational role in determining government legitimacy consistent with their constitutional duty to "ordain and establish this Constitution for the United States of America."[42] The American people play a structural role in shaping and interpreting the constitution through their consent expressed through active participation. In the same vein, Amar describes the Constitution

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37. KRAMER, THE PEOPLE THEMSELVES, *supra* note 35, at 7. According to Kramer:

> "The people" they knew could speak, and had done so. "The people" they knew had fought a revolution, expressed dissatisfaction with the first fruits of independence, and debated and adopted a new charter to govern themselves. Certainly the Founders were concerned about the dangers of popular Government, some of them obsessively so. But they were also captivated by its possibilities and in awe of its importance. Their Constitution remained, fundamentally, an act of popular will: the people's charter, made by the people. And, as we shall see, it was "the people themselves"–working through and responding to their agents in the government –who were responsible for seeing that it was properly interpreted and implemented.

Id.

38. MAIER, AMERICAN SCRIPTURE, *supra* note 21, at 175–208.

39. *Id.* at 208.

40. *Id.* According to Maier, "The Declaration of Independence that Lincoln left posterity, the 'charter of our liberties,' was not and could not have been his solitary creation. It was what the American people chose to make of it, at once a legacy and a new conception, a document that spoke both for the revolutionaries and for their descendants, who confronted issues that country's fathers had never known or failed to resolve, binding one generation after another in a continuing act of national self-definition." *Id.*

41. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification,* 27 S. TEX. L. REV. 433 (1986) (originally delivered as a speech at Georgetown University on October 12, 1985).

42. U.S. CONST., pmbl.

as "a democratic and intergenerational project."[43]

Elections have become the mechanism of consent. Elections establish that consent is a foundational constitutional principle applicable to the ordinary operation of government on an ongoing basis.

The idea that voting is an expression of consent necessary for the continuing legitimacy of government is most apparent when the legitimacy of government is fundamentally challenged. After the Civil War, the Supreme Court began enforcing new federal civil rights statutes defining voting fraud as a federal crime and, in so doing, articulated a concept of constitutive voting that treated consent expressed through voting as the foundation of legitimate government.[44] In these post-Civil War cases, the Court, in effect, mapped consent in the elements of effective electoral participation consistent with the concept of constitutive voting—i.e., being able to receive and mark a ballot,[45] putting the ballot in the ballot box,[46] and having the election results determined by an honest count of all of the legal votes cast.[47] As the Court explained in *Ex parte Yarbrough*:

> It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. . . . In republican governments, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and corruption is a constant source of danger.[48]

Ensuring that voters could cast an effective ballot was thus understood at the time as a matter of ensuring consent in order to establish the legitimacy of the government.

The Court returned to consent as a touchstone of legitimate government in later cases. In the early Twentieth Century, as primary elections began to replace private meetings of party bosses as mechanisms of candidate selection, African-Americans who were registered voters were denied the right to vote in primaries on the grounds that the political parties had the right as private associations to

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43. AMAR, *supra* note 22, at 476.

44. *See* Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections,* 64 U. MIAMI L. REV. 535, 538–53 (2010) [hereinafter Hill, *Constitutive Voting*]. *See also* Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law,* 60 U. MIAMI L. REV. 155 (2006) (arguing that citizens give the government legitimacy by their ongoing consent as expressed by voting).

45. *See Ex parte* Yarbrough, 110 U.S. 651 (1884) (upholding convictions of private persons using physical violence to prevent freed slaves from voting).

46. *See Ex parte* Siebold, 100 U.S. 371 (1880) (upholding the criminal conviction of election judges for stuffing ballot boxes to offset the votes of freed slaves).

47. *See* United States v. Reese, 92 U.S. 214 (1875) (upholding the conviction of election officials for refusing to receive and count votes of a freed slave eligible to vote).

48. 110 U.S. at 666.

determine who participated in the selection of the party's candidates. The White Primary cases addressed questions such as whether primaries are elections and whether the constitutional protections accorded voters under the Fourteenth and Fifteenth Amendments applied to primary elections.[49] In the end, the Court resolved these questions by finding consent as a core constitutional principle establishing the legitimacy of government and treating elections as mechanisms of consent through participation.[50] More recently, the Court in *Baker v. Carr* struck down electoral districts that weighed the votes of various voters differently.[51] In so doing, the Court extended the principle of consent and affirmed its central role in defining legitimate government. Equality matters and vote dilution matters because elections were part of the process of ensuring and affirming the legitimacy of government. As Justice Brennan observed, "[r]ecognition of the principle of 'one person, one vote' as a constitutional principle redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process."[52]

Yet, while the Court repeatedly recognized the role of elections as a mechanism of consent in legitimate democratic government, it did not extend the principle of consent to campaigns and campaign finance. Individuals who choose to make a contribution to a candidate have exercised their personal choice. Similarly, individuals who make contributions to organizations established for

49. Terry v. Adams, 345 U.S. 461 (1953) (holding that the exclusion of African-American registered voters from a preference poll conducted by a private association that in effect determined political party candidates violated the Fifteenth Amendment, thereby rejecting a formalistic concept of state action); Smith v. Allwright, 321 U.S. 649 (1944) (holding that, because they were statutorily required to hold primaries in order to select party nominees for inclusion on the general election ballot, political parties were state actors and could be sued for preventing an African-American voter from casting a ballot in a primary election); United States v. Classic, 313 U.S. 299 (1941) (finding that a registered voter who was African-American had the right to have his vote counted in primary election); Nixon v. Condon, 286 U.S. 73 (1932) (striking down a state statute authorizing a state executive committee of a political party to limit party membership to white voters); Nixon v. Herndon, 273 U.S. 536 (1927) (finding that a registered African-American voter had the right to vote in a party primary).

50. *See* Hill, *Constitutive Voting, supra* note 44, at 553–75 (analyzing the White Primary cases in terms of the role of voting as an expression of consent that establishes government legitimacy).

51. Baker v. Carr, 369 U.S. 186 (1962) (holding that a complaint alleging that a state apportionment statute deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action, and that the right asserted was within reach of judicial protection under the Fourteenth Amendment). *See also* Wesberry v. Sanders, 376 U.S. 1 (1964) (holding that Georgia's apportionment of congressional districts so that a single congressman represented from two to three times as many voters as were represented by each of congressmen from other Georgia districts grossly discriminated against voters in his district); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that two legislatively proposed plans for apportionment of seats in the two houses of the Alabama Legislature were invalid under the Equal Protection Clause because the apportionment was not on a population basis and was completely lacking in rationality).

52. *See* Brennan, *supra* note 41, at 442.

the purpose of making independent expenditures in support of a particular candidate or groups of candidates have had the opportunity to consent to the organizations' use of their money. But organizations that do not exist for such clear political purposes may now use their general treasury funds for independent expenditures as determined by the managers of the organization, without the consent of the individuals who have become members of or shareholders in those organizations. The issue of consent within organizations has thus become much more important and much more difficult.

III.
ASSOCIATION AND CONSENT

In the wake of *Citizens United,* conceptualizing campaigns and campaign finance without taking account of consent as a constitutional principle results in impermissible burdens on the First Amendment associational rights of shareholders and members. This Part discusses the attenuated development of a jurisprudence of association. It identifies two theories of association: an entity theory of association which treats organizations as having First Amendment rights of association and political speech separate from the rights of their members and shareholders, and an aggregate theory of association which treats organization members and shareholders as having First Amendment rights separate from those of the organization. A jurisprudence of participatory association based on the constitutional principle of consent depends on articulating the relationship between the entity theory and the aggregate theory of association. This is precisely what courts have been unable or unwilling to do. Instead of following the promising beginnings in earlier cases, the Court in recent decades has substituted a theory of managerial primacy that limits the scope of participation within organizations and even provides a judicial rationale for discrimination against members and prospective members.

The core question here is whether the act of association—i.e., the act of joining or becoming a member of an organization—means that associated persons have no rights or lesser rights or fewer rights or different rights than they have as individuals. The aim here is to begin to address these questions based on the First Amendment Association Clause and in light of the constitutional principle of consent. Importantly, while we can assume that individuals making contributions and expenditures have consented to their own actions, we cannot assume that an organization's members consent when that organization makes independent expenditures using its general treasury fund without first considering the terms of association. The link between nonparticipatory association and compelled political speech is discussed in the next section of the Article.

A. Association and the First Amendment

Association occupies an ambiguous place in constitutional law. It is far from clear why this should be the case. As the cases discussed later in this Part illustrate, earlier cases treated association as an ancillary or derivative right based on the purpose for associating. Most commonly, this was a right of free expression. The idea that association permits people to be heard and to participate with greater effectiveness is essential to democratic theory. What is surprising is that the importance of association did not lead to greater interest in the constitutional language establishing the right to associate as an important constitutional right.

The First Amendment Association Clause reads, "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[53] While the Association Clause shares with the Speech Clause the introductory phrase, "Congress shall make no law," that phrase is less significant to a jurisprudence of association than is the language of the Association Clause itself. The question is what associational rights might be protected under the First Amendment; it is not, at least initially, what level of protection we might properly accord them or whether textual literalism provides compelling support for a claim of associational absolutism.

The Association Clause focuses on the "right of the people to assemble." This suggests an aggregate theory of association in which the people who associate are active parties. This language does not mean that only the people who assemble have First Amendment rights, but it does suggest that the people who assemble cannot simply be ignored. There is some element of consent in the act of associating.

Moreover, the Clause specifies that it protects the right of the people to assemble peaceably in order "to petition the Government for a redress of grievances." In short, they participate in governance. They have a voice in the operation of government and, through this voice, determine the legitimacy of government.

The language of the Association Clause, like that of so many other constitutional clauses, is open-textured and invites future definition. As Chief Justice Marshall so famously said of the language of the Commerce Clause and the Necessary and Proper Clause, "it is a Constitution we are expounding."[54] On its face, nothing in the text of the First Amendment supports the idea that, once people assemble, the assembly may co-opt or even silence their individual voices. Nothing in the language of the Association Clause negates the constitutional principle of consent. Indeed, the constitutional principle of consent supports the ongoing effort to ensure that association is participatory and that speech through associations is voluntary, not compelled. At the same time, there

53. U.S. CONST., amend. I.

54. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

is nothing in the text that compels any specific response to nonparticipatory association. The problem is that courts and commentators alike seem to have overlooked the text of the Clause entirely, and so have failed to contribute to the usual process of construing this constitutional language. The result is an attenuated jurisprudence of association.

The current jurisprudence of association is based in many respects on a series of cases involving the NAACP.[55] In these cases, the NAACP challenged the demands by various state and local governments that local NAACP chapters turn their membership lists over to the government in the context of such matters as administration of a local occupational license tax[56] or qualifying to do business in a state.[57] In each case, the Supreme Court held that such requests impermissibly burdened the rights of both the NAACP chapters as organizations and their members.[58] For example, the Court in *Bates v. City of Little Rock* overturned the convictions of two local NAACP officers for failing to turn over documents listing the names of the organization's members and contributors as required by a local occupational license tax statute.[59] The Court reasoned that:

> Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of the Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty.[60]

In their concurring opinion, Justice Black and Justice Douglas observed that "freedom of assembly includes of course freedom of association; and it is entitled to no less protection than any other First Amendment rights . . . ."[61]

Similarly, in *NAACP v. Alabama* ex rel *Patterson,* the Court held that Alabama had no right to compel the organization to disclose the names of its members who were neither employees nor elected leaders of the organization as a condition of registering to do business in the state. The Court noted that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the

55. *See* NAACP v. Alabama, 377 U.S. 288 (1964); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); NAACP v. Button, 371 U.S. 415 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 379 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). Thomas I. Emerson discussed these cases as evidence of his observation that "[t]he most striking development of the past few years has been the enunciation by the Supreme Court of a new constitutional doctrine known as 'the right of association.'" Thomas I. Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L. J. 1, 1 (1964).

56. *Bates*, 361 U.S. at 517–18.

57. *Patterson*, 357 U.S. at 451–52.

58. *Bates,* 361 U.S. at 527; *Patterson,* 357 U.S. at 462–63.

59. *Bates*, 361 U.S. at 419.

60. *Id.* at 522–23.

61. *Id.* at 528.

freedoms of speech and assembly."[62] Because of "the vital relationship between freedom to associate and privacy in one's associations," the NAACP could not be compelled to turn over its membership lists.[63]

The NAACP cases provide a promising contribution to a jurisprudence of association. In these cases, the Court recognized that the right to freedom of association is a First Amendment right and did not treat this right as purely derivative of other constitutionally-protected rights.[64] The Court considered the rights of organizations and the rights of members of organizations. At the same time, these important cases did not address the issue of the rights of members who have interests at least partially adverse to those of the organization, as there was no factual predicate for such a claim.

The Supreme Court considered the right of association in campaign finance law in *Citizens Against Rent Control v. Berkeley*.[65] In that case, an unincorporated association formed to oppose a ballot measure intended to require rent control in Berkeley, California sought injunctive relief against a Berkeley city ordinance that prohibited individuals from contributing more than $250 to committees formed to support or oppose ballot measures submitted to a popular vote.[66] The association collected some 1300 contributions, nine of which exceeded the amount an individual was permitted to contribute to the organization.[67] This ordinance placed no limit on the amount an individual could spend directly on supporting or opposing a ballot measure.[68] The case thus involved the rights of the contributors to associate and speak by making contributions to the organization, and the right of the organization to spend the contributions to oppose the ballot measure. In the ensuing litigation, the California Supreme Court upheld the Berkeley city ordinance because it found the state had a compelling interest in avoiding corruption.[69]

On appeal, the Supreme Court struck down the city ordinance based in part on a determination that the city could show no compelling government interest that could justify limiting the rights of association and speech in the context of ballot measures.[70] The Court held that the city ordinance "imposes a significant

62. *Patterson*, 357 U.S. at 460.

63. *Id.* at 462.

64. The majority in *Patterson* stated that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remaking upon the close nexus between the freedoms of speech and assembly." 357 U.S. at 460. According to Emerson, the Court in *Patterson* "initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them" but that, as it continued its analysis, the majority "elevated freedom of association to an independent right." Emerson, *supra* note 55, at 2

65. 454 U.S. 290 (1981).

66. *Id.* at 292–93.

67. *Id.*

68. *Id.*

69. Citizens Against Rent Control v. Berkeley, 614 P.2d 742 (1980).

70. *Id.* at 299 ("Whatever may be the state interest or degree of that interest in regulating and

restraint on the freedom of expression of groups and those individuals who wish to express their views through committees."[71] The majority in *Citizens Against Rent Control* based its decision, in part, on the notion that the First Amendment right of association encompassed the concept that individuals could not be made subject to special limitations if they acted with others in an association. The majority observed:

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.[72]

As in the NAACP cases, the Court looked at association as a means of amplifying the voices of the individuals who associate. In this case, however, the Court also focused more directly on the role of contributors as having actively engaged in an act of association that is protected under the First Amendment.[73] The Court thus found that the city could not impose a limit on individuals who associated with others in the organization when it imposed no limit on individuals who spoke as individuals:

> There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association. [The ordinance] does not seek to mute the voice of one individual, and it cannot be allowed to hobble the

limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure."). The Court went on to reject the city's claim that the limit on contributions to the organization was necessary to ensure that voters had adequate information about the source of the organization's funds. *Id.* at 298 ("[T]he city of Berkeley argues that § 602 is necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures."). The Court acknowledged that "[i]t is true that when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." *Id.* In this case, however, the Court held that such concerns were allayed by the disclosure requirements imposed by other sections of the city ordinance, which required publication of lists of contributors in advance of voting. *Id.*

71. *Citizens Against Rent Control*, 454 U.S. at 299. Professor Tribe found this element of the Court's reasoning a significant contribution to the jurisprudence of association, stating that "[n]ot until *Citizens Against Rent Control v. Berkeley* did the Court suggest that individuals acting in concert have an associational right to be as free to pursue lawful aims as they would if the same individuals pursued the same aims acting separately." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1012 (2d ed. 1988).

72. *Citizens Against Rent Control*, 454 U.S. at 294–95.

73. *See id.* at 295–96 (addressing freedom of association); *id.* at 299 (addressing freedom of speech).

collective expressions of a group.[74]

However, it is important to note that there was no question in this case that the organization was using the contributions as the contributors had intended. Whether the organization is conceptualized as an entity or as an aggregate, there was no issue of compelled political speech arising from the operation of the organization.

The Court concluded by considering the relation between the right of association and the right to freedom of expression. The Court reasoned:

> A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression. The restraint imposed by the Berkeley ordinance on rights of association and in turn on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment.[75]

These cases contribute to the recognition of association as an autonomous right under the First Amendment. While these cases contain some elements of both entity and aggregate theories of association, they were not based on fact patterns involving members or contributors with interests inconsistent with those of the organization. This fact pattern emerged in a series of cases involving union political activities funded by their members.

B. Elements of an Aggregate Theory of Association

The issue of consent in cases where members' interests were at least partially adverse to the interest of the organization (as defined by the organization managers) arose in the context of politically active labor unions during and after World War II.[76] In each case, the union and its officers challenged their convictions under a section of the Corrupt Practices Act, which banned unions from making any contribution or expenditure in connection with any election to any political office. These cases turned on issues relating to the use of union funds derived from membership dues for political activities. The rights of members to participate in the decision to fund particular political activities arose in different contexts and thus produced somewhat different reasoning.

In *United States v. Congress of Industrial Organizations (C.I.O.),* for

74. *Id.* at 296.

75. *Id.* at 300.

76. Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972); United States v. Int'l United Auto, Aircraft and Agricultural Implement Workers of America (U.A.W.), 352 U.S. 567 (1957); United States v. Congress of Indus. Organizations (C.I.O.), 335 U.S. 106 (1948).

example, union representatives challenged the constitutionality of a section of the Corrupt Practices Act that banned unions from making any contribution or expenditure in connection with any election to any political office.[77] Several union representatives had been convicted under the Act for using union funds to endorse candidates for public office in the union's regular periodical distributed to its members.[78] The Court reversed their convictions, finding that the Act did not reach this kind of expenditure.[79] Notably, it found that members knew that the union published a periodical that endorsed candidates and that the union endorsements were based on the union leaders' determinations that those candidates endorsed by the union in its periodical supported policies favorable to the union and its members.[80] As such, the Court found that "[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, and the support thereby of candidates thought to be favorable to their interests."[81]

The Court reached a different conclusion in *United States v. International United Auto, Aircraft, and Agricultural Implement Workers of America (U.A.W.),* in which union officials challenged the constitutionality of their indictment under the Act for using union funds derived from member dues to finance television ads aimed at convincing the general public to vote for particular candidates in the 1954 elections.[82] The majority distinguished this case from *C.I.O.* on the grounds that the expenditure at issue here was directed at the public while the C.I.O.'s expenditure was directed at its own members.[83] The majority then rejected the government's claims that this case raised constitutional issue of speech and association under the First Amendment.[84]

In his dissent, Justice Douglas argued that the Court should have addressed the constitutional issues, particularly the right of the union as an entity to engage in political speech and the right of voters to hear the viewpoints of all speakers.[85] Despite its focus on the rights of the union as a speaker, Douglas's dissent did at least acknowledge that members who did not want their dues used to support the entity's political message should be considered.[86] Describing this issue as "a question that concerns the internal management of union affairs,"[87] the dissent

77. *C.I.O.*, 335 U.S. at 107–09.
78. *Id.* at 123.
79. *Id.* at 123–24.
80. *Id.* at 123.
81. *Id.*
82. *U.A.W.*, 352 U.S. at 584–85.
83. *Id.* at 588–89.
84. *Id.* at 589–93.
85. *Id.* at 593 (Douglas, J., dissenting).
86. *Id.* at 596 (Douglas. J, dissenting).
87. *Id.* (Douglas, J, dissenting).

acknowledged that "[p]erhaps minority rights need some protection."[88] The dissent emphasized the importance of finding a way of offering this protection without burdening the right of the union, which the dissent treated as the equivalent of the majority of its members, to engage in political speech.[89] The dissent suggested that this could be done "by permitting the minority to withdraw their funds from that activity."[90] The fundamental principle articulated by the dissent was that "First Amendment rights are part of the heritage of all persons and groups in this country."[91] While Douglas's dissent did not address association or consent as constitutional principles, it did explore some of the difficulties of finding an appropriate balance between the entity and aggregate theories of association.

The last of these union cases, *Pipefitters Local Union No. 562 v. United States,*[92] also involved a union political fund created using the contributions of both union members and nonmembers working under collective bargaining agreements negotiated by the union. The majority opinion by Justice Brennan treated the question of whether the contributions to the political fund were voluntary as the central question in the case.[93] The Court interpreted the relevant legislative history as establishing that the statute did not apply to voluntary contributions used for political expenditures.[94] The Court held that union officials can control the use of the fund but that solicitation of contributions from union members by union officials "must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power."[95] The Court defined "the test of voluntariness" as "whether the contributions solicited for political use are knowing free-choice donations."[96] The Court observed that "[t]he dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member."[97] The voluntary quality of the donations also meant that the union was not violating what the Court identified as Congress' concern about the use of aggregate wealth in election campaigns. The Court determined that "the aggregate wealth it plainly had in mind was the general union treasury—not the funds donated by union members

88. *Id.* (Douglas, J, dissenting).

89. *Id.* at 597. (Douglas, J, dissenting).

90. *Id.* at 597 n.1 (Douglas, J, dissenting). Douglas observed that this was the common practice in England. *Id.*

91. *Id.* at 597. (Douglas, J, dissenting).

92. 407 U.S. 385 (1972).

93. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 391–401 (1972) (discussing evidence relating to whether the contributions were voluntary).

94. *Id.* at 408–409.

95. *Id.* at 414.

96. *Id.*

97. *Id.* at 414–15.

of their own free and knowing choice."[98] Although the Court did not address association directly, its emphasis on voluntary contributions is consistent with the constitutional principle of consent.

What the Court did not address in any of these union cases was the question of member participation in determining how the voluntary contributions should be used. In *Pipefitters,* for example, union members could choose to contribute to the political fund, but had no role in determining how the money in the political fund would be spent.

Taken together, these three early union cases recognized that members' interest in elections could be adverse to the interests of the organization that they joined for other reasons. While these cases by no means developed a jurisprudence that integrates the aggregate and entity theories of association, they did focus on some of the very difficult issues in crafting a jurisprudence of participatory association that does not result in compelled political speech.

C. Expressive Association as an Entity Theory of Nonparticipatory Association and Compelled Political Speech

Subsequent cases addressing association centered on the key questions of who could join an organization and who would decide this matter. The authority to control who joined an organization was argued in terms of the identity of the organization as an entity engaged in expressive activities. This argument posited that the composition of the organization was an integral part of the organization's expressive activity and thus protected under the First Amendment right of association. Even those members who shared the organization's beliefs and supported its activities could be declared ineligible for membership based on some aspect of the prospective members' identities, such as race, gender, or national origin. In light of the subsequent history of expressive association in providing a First Amendment rationale for discrimination,[99] it is useful to remember that the initial cases involved claims that business associations—specifically, the Chamber of Commerce[100] and the Rotary Club[101]—had no constitutional right to deny membership to women on the basis of gender. In both these cases, local chapters admitted women to full membership contrary to the stated policies of the organizations, and the managers of the national or international organizations revoked or threatened to revoke the charters of the local chapters.[102] In each case, the managers of the national or international organizations claimed that they had a First Amendment right to determine who

98. *Id.* at 416.

99. *See* the discussion of Boy Scouts of America v. Dale, 530 U.S. 640 (2000), *infra* notes 115–123 and accompanying text.

100. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

101. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

102. *Id.* at 541–42; *Roberts*, 468 U.S. at 614–15.

could join their organizations, and that this right of association protected them from any requirement that they comply with anti-discrimination statutes if doing so was, in their judgment, inconsistent with the identity of the organization.[103]

In both cases, the Court rejected the national or international business associations' claims that they could discriminate against women whom the local chapters had found qualified for membership.[104] In *Roberts v. U.S. Jaycees*, Justice Brennan, writing for the majority, described freedom of expressive association as "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[105] He focused on the rights of individuals to associate, stating that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."[106] As such, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in a group effort toward those ends were not also guaranteed."[107]

Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court rejected the notion that the business association had a First Amendment right to exclude women on the basis of gender. In that case, Rotary International argued that a California statute prohibiting discrimination against women violated the organization's right of expressive association under the First Amendment.[108] The Court agreed that Rotary was an expressive association: although the Rotary Clubs do not take political positions, they do engage in "service activities that are protected by the First Amendment."[109] However, the Court found that this characterization was not in itself determinative. The Court looked at the organization, the organization's activities, and the prospective members and found that "the evidence fail[ed] to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."[110] Both the organization and its prospective members were treated as having First Amendment rights.[111] The issue of what roles and rights women and other members might have once they had been admitted to membership was not before the Court.

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103. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 537; *Roberts*, 468 U.S. at 608–09.

104. *See Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548–49 (finding that Rotary's expressive identity was not undermined by admission of women to full membership); *Roberts*, 468 U.S. at 623 (observing that the right of expressive association is not absolute). The Court in *Rotary Int'l* based its First Amendment reasoning on its reasoning in *Roberts*. *Id.* at 544–45.

105. *Roberts*, 468 U.S. at 618.

106. *Id.*

107. *Id.* at 622.

108. *See Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 543–49.

109. *Id.* at 548.

110. *Id.*

111. *Id.* at 548–49.

Both *Roberts* and *Rotary* involved the rights of women and the enforcement of state statutes prohibiting discrimination based on gender. In *Roberts*, the Court rejected arguments that the First Amendment protects the right to discriminate on the basis of gender as part of the right of association. The *Roberts* Court held that expressive association is not an absolute right but is properly balanced against a compelling state interest in preventing discrimination.[112] The Court also relied on a balancing approach in *Rotary*.[113] In both cases, the Court took a step toward crafting a jurisprudence of participatory association that rejects constitutionally impermissible discrimination.

This step forward was rejected and reversed in *Boy Scouts of America v. Dale*.[114] The issue in that case was whether a New Jersey anti-discrimination statute required that an Eagle Scout who was openly gay be permitted to serve as a scoutmaster.[115] The Boy Scouts claimed that requiring the organization to allow James Dale to serve as a scoutmaster would violate its First Amendment right of expressive association.[116] The Court's problematic factual predicates relating primarily to the Boy Scouts' policies and unprecedented reliance on unsupported assertions in the organization's briefs were the focus of vigorous dissents[117] and intensely critical analysis,[118] but they are not the central point here. The point here is that the Court refused to inquire into the internal operations of the organization and concluded that "the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"[119] This formulation is at best misleading. The issue in the case was whether treating an organization as

112. *Roberts*, 468 U.S. at 623–29.

113. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549.

114. Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

115. *Id.* at 645.

116. *See id.* at 651 ("The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight,' Brief for Petitioners 39, and that it does 'not want to promote homosexual conduct as a legitimate form of behavior,' Reply Brief for Petitioners 5.").

117. In his dissent, Justice Stevens expressed concern about the implications of both the result and reasoning in *Dale* for the jurisprudence of association. *Id.* at 687 (Stevens, J., dissenting) ("If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant's claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. Accordingly, the Court's prescription of total deference will not do.").

118. Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations,* 9 WM. & MARY BILL RTS. J. 595 (2001) (criticizing the Court's reliance on statements by managers in the briefs to determine organizational policies and arguing that preventing discrimination against gays is a compelling government interest permitting regulation of the Boy Scouts to prevent impermissible discrimination); Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment,* 85 MINN. L. REV. 1483 (2001) (criticizing the Court's focus solely on entities and managers and urging greater focus on members and their roles in associations).

119. *Dale,* 530 U.S. at 655.

engaged in expressive activity means that the organization and its managers may intentionally violate a statute that prohibits discrimination against persons otherwise qualified for a role in the organization. As an Eagle Scout, Dale was certainly qualified for a role in the organization. The case is significant because the Court determined that invocations of the right of expressive association provide absolute discretion to organization managers.[120] In holding that the Boy Scouts could exclude an Eagle Scout based on his sexual orientation, the Court in *Dale* interpreted the First Amendment right of association as overriding other constitutional values, such as equal protection, even when this meant permitting otherwise impermissible discrimination.[121] In so holding, the Court rejected and reversed the balancing approach at the heart of *Roberts* and *Rotary*.[122] It also rejected any effort to craft a jurisprudence of participatory association, and, instead, chose to adopt an entity theory of association and to link the entity theory to absolute discretion by organization managers. This is a fully developed jurisprudence of nonparticipatory association linked with First Amendment absolutism that gives no consideration to any other constitutional principle or requirement.

The Court quickly extended its reasoning in *Dale* to political parties in *California Democratic Party v. Jones*, which was decided two days later.[123] In *Jones*, the Court held that a state statute establishing a blanket primary system violated political parties' First Amendment right of expressive association.[124] Justice Scalia, writing for the majority, found that "we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution."[125] Justice Scalia concluded, citing *Roberts*, that "a corollary of the right to associate is the right not to associate."[126] Thus, political parties could not be compelled to permit voters who were not party members to select the party's candidate in the general election.[127] The point here is not the relative merits of a blanket primary compared with a closed primary but rather the absolute authority of party managers to decide this matter. The Court thus invoked the First Amendment in the service of nonparticipatory association and managerial control.

Participatory association and consensual political speech are the benchmark

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120. *Id.*

121. *Id.* at 657–59.

122. Id. at 656–57.

123. California Democratic Party v. Jones, 530 U.S. 567 (2000).

124. *Id.* at 572–73.

125. *Id.* at 573. This is an astoundingly willful recasting of the legacy of the White Primary cases. *See* Hill, *Constitutive Voting, supra* note 44, at 616–19 (discussing how the Court "limited the White Primary cases to situations in which 'a State prescribes an election process that gives a special role to political parties'").

126. *Jones*, 530 U.S. at 574. Justice Scalia then claimed that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575.

127. *Id.* at 573–75.

of a constitutional jurisprudence of association. Development of this jurisprudence depends on recognizing the importance of both the aggregate theory and the entity theory of association. By adopting a concept of expressive association, the Supreme Court has abandoned the aggregate theory and, in so doing, has ignored the central importance of the constitutional principle of consent. *Citizens United* extends the harm attendant upon the rejection of consent as a constitutional principle applicable to campaign finance jurisprudence. As the next Part suggests, this was an avoidable error.

IV.
ELEMENTS OF PARTICIPATORY ASSOCIATION AND COMPELLED POLITICAL SPEECH: THE LAW BEFORE *CITIZENS UNITED*

Participatory association is the foundation of voluntary political speech for members of organizations. Yet neither courts nor commentators have focused on participation inside organizations as a central element of the jurisprudence of association. In his seminal article on association, Thomas Emerson observed that "the rights of individual members and minority groups within these centers of private power have come to be a matter of growing concern," but he did not develop this insight.[128] While the courts have neither expressly denied the right of participation nor expressly defended the resulting compulsion with respect to political speech, they have failed to develop a jurisprudence of association that includes consent as a core constitutional value. The result of this failure is compelled political speech. This is an avoidable wrong turn in the development of a jurisprudence of association. This Part analyzes elements of participation and consent in certain campaign finance cases decided before *Citizens United.* Prior to *Citizens United,* these elements of consent had by no means cohered into a fully developed jurisprudence of participatory association that protected members and shareholders from compelled political speech. As is discussed in the following section, *Citizens United* interdicted the development of a jurisprudence of participatory association without compelled political speech and made developing such a jurisprudence of association much more difficult.

A. Austin *and* MCFL*: Two Approaches to Participatory Association in Campaign Finance Jurisprudence before Citizens United*

Before it decided *Citizens United*, the Court decided two cases that had addressed elements of participatory association, albeit somewhat obliquely. In *Citizens United*, the Court devoted itself to overruling one of these cases, *Austin*

128. Emerson, *supra* note 55, at 1. Emerson did include among his four contexts in which difficult questions of freedom of association arise "rights of individual members or minority groups vis-à-vis the organization to which they belong." *Id.* at 3.

v. Michigan Chamber of Commerce.[129] The other case, *Federal Election Comission (FEC) v. Massachusetts Citizens for Life (MCFL),*[130] was not expressly overruled, but little is left of either its holding or its reasoning. These two cases provide two different theories of association and two different approaches to using entity structure to provide at least some limited element of participation within the organization. Neither embraces a fully-developed concept of an association as an aggregate, neither incorporates consent as a constitutional principle, and neither sets forth a fully specified concept of participatory association. Yet each provides potential building blocks for an approach to participatory association that treats consent as a constitutional principle.

These two cases provide a useful means of exploring participation in expressive associations both because of their similarities and because of their differences. Both *Austin* and *MCFL* involved tax-exempt entities. *Austin* involved a state chamber of commerce,[131] while *MCFL* involved a section 501(c)(4) organization[132] dedicated to preventing abortion. *Austin* involved a multi-issue group that attracted members interested in business and in discussing business issues with other people involved in business.[133] *MCFL* involved a single-issue group of people who shared a common opposition to abortion.[134] The chamber of commerce in *Austin* operated a well-financed PAC.[135] MCFL had established a PAC six years before the Supreme Court decided the case,[136] but it nevertheless argued that it should not be required to finance its independent expenditures through the PAC because MCFL itself received contributions solely from individuals. Juxtaposing the two cases provides a framework for thinking about the complex issue of participation in various types

129. Austin v. Mich Chamber of Commerce, 494 U.S. 652 (1989).

130. Fed. Election Comm'n v. Mass. Citizens for Life (MCFL), 479 U.S. 238 (1986).

131. A chamber of commerce is exempt from federal income taxation under § 501(c)(6) of the Internal Revenue Code. 26 U.S.C. § 501(c)(6) (2006). While dues paid to a chamber of commerce may be deductible under § 162(a) as a trade or business expense, any dues used for lobbying or for other political activity are not deductible. 26 U.S.C. § 162(a), (e). The organization must either notify members of the share of dues that are not deductible each taxable year or pay a proxy tax. For a detailed analysis of § 501(c)(6) organizations, see FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶¶ 14.01–.06 (2009).

132. MCFL is exempt from federal income taxation under 26 U.S.C. §501(c)(4) (2006). Contributions to section 501(c)(4) organizations are not deductible. Lobbying is an exempt activity for a section 501(c)(4) organization and may be the organization's sole activity. A section 501(c)(4) organization may expressly support or oppose the election of a candidate for public office, but such activity may not be the organization's primary activity. For a detailed analysis of section 501(c)(4) organizations, see HILL & MANCINO, *supra* note 131, at ¶¶ 13.01–.07.

133. *Austin*, 494 U.S. at 656.

134. *MCFL*, 79 U.S. at 260–62.

135. *See Austin*, 494 U.S. at 676 n.7.

136. MCFL had established a PAC in 1980. *MCFL*, 479 U.S. at 255 n.8. The Court took the position that this fact did not alter its conclusion that the PAC requirement impermissibly burdened political speech by organizations like MCFL. *Id.*

of organizations.[137]

MCFL was the first case to challenge the prohibition on independent expenditures by corporations and the requirement that any such expenditures be made through a PAC. The case arose under section 441b of the Federal Election Campaign Act (FECA), the same section at issue in *Citizens United.* MCFL had made several expenditures from its general treasury related to the publication of a "Special Edition" of the organization's newsletter that contained a voter guide highlighting candidates' views on abortion.[138] At issue was whether MCFL should have the right under the First Amendment to use its general treasury funds to finance the Special Edition rather than having to use a PAC—i.e., whether section 441b was unconstitutional as applied to that organization.[139] The government argued that FECA section 441b was necessary to ensure that organizations, including MCFL, did not use members' contributions to finance political speech that the members had not authorized.[140]

The Court rejected MCFL's claim that the Special Edition was not an independent expenditure because it did not constitute express advocacy.[141] However, the Court agreed that the statute was nevertheless unconstitutional as applied to MCFL.[142] The Court emphasized that its opinion applied only to organizations like MCFL and that its opinion did not strike down the PAC requirement generally. The Court made it clear that it regarded the PAC requirement as a mechanism for ensuring that political contributions reflect the political preferences of the contributors,[143] and emphasized the importance of the PAC requirements for union members or corporation shareholders protection from compelled political speech.[144] Nonetheless, because it found that an

137. *See infra* Part VI for a discussion of potential responses for single-issue nonprofits, complex nonprofits, and taxable business corporations.

138. *MCFL*, 479 U.S. at 243–44. The Special Edition was a voter guide that identified pro-life candidates and urged readers to vote for them. *Id.* It was distributed to approximately 100,000 persons, a number that far exceeded the approximately 3,000 recipients of regular editions of the newsletter. *Id.* at 244.

139. *Id.* at 241.

140. *Id.* at 258–59 (citing *Pipefitters* and *U.A.W.* on the importance of ensuring that contributions for political speech are voluntary). *See supra* Part III for a discussion of these cases.

141. *Id.* at 248–50.

142. *Id.* at 263.

143. *Id.* at 258.

144. *Id.* at 260 ("The Commission next argues in support of § 441b that it prevents an organization from using an individual's money for purposes that the individual may not support. We acknowledged the legitimacy of this concern as to the dissenting stockholder and union member in *National Right to Work Committee,* 459 U.S., at 208, 103 S.Ct., at 559, and in *Pipefitters,* 407 U.S., at 414-415, 92 S.Ct., at 2264. But such persons, as noted, contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union. It was thus wholly reasonable for Congress to require the establishment of a separate political fund to which persons can make voluntary contributions.")

organization like MCFL posed no danger of political corruption, the government could not restrict its independent expenditures to those made through a PAC.[145]

In *MCFL*, the Court formulated a means of protecting the constitutional importance of member consent without requiring the use of a PAC. This approach was based on the specific structure of MCFL as a single-issue organization that made its purpose and its activities in support of that purpose clear to all who might contemplate contributing to the organization.[146] The Court located consent at the time the member chose to contribute to the organization, noting that "[i]ndividuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes."[147]

While the Court recognized that consent at the time of contribution is not the same as ongoing participation in determining how that contribution will be used by the organization, it found the initial consent was still meaningful.[148] The Court reasoned that:

> It is true that a contributor may not be aware of the exact use to which her or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor.[149]

The Court also suggested that contributors could earmark their contributions for particular uses.[150] The Court noted that this approach might be particularly useful when a contributor wanted to support a cause but did not wish to do so through support of candidates for public office.[151]

This theory of locating consent in association at the point of making the contribution was expressed by the Court in its three-prong test for determining what type of organization could use its general treasury funds to finance

145. *See id.* at 259. The Court distinguished FECA section 441b from the state statute at issue in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which the Court in *MCFL* described as involving "a complete foreclosure of any opportunity for political speech." *Id.* at 259 n.12.

146. *Id.* at 260-62.

147. *Id.* at 260–61.

148. *Id.* at 261.

149. *Id.*

150. *Id.* ("In addition, an individual desiring more direct control over the use of his or her money can simply earmark the contribution for a specific purpose, an option whose availability does not depend on the applicability of § 441b."). For further consideration of this option, see *infra* Part VI.

151. For further discussion, see *infra* Part V.

independent expenditures in election campaigns.[152] First, prospective members must know that the organization focused exclusively on one issue.[153] Second, none of the contributors could have a claim on the organization's assets or earnings in order to ensure that the cost of exit are relatively low.[154] Third, the organization must accept no contributions from business corporations, so that the organization was not a conduit for the use of power in the marketplace to acquire political power.[155] This test was subsequently incorporated into FEC regulations under FECA section 441b as the "qualified nonprofit corporation" test.[156]

Chief Justice Rehnquist, joined by Justice White, Justice Blackmun, and Justice Stevens, dissented in part and concurred in part. Their dissent rested in substantial part on the argument that the majority's three-part test would not protect the political speech rights of "individuals who pay money into a corporation or union for purposes other than the support of candidates for public office."[157] The dissent pointed out that in *FEC v. National Right To Work Committee* (NRWC),[158] the Court had upheld the limitations on PAC solicitations in the case of a "corporation . . . not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public importance."[159] The dissent rejected the majority's distinction between MCFL's use of general treasury funds for independent expenditures and NRWC's use of general treasury funds for contributions to candidates,[160] remarking that "[t]he distinction between contributions and independent expenditures is not a line separating black from white."[161]

While MCFL was a single-issue organization that made its views and its political activities very clear, the Chamber of Commerce in *Austin* was a large, multipurpose organization with some 8,000 members, three-fourths of which were taxable corporations.[162] It controlled a PAC with a track record of successful fund raising.[163] Nevertheless, the Chamber argued that it should be able to use its general treasury funds for independent expenditures to support or oppose candidates in elections for state office, notwithstanding a Michigan state law that only permitted corporate independent expenditures made through a PAC.[164] The Chamber did not qualify as an MCFL-type organization that could

152. *See MCFL*, 479 U.S. at 264.

153. *Id.* at 264.

154. *Id.*

155. *Id.*

156. *See* 11 C.F. R. § 114.10 (2010).

157. *MCFL*, 479 U.S. at 267–68 (Rehnquist, C.J. concurring in part and dissenting in part) (citing the union PAC cases).

158. Fed. Election Comm'n v. Nat'l Right To Work Comm., 459 U.S. 197 (1982).

159. *MCFL*, 479 U.S. at 269 (Rehnquist, C.J. concurring in part and dissenting in part).

160. *Id.* at 270.

161. *Id.* at 270.

162. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 656 (1989).

163. *Id.* at 658.

164. *Id.* at 654–56. The Court observed that permitting the Chamber to use its general

use its general treasury funds for independent expenditures.[165]

The Court in *Austin* upheld the Michigan statute's PAC requirement. Writing for the majority, Justice Marshall reasoned that "[b]ecause persons contributing to [PACs] understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views."[166] By contrast, "the corrosive and distorting effects of immense aggregates of wealth that are accumulated with the help of the corporate form and that have little or no correlation with the public's support for the corporation's political ideas" justified the restriction on independent expenditures from general treasury funds.[167] The Court found that both contributions to candidates and independent expenditures pose a danger of this kind of corruption.[168]

The Court pointed specifically to the impossibility of members having knowledge of the Chamber's likely political positions due to the Chamber's "more varied purposes."[169] The Court also noted that the Chamber's "educational activities are not expressly tied to political goals."[170] Because members may want to participate in the educational activities without supporting the Chamber's political agenda, they may be reluctant to leave the Chamber.[171] Although the majority did not directly address consent or the nature of an association as either an entity or an aggregate, it did indicate that the opportunities for consent in *MCFL* did not exist in *Austin*.[172]

Justice Brennan's concurring opinion in *Austin* underscored the element of participation and consent at the heart of his majority opinion in *MCFL* and responded to the assault on these principles in Justice Kennedy's dissent. Justice Brennan agreed with the dissents, discussed in more detail below, that political speech is at the core of the First Amendment.[173] He argued, however, that the First Amendment protected the association and political speech rights of the members and shareholders of the corporations, not just the rights of the entities.[174] He found that "just as speech interests are at their zenith in [the area

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treasury funds would enable it to operate as a conduit for corporate money in a way that the Chamber's controlled PAC could not, because the PAC could not accept contributions from corporate members or nonmembers general treasury funds. *Id.* at 664.

165. *Id.* at 661–65.

166. *Id.* at 660–61.

167. *Id.* 659–60.

168. *Id.* at 660.

169. *Id.* at 662.

170. *Id.*

171. *Id.* at 663.

172. *See id.* at 662–63 ("In reaching th[e] conclusion [in *MCFL*], we enumerated three characteristics of the corporation that were 'essential' to our holding. . . . Because the Chamber does not share these crucial features, the Constitution does not require that it be exempted from the generally applicable provisions of [the Michigan statute].").

173. *See id.* at 669–70 (Brennan, J., concurring).

174. *See id.* at 670–78 (Brennan, J., concurring).

of political speech], so too are the interests of unwilling Chamber members and corporate shareholders forced to subsidize that speech."[175] He insisted that the Michigan statute should be understood as "preventing both the Chamber *and other business corporations* from using the funds of other persons for purposes that those persons may not support."[176] He also noted that the PAC requirement "protects dissenting shareholders of business corporations that are members of the Chamber to the extent that such shareholders oppose the use of their money, paid as dues to the Chamber out of general corporate treasury funds, for political campaigns."[177] In effect, Justice Brennan set forth the beginning of a jurisprudence of participatory association and consensual political speech for complex, multipurpose nonprofit organizations.

Even this modest beginning was categorically rejected in the dissents. These dissenting opinions, with their unnuanced rejections of participatory association and consensual political speech within organizations, put in sharp relief the difficulty of developing a jurisprudence of association based on consent. They underscore the consequences of embracing an entity theory of association without also considering the interests at stake in an aggregate theory of association. These dissents are precursors of the positions taken by the majority in *Citizens United.*

In their dissents, both Justice Scalia and Justice Kennedy took exception to the idea of member consent as a compelling government interest. Justice Scalia dismissed Justice Brennan's concurring opinion as an effort to present the Michigan statute as "a paternalistic measure to protect the corporate shareholders of America."[178] Writing about the relationship between a business corporation and its shareholders, Justice Scalia set forth his own theory of association:

> A person becomes a member of that form of association known as a for-profit corporation in order to pursue economic objectives, *i.e.*, to make money . . . . Thus, in joining such an association, the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal.[179]

Justice Scalia rejected any idea that a shareholder should have any voice in the event that the corporation takes actions that the shareholder finds "uncongenial."[180]

Justice Scalia offers no description of "the deal" that contributors or

175. *Id.* at 677 (Brennan, J., concurring).

176. *Id.* at 672 (Brennan, J., concurring) (emphasis in original).

177. *Id.* at 673 (Brennan, J., concurring).

178. *Id.* at 685–86 (Scalia, J., dissenting).

179. *Id.* at 686 (Scalia, J., dissenting). Justice Brennan rejected this analysis in his concurring opinion. *Id.* at 676 n.8.

180. *Id.* at 687 (Scalia, J., dissenting).

members or supporters make when they join a nonprofit organization. Rejecting any distinction between business corporations and nonprofit corporations, Justice Scalia framed the issue of members of nonprofit corporations as follows:

> Would it be any more upsetting to a shareholder of General Motors that it endorsed the election of Henry Wallace (to stay comfortably in the past) than it would be to a member of the American Civil Liberties Union that it endorsed the election of George Wallace? I should think much less so. Yet in the one case as in the other, the only protection against association-induced trauma is the will of the majority and, in the last analysis, withdrawal from membership.[181]

The casual reference to "association-induced trauma" underscores Justice Scalia's refusal to consider the speech interests of organization members. While Justice Scalia concludes his dissent with the observation that "[t]he premise of our system is that there is no such thing as too much speech,"[182] this observation apparently does not apply to speech by organization members or corporate shareholders.

Like Justice Scalia, Justice Kennedy denounced distinctions between the First Amendment rights accorded individuals and corporations,[183] as well as distinctions among the rights accorded to different types of corporations.[184] Dismissing the PAC option as a "secondhand endorsement structure,"[185] Justice Kennedy observed that speaking through a PAC resulted in "diffusion of the corporate message."[186] He expressed greater concern about such diffusion of the corporation message than about the rights of corporate shareholders or association members.

Justice Kennedy seems content to relegate association members to the role of listeners to the speech of their own associations. After reciting a list of prominent exempt entities that had filed *amicus* briefs in support of the Michigan Chamber of Commerce, Justice Kennedy concluded:

> I reject any argument based on the idea that these groups and their views are not of importance and value to the self-fulfillment and self-expression of their members, and to the rich public dialogue that must be the mark of any free society. To suggest otherwise is contrary to the

181. *Id.* (Scalia, J., dissenting).

182. *Id.* at 695 (Scalia, J., dissenting).

183. *See id.* at 699–700 (Kennedy, J. dissenting) ("[T]he Act discriminates on the basis of the speaker's identity. Under the Michigan law, any person or group other than a corporation may engage in political debate over candidate elections; but corporations, even nonprofit corporations that have unique views of vital importance to the electorate, must remain mute. Our precedents condemn this censorship."). Justice Scalia and Justice O'Connor joined Justice Kennedy's dissent.

184. *Id.* at 699 (Kennedy, J., dissenting) ("The protection afforded core political speech is not diminished because the speaker is a nonprofit corporation. Even in the case of a for-profit corporation, we have upheld the right to speak on ballot issues.")

185. *Id.* at 708 (Kennedy, J., dissenting).

186. *Id.* at 709 (Kennedy, J., dissenting).

American political experience and our own judicial knowledge.[187]

What "judicial knowledge" Justice Kennedy was invoking remains unexplained. He went on to state that "[t]o the extent that members disagree with a nonprofit corporation's policies, they can seek change from within, withhold financial support, cease to associate with the group, form a rival group of their own."[188] He expressly rejected claims that protecting dissident members was a sufficient compelling state interest to support the PAC requirement.[189] Justice Kennedy concluded that "[a]llowing government to use the excuse of protecting shareholder rights to stifle the speech of private, voluntary organizations undermines the First Amendment."[190] He did not consider the possibility that protecting association members' rights is part of the First Amendment and not simply an impermissible burden on the rights of associations.

What is certain in *Austin* is that Justice Kennedy articulated a jurisprudence of nonparticipatory association. Left unclear is how nonparticipatory association can be reconciled with the idea of "one person, one vote," the idea of representation, or the idea of government accountability to the people. In sum, Justice Kennedy removed consent from the Constitution and does not appear to understand the harm that result from his reasoning.

Both *MCFL* and *Austin* linked nonparticipatory association to compelled political speech. In *MCFL*, the Court found that the transparency of a single-issue advocacy association provided sufficient information about the organization's political activities to infer consent from the individual's decision to contribute. In *Austin*, the Court found that a large, multipurpose organization could not assume consent, but that the use of a PAC permitted members and contributors to consent to political expenditures. The dissents rejected any participation in organizations and ignored the relationship between nonparticipatory association and compelled political speech.

B. Seeking Limits on Compelled Political Speech

Individuals have broad but not absolute rights of political speech under the First Amendment. Once an individual affiliates with an association, the situation becomes far more complex and problematic. The existing jurisprudence of compelled speech offers no ready solutions to the constitutional problem of compelled speech arising from nonparticipatory association. Nevertheless, the cases that reject the right of the government to compel speech are important

187. *Id.* (Kennedy J., dissenting).

188. *Id.* at 710 (Kennedy J., dissenting).

189. *Id.* at 709–10 (Kennedy, J., dissenting) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 n.34 (1978) as "noting 'crucial distinction' between union members and shareholders"). Justice Kennedy rejected the relevance of such compelled speech cases as *Abood* v. *Detroit First Board of Education*, 431 U.S. 209 (1977), noting crisply that "[o]ne need not become a member of the Michigan Chamber of Commerce . . . in order to earn a living." *Id.* at 710.

190. *Id.* (Kennedy J., dissenting).

because they establish that a core element of the First Amendment right to free speech is not only the right to speak freely and voluntarily, but the right to be free from efforts to compel persons to speak or not to speak.[191] As discussed above, the fundamental problem is the attenuated development of a jurisprudence of association.[192] The core question is whether or not the act of association amplifies the voices of the people who constitute the association. The jurisprudence of association offers no clear answer to this question. The Court has decided a number of cases involving claims by union members[193] or by nonmembers in agency shops[194] that their dues or fees should not be used to finance political speech with which they disagree.[195] These cases present the closest analogy to the compelled speech at issue here. In these cases, the Court was called upon to balance the right of the union to collect dues from members and payments in lieu of dues from nonmembers to avoid a "free rider" problem, while at the same time prohibiting compulsory political speech and compelled subsidization of political speech. The cases address the issue of contributions to union political funds but not the issue of determining how that fund will be used or what candidates will be supported or opposed.

In *Abood v. Detroit Board of Education*, teachers who objected to the use of union dues for political activities brought suit against both the school board and the union that was the sole collective bargaining representative of public school teachers in Detroit.[196] The teachers claimed that the requirement that they contribute funds to the union that would be used for political speech that they did not support was an impermissible burden on their First Amendment right of association.[197] The teachers claimed that they could prevent the union from making political expenditures "unrelated to its duties as exclusive bargaining representative."[198]

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191. *See e.g.*, Wooley v. Maynard, 430 U.S. 705 (1976) (rejecting compelled display of state motto on license plate); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (rejecting compelled recitation of the Pledge of Allegiance in schools).

192. *See supra* Part II.

193. The Court has considered this issue somewhat indirectly as it applies to union members in the union cases discussed above at Part III(B) as an element of more general considerations of consent.

194. An "agency shop" is a workplace in which all the workers are represented by a single union but not all the workers are required to become union members. Those who do not choose to become members are required to pay fees equivalent to union dues to support the collective bargaining activities from which they benefit. For a description of an "agency shop," *see Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 211 (1977).

195. *E.g.*, Davenport v. Washington Educ. Ass'n, 551 U.S. 177 (2007); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Commc'n Workers v. Beck, 487 U.S. 735 (1988); Teachers v. Hudson, 475 U.S. 292 (1986); Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977); Bhd. of Ry. Clerks v. Allen, 373 U.S. 113 (1963); Machinists v. Street, 367 U.S. 740 (1961); Ry. Emps. Dept. v. Hanson, 351 U.S. 225 (1956).

196. *Abood*, 431 U.S. at 211–12.

197. *Id.* at 213, 233–34.

198. *Id.* at 234.

The Court agreed. The Court based its decision on the absence of consent by the teachers to the political expenditures.[199] According to the Court:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.[200]

The Court made it clear that its decision did not deprive the union of the First Amendment right to engage in political speech, but simply protected the rights of those who associated in the union to avoid compelled speech. The Court reasoned:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as a collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.[201]

The Court observed that the application of this principle in practice would involve "difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited," but declined to draw such a line in this case. [202] This opinion is one of the few instances where the Court attempted to integrate aggregate and entity theories of association.

Abood provides guidance on the specificity of consent required before nonmembers' fees could be used to finance the union's political speech. Political speech requires specific consent to the use of their fees for the union's political speech. Consent cannot be inferred from their affiliation with the union as their collective bargaining agent. Simply being a member of the union or a nonmember who benefitted from the union's collective bargaining on their behalf does not establish the requisite consent to the use of some part of their dues for political speech with which they do not agree.

The Court confirmed the essential principle of consent eleven years later in

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199. *Id.* at 235. The Court cited Thomas Jefferson as saying that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Id.* at 235 n.31.

200. *Id.* at 234–35.

201. *Id.* at 235-36.

202. *Id.* at 236.

Communication Workers v. Beck, holding that the fees paid by nonmembers to a union that was the collective bargaining agent in a private sector employer could not expend those fees on activities unrelated to collective bargaining activities over the objections of dues-paying nonmember employees.[203]

The Court revisited the issue of members' consent to political expenditures in *Davenport v. Washington Education Association* in 2007.[204] Both the State of Washington and union members brought suit against the public education employees' union, alleging that the union had violated a state statute requiring that the union obtain affirmative authorization from nonmember employees before using their agency-shop fees to make political expenditures.[205] The Supreme Court of Washington held that the affirmative authorization requirement violated the union's First Amendment rights.[206] On appeal, the U.S. Supreme Court reversed the Washington State Supreme Court and held that a nonmember who pays an agency-shop fee must be given an opportunity for affirmative consent to the use of any portion of this fee for political activities as required under the state statute and that this statutory requirement did not violate the First Amendment of the Constitution.[207] Writing for the majority, Justice Scalia concluded that the affirmative authorization requirement was not a restriction on the union's First Amendment right of political speech.[208] He rejected the union's claim that the agency fees were union funds on the grounds that the funds paid by nonmembers were paid under government compulsion.[209] Thus, as applied to a public sector union, the affirmative authorization requirement is merely "a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money."[210]

Based on this reasoning, Justice Scalia rejected the union's reliance on campaign finance cases, including *Bellotti*.[211] He found that "the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission."[212] Justice Scalia noted that requiring an affirmative authorization is

203. Commc'n Workers v. Beck, 487 U.S. 735 (1988).

204. Davenport v. Washington Educ. Ass'n, 551 U.S. 177 (2007).

205. *Id.* at 183.

206. *Id.*

207. *See id.* at 191 ("We hold that it does not violate the First Amendment for a State to require that its public-sector unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes.").

208. *Id.* at 191.

209. *Id.* at 185.

210. *Id.* 187 (emphasis in original).

211. *Id.* at 186–87. He also rejected as erroneous the state supreme court's reliance on *Dale* to support the union's expressive association claims, stating that the state statue at issue in this case "does not compel respondent's acceptance of unwanted members or otherwise make union membership less attractive." *Id.* 187 n.2.

212. *Id.* at 190.

not burdensome to the nonmembers who wish to do so.[213] Justice Scalia observed that the holding might have been different had the state statute burdened the union's ability to spend the dues of its own members.[214] In that case, a union might well have been able to rely on *Bellotti* and the other campaign finance cases, because the member dues were voluntary and therefore became the union's money. While this comment is dicta, it is quite suggestive in the context of a post-*Citizens United* challenge by a corporate shareholder or association member to the use of general treasury funds for independent expenditures. The concept of a general treasury in *Citizens United* suggests that *Davenport* would apply only in the very limited circumstances of an agency shop fee paid by a nonmember to the collective bargaining agent. Other funds would be treated as union funds because they had been transferred to the organization voluntarily even if they had not been transferred for purposes of supporting the organization's political speech.[215]

Justice Scalia also suggested that the outcome of the case might be different if the case had involved a private-sector union.[216] He observed that the distinction between the use of agency fees for collective bargaining activities and for political speech "is arguably content based," which would support strict scrutiny under the First Amendment.[217] Justice Scalia nevertheless stated that the majority was not taking the position that it was necessary to distinguish between public-sector and private-sector unions.[218] In doing so, Justice Scalia raised the specter that the state action doctrine could be invoked to bolster claims that organization members have no rights once they join or contribute to an organization unless the deprivation of rights arises from state action. This is in itself an admission, however indirect, that nonparticipatory association and compelled political speech do not rest easily in First Amendment jurisprudence.

There are at least three possible responses to an invocation of some version of the state action doctrine to bolster the holding in *Citizens United*. One is that *Citizens United* itself constitutes state action, a government action that changes the terms of operation of all entities in ways that negate the constitutional principle of consent and negate voluntarism as an element of political speech. The second possible response is that any such invocation of state action would

213. *Id.* at 187 n.2.

214. *Id.*

215. In an earlier decision, Justice Scalia applied a version of this argument in the context of government speech. Justice Scalia distinguished between compelled speech, in which the government compels an individual to personally express messages with which she disagrees, and compelled subsidization, in which the government requires an individual to subsidize a message with which she disagrees that is expressed by a private entity. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005).

216. *Davenport*, 551 U.S. at 190–91.

217. *Id.* at 190 n.4 (citing Commc'n Workers v. Beck, 487 U.S. 735 (1988), as an example of a content-based distinction by a private-sector union).

218. *Id.*

provide little support for Scalia's position.[219] The state action doctrine's appropriate interpretation and application are highly contested.[220] The third possible response is that a rigid, doctrinaire invocation of state action would be inconsistent with the constitutional principle of consent grounded in the language of the first sentence of the Constitution. The use of state action to erect a barrier against the constitutional role assigned to the people in determining government legitimacy, especially in the context of elections, would require a negation of the right of association as well as the right of voluntary political speech and would be fundamentally inconsistent with the idea that legitimate government is based on consent.[221]

This hint that *Communications Workers of America v. Beck* might be overruled in some future case suggests that Justice Scalia finds a burden on political speech arising from contributions to a corporation only where the government compelled the contribution. If this becomes the law and *Beck* is overruled, the scope of the concept of the general treasury would be expanded and the scope of managerial discretion in the area of entity political speech consistent with the jurisprudence of expressive association would know no bounds in the private sector.

As discussed in the next section, *Citizens United*'s negation of even the limited elements of consent previously found in *MCFL* and *Austin*[222] strongly suggests that crafting remedies for compelled speech and compelled subsidization of speech will depend, in significant part, on developing a First Amendment theory of participatory association that gives operational meaning to the constitutional principle of consent. *Citizens United* makes crafting a jurisprudence of participatory association more difficult by enhancing corporations' rights as political speakers and negating the constitutional significance of shareholders' or members' consent to the managers' uses of general treasury funds for political speech. For all its rhetorical flourishes about combating government censorship of political speech, the majority in *Citizens United* embraces both nonparticipatory association and compelled political speech.

219. The White Primary cases, particularly *Terry v. Adams*, 345 U.S. 461 (1953), rejected reliance on the state action doctrine to deny voters their constitutional right to play their constitutional role as voters.

220. *Developments in the Law-State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1261–64 (2010). *See also* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

221. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39–45 (1969) (providing a pervasive critique of state action doctrine on structural grounds).

222. See *supra* Part III(A).

V.
CITIZENS UNITED: ASSOCIATION WITHOUT PARTICIPATION AND POLITICAL SPEECH WITHOUT CONSENT

Ciitzens United held that a section 501(c)(4) organization could finance electioneering communications using its general treasury funds rather than funds in its PAC.[223] The Court also held that all independent expenditures, but not contributions to candidates, could be financed using general treasury funds.[224]

The Court's holdings might suggest that *Citizens United* is a narrow case about the accounting mechanics of campaign finance. This would be wrong. *Citizens United* is a very broad case about the control of corporations and their resources and the use of those resources to influence campaigns, election outcomes, and the operation of government. As discussed below, the opinion is based on First Amendment speech claims; an entity theory of association in the guise of a discussion about the use of "general treasury funds;" acceptance of broad managerial discretion over the allocation of general treasury funds to independent expenditures; the express rejection of any limits on the rights of an entity to make independent expenditures; and the refusal to find constitutional significance in any rights of shareholders or members to participate in deciding how to use general treasury funds for political speech by the corporation.

The majority opinion in *Citizens United* is complex because its meaning can be understood only if one grasps the structure of the argument rather than focusing on discrete elements of it. For all the claims that the majority is protecting speech, the majority opinion extends an entity theory of nonparticipatory association to political speech that members and contributors have no right and no opportunity to shape or support or interdict. The Court generally ignores members and treats associations as the equivalent of individuals. The power of the Court's reasoning arises from its assertion of a First Amendment political speech absolutism focused on the rights of entities. The majority took full advantage of the attenuated development of the jurisprudence of association, particularly the asymmetry between the attention devoted to the rights of the entity and the rights of the members. The result was to remove from the campaign finance jurisprudence those few instances where the Court considered at least some elements of participatory association, particularly *Austin* and *MCFL*.[225] This approach to association enabled the Court to ignore the jurisprudence of compelled speech, which exists in considerable tension with the political speech claims made by the majority.[226] The majority based its reasoning on *First National Bank v. Bellotti*, a case permitting a corporation to use its general treasury funds to finance ads in a referendum

223. 130 S.Ct. 876, 913 (2010).

224. *Id.*

225. For a discussion of these cases, see *supra* Part III(A).

226. For a discussion of compelled speech as a consequence of nonparticipatory association, see *supra* Part III(B).

contrary to state law.[227] The majority did nothing to preserve or enhance the rights of members or shareholders to consent to the decisions made by entity managers with respect to the entity's political speech. Indeed, as is discussed later in this section, the majority took the position that protecting members' rights to participate in organizations' decisions regarding the use of the funds they contributed to the general treasury is not a compelling government interest for purposes of First Amendment jurisprudence. This decision, together with the extension of managerial discretion to the use of general treasury funds for independent expenditures, permits compelled political speech within organizations. How the majority achieved this result requires an understanding of the scope of the entity rights and managerial discretion at the core of the majority opinion in *Citizens United.* The result is an asymmetrical jurisprudence of association focused on an entity theory and ignoring any possibility of an aggregate theory of association.

Citizens United is a politically active section 501(c)(4) organization with an annual budget of approximately $12 million.[228] Most of its funds are raised through contributions from individuals, but it also accepts contributions from corporations.[229] It controls a well-funded PAC and several affiliated section 527 organizations that are not classified as PACs for federal election law purposes.[230] Under the reasoning of *MCFL*, Citizens United could not use its general treasury funds to finance electioneering communications or independent expenditures because it accepted corporate contributions.[231]

During the 2008 primary campaign, Citizens United produced and distributed a ninety-minute video critical of then-Senator Hillary Clinton, who was, at the time, a candidate to be the Democratic Party's presidential nominee.[232] The video, entitled *Hillary: The Movie*, had been shown in limited release in a small number of commercial theaters and was also released on

227. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 902–903 (2010). The Court previously upheld this right in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978). The importance of *Bellotti* in the campaign finance jurisprudence of the Roberts Court is even more apparent when one reads *Citizens United* in light of *Fed. Election Comm'n v. Wisc. Right To Life* (*WRTL II*), 551 U.S. 449 (2007). For an analysis of *WRTL II*, see Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in* Wisconsin Right to Life, 27 ST. LOUIS U. PUB. L. REV. 267 (2008).

228. *Citizens United*, 130 S. Ct. at 887. The majority opinion did not reference Citizens United's tax status but did provide the information relating to its annual budget.

229. *Id.*

230. *Id.* at 929 (Stevens, J. concurring in part and dissenting in part) (describing the PAC controlled by Citizens United as having "millions of dollars in assets"). On its website, Citizens United lists three affiliates, one is a section 501(c)(3) organization and two appear to be PACs that make contributions to candidates. *See What We Do*, CITIZENS UNITED, www.citizensunited.org/what-we-do.aspx (last visited July 30, 2011).

231. See *supra* Part III(A) for a discussion of *MCFL* and the regulations applicable to qualified political organizations.

232. *Citizens United*, 130 S. Ct. at 887–88.

DVD.[233] Citizens United wanted the video production made available through video-on-demand, which ordinarily requires that viewers pay a fee to view a production.[234] Citizens United paid a cable company called "Election '08" $1.2 million to make *Hillary: The Movie* available to viewers without the viewer having to pay a fee.[235] To promote *Hillary: The Movie* and its availability without charge through video-on-demand, Citizens United produced two ten-second ads and one thirty-second ad.[236] Both the video and the ads would have been shown during the period when they would have been treated as electioneering communications under BCRA and FECA that could not be funded by Citizens United's general treasury funds.[237]

Citizens United petitioned the district court for a preliminary injunction to prevent the enforcement of federal campaign finance laws preventing it from using its general treasury funds to broadcast the movie, but the district court denied the petition and instead granted the FEC's motion for summary judgment.[238] Citizens United then appealed to the Supreme Court, which noted probable jurisdiction in 2008.[239] After the initial oral argument, the Court asked the parties to file supplemental briefs on the question of whether either or both *Austin* or the part of *McConnell* addressing section 441b should be overruled.[240]

After the second oral argument, the Court held that the prohibitions on the use of corporate general treasury funds to finance electioneering communications[241] and independent expenditures[242] impermissibly burden corporations' First Amendment rights.[243] According to Justice Kennedy, writing for the majority, "We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity."[244] Having rejected such distinctions, the majority concluded that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[245] The Court overruled *Austin*[246] and those parts of *McConnell* upholding the prohibition on the use of corporate general treasury funds used to finance electioneering

233. *Id.* at 887.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 887–88.
238. Citizens United v. Fed. Election Comm'n, 530 F. Supp. 2d 274, 279 (2008) (holding FECA § 441b facially constitutional under *McConnell*). *See Citizens United*, 130 S. Ct. at 888 for a statement of the procedural posture of the case.
239. Citizens United v. Fed. Election Comm'n, 129 S. Ct. 594 (2008).
240. Citizens United v. Fed. Election Comm'n, 129 S. Ct. 2893 (2009).
241. *Citizens United*, 130 S. Ct. at 887, 913 (addressing BCRA § 203).
242. *Id.* at 887 and 913 (addressing FECA § 441b).
243. *Id.* at 895–97.
244. *Id.* at 913.
245. *Id.*
246. *Id.* at 913 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)).

communications.[247]

The majority in *Citizens United* rejected the claim that a PAC controlled by a corporation provided the corporation with a means of exercising its right of political speech under the First Amendment.[248] The majority held that "[s]ection 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak."[249] The majority rested this conclusion primarily on the observation that "[a] PAC is a separate association from the corporation."[250] The majority then took the position that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."[251] The Court concluded that the "purpose and effect [of § 441b] are to silence entities whose voices the Government deems to be suspect."[252] The majority then linked limits based on the identity of a speaker to content restrictions:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.[253]

The Court did not provide any further reasoning with respect to the parallel between regulation and prior restraint.

The Court made it clear that it rejected any distinctions between the First Amendment rights of individuals and corporations, as well as distinctions among types of corporate entities.[254] The Court rejected any effort to distinguish wealthy individuals from corporations on the grounds that corporations have accumulated wealth in part due to special advantages provided under law.[255] In *Austin*, the Court had defined such "special advantages" as "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."[256] While not denying the existence of such distinctions, the majority in

247. *Id.* (overruling McConnell v. Fed. Election Comm'n, 540 U.S. 93, 203–09 (2003) in part).

248. *Id.* at 897–98.

249. *Id.* at 897.

250. *Id.*

251. *Id.*

252. *Id.* at 898.

253. *Id.* at 898–99.

254. The Court left for another case on another day the issue of whether foreign corporations were included in this broad assertion that all corporations are to be alike for purposes of First Amendment rights of political speech. *Id.* at 911 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

255. *Id.* at 905.

256. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1989).

Citizens United denied their constitutional significance, concluding that "[t]his does not suffice, however, to allow laws prohibiting speech."[257] The sole authority cited for this proposition is Justice Scalia's assertion in his dissent in *Austin* that "[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[258] Based on this rationale, the Court concluded that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[259]

Consistent with its rejection of distinctions among speakers, the Court refused to make distinctions among types of speech. Because the majority based its opinion so centrally on *Bellotti,* the Court was at great pains to reject the distinction between the expenditures for a referendum at issue in *Bellotti* and the independent expenditures and electioneering communications at issue in *Citizens United*:[260]

> *Bellotti* did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti's* central principle that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.[261]

The Court rejected as dicta the *Bellotti* Court's suggestion, made in a footnote, that a future Court might find that independent expenditures in candidate elections could result in corruption sufficient to sustain regulation of independent expenditures.[262] According to the Court, there was no link between independent expenditures and corruption or the appearance of corruption, as "there is only scant evidence that independent expenditures even ingratiate."[263] Even if there were such evidence, Justice Kennedy observed that "[i]ngratiation and access, in any event, are not corruption."[264] In support of this conclusion, Justice Kennedy, writing for the Court, cited his dissent in *McConnell*, in which

257. *Citizens United*, 130 S. Ct. at 905.

258. *Id.* (citing *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

259. *Id.* at 905.

260. *Id.* at 909.

261. *Id.* at 903.

262. *Id.* at 909 (referencing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26, which states, "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of public debts. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a public campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.") (citation omitted).

263. *Id.* Reliance on the record of a different case seems, at the very least, unusual. There was no evidentiary record in *Citizens United.*

264. *Id.* at 910.

he equated "favoritism and influence" with the "responsiveness" on which "[d]emocracy is premised."[265] In any case, the majority took the position that the appropriate remedy is more speech.[266]

The Court linked its rejection of distinctions among types of speakers and forms of political speech to a rejection of complex multi-factor tests used to administer these distinctions. The Court concluded that it could not "resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment."[267] The Court took the position that the FEC has issued too much guidance and that the sheer volume of campaign finance regulations amounted to an unconstitutional restraint of freedom of speech due to their complexity.[268] Stating that the Court originally had hoped its opinion in *WRTL II* would reduce this complexity through "an objective 'appeal to vote' test for determining whether a communication was the functional equivalent of express advocacy,"[269] the Court observed that "the FEC adopted a two-part, 11-factor balancing test to implement *WRTL's* ruling."[270] This conclusion was based in part on the assertion that the complexity of election law constitutes an impermissible burden on political speech akin to a prior restraint.[271] Based on this analogy between regulation and prior restraint, the Court determined that the prohibition on a corporation's use of general treasury funds to finance electioneering communications and independent expenditures "is an outright ban, backed by criminal sanctions."[272]

The majority in *Citizens United* established the breadth of its holding in its determination that all of the previously relied upon compelling state interests for regulating political speech except *quid pro quo* corruption were impermissible under the First Amendment.[273] The majority briskly dismissed any compelling state interest based on "protecting dissenting shareholders from being compelled to fund corporate political speech."[274] The majority reasoned that recognizing the rights of dissenting shareholders would give the government the authority to

265. *Id.* at 909–10 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 297 (2003) (Kennedy, J., dissenting)).

266. *Id.* at 911.

267. *Id.* at 892.

268. *Id.* at 895 (relying on an amicus brief from Seven Former Chairs of the FEC, the Court states that FEC rules apply to 71 distinct entities and provide rules for 33 types of political regulations and accepts the Former Chairs' conclusion that "[t]he FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975.").

269. *Id.* at 895–96.

270. *Id.* (citing 11 CFR § 114.15 (2010)).

271. *Id.* at 895–96.

272. *Id.* at 897.

273. *See id.* at 903–11.

274. *Id.* at 911.

restrict the corporation's political speech.[275] Citing *Bellotti,* the majority found "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[276] The majority offered no thoughts on what procedures of corporate democracy it might find most appropriate in the context of an election campaign.

The only role available for members in the wake of *Citizens United* is to listen to organizational speech funded with their money just as citizens who are not members listen to the organization's speech. The Court makes no reference to the right of members to speak for themselves, whether individually or through associations. Instead, the majority reasons that "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[277]

The Court's cursory observations about the rights of members in associations, and the rhetorical device of referencing "dissenting shareholders" rather than members, avoid the larger issues that arise from the asymmetrical theory of association embraced in the majority opinion. This theory arises not simply from the references to "dissenting shareholders," but more importantly from the importance of the concept of the general treasury in the opinion. The operational outcome of *Citizens United* is to give organization managers absolute control over the use of organizational resources for whatever independent expenditures they choose to make. In doing so, it establishes nonparticipatory association and results in compelled speech, both of which are inconsistent with the First Amendment.

The majority does not appear to understand that it has defined a category of organizational members who have no right of political speech in their role as members of organizations. The great solicitude the majority expresses for managers of organizations having to cope with what it characterizes as the burdens of operating a PAC finds no parallel in any solicitude at all for members denied the right to participate in their associations' decisions with respect to political speech financed with their money. If PACs are burdensome, and if PACs are rejected as a mechanism for the corporation that controls the PAC to speak, why should it be constitutionally permissible to permit the organization to speak without permitting the members, whether or not they are dissidents, to have an opportunity to consent or not as they see fit? Does the absence of any opportunity for consent satisfy the rights of political speech and association afforded members under the First Amendment? The majority in *Citizens United* offers no analytical support for its asymmetrical concept of constitutionally permissible burdens on political speech. It simply holds that burdens on organizational managers outweigh the rights of members to participate in their

275. *Id.*

276. *Id.* at 911 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

277. *Id.* at 907.

associations so that their political speech is based on consent, not on compulsion.

If consent is treated as a constitutional value linked to participation and government accountability, then the absence of any reference to rights of members of associations is a glaring omission in *Citizens United.* Treating consent as a constitutional value should be the core principle in developing a jurisprudence of participatory association that encompasses members' rights as well as entity rights. This is the important jurisprudential enterprise that the majority in *Citizens United* made more difficult.[278] The majority focused on what it characterized as the burdens of operating a PAC on entity managers but summarily rejected any serious consideration of the burdens that its view of entity rights imposed on members or shareholders.

VI.
CONSENT IN OPERATION: CRAFTING REMEDIES TO NONPARTICIPATORY ASSOCIATION AND COMPELLED POLITICAL SPEECH

In light of the holding and the reasoning in *Citizens United,* the Court's casual reference to the "ordinary mechanisms of corporate democracy" seems insufficient at best.[279] Crafting a jurisprudence of participatory association that treats both the entity and the members as speakers is likely to be a lengthy undertaking. This Part applies the consent principle to the task of crafting operational remedies to the kind of compelled speech arising from the Court's entrenchment of nonparticipatory association within the framework of First Amendment jurisprudence. As this section of the Article suggests, these operational remedies will vary in the context of single issue nonprofits, complex nonprofits that engage in multiple activities relating to multiple issues, and taxable business corporations. This Part suggests that business corporations may more readily provide certain mechanisms for shareholder voting while complex nonprofits may find remedies based on creating funds for particular activities more effective.

Crafting remedies begins with conceptualizing corporate independent expenditures as a transaction between shareholders, members, or contributors and the entity. The parties to an independent transaction expenditure are the members and the entity—which means, in operation, the organization managers. The elements of an independent expenditure transaction are the decision to become a member, the decision to use general treasury funds for an independent expenditure, and the decision of which candidate or candidates to support or

278. Paradoxically, perhaps, those seeking to develop a jurisprudence of participatory association that prevents compelled political speech might find some comfort in Chief Justice Roberts' claim in his concurring opinion that *stare decisis* is subject to analysis based on a balancing of interests. *Id.* at 920–21. The work of developing a jurisprudence of participatory association that does not result in compelled political speech would begin by considering the interests of members and shareholders and balancing their right of consent against the right of the entity to speak.

279. *Id.* at 911 (quoting *Bellotti*, 435 U.S. at 794).

oppose. The elements of the transaction can be understood as decision points offering members opportunities for consent. Nonparticipatory association results in compelled political speech because the decision to become a member provides no role in determining whether to make independent expenditures and which candidates to support or oppose. The task then becomes to specify the operational arrangements necessary for expressing consent.

This transactional perspective directs attention to two categories of possible remedies: a fund mechanism that permits members to allocate their contributions to activities other than independent expenditures and a mechanism for voting on corporate policies with respect to independent expenditures. Voting on policies means consenting to the uses of general treasury funds. Permitting members to allocate their contributions to particular activities means dividing the general treasury into funds, each of which is limited to use for particular activities.

The central concept in crafting remedies is the concept of a general treasury. The important questions relate to how general treasury funds are raised and how determinations are made to use them for independent expenditures. What are the sources of general treasury funds? Who decides whether to make independent expenditures? Who decides what candidates to support and which candidates to oppose? Who decides how much to spend? Who decides when to spend it?

The Court in *Citizens United* appears to assume that general treasury funds "belong" in some way to the organization. The question here is whether that is an adequate assumption in the context of political speech at the core of the First Amendment. This assumption fits comfortably with an entity theory of association, but it fits less comfortably with an aggregate theory.

How does an organization acquire general treasury funds? The funding element of the transaction is clearest in the case of entities that are funded primarily by contributions: contributors transfer money to the entity. It is far less clear in the case of a business corporation that raises funds through sales of stock, sales of corporate debt, and earnings from operations. The question then becomes whether shareholders, members, or contributors have continuing claims on the funds that they invested or contributed and what the nature and scope of those continuing claims is.

This question can be addressed in the context of political speech by examining reasonable expectations at the time of the transfer. For what purpose do people contribute to nonprofits or invest in taxable corporations? What are their reasonable expectations when they transfer funds to these various entities? How do these reasonable expectations relate to consent as an operational principle? As previously noted, *Citizens United* has redefined these expectations by removing the statutory prohibition on the use of general treasury funds for independent expenditures.[280]

280. This Article will not focus on the situation of those persons who became shareholders or members or contributors before the Court decided *Citizens United.* This is the kind of situation that is addressed in transition rules when Congress amends statutes. No such concept applies when the

Contributors' expectations are clearest in the case of a single-issue organization like *MCFL*.[281] The theory in *MCFL* is that contributors can be regarded as having consented when they make a contribution, because the organization's purpose, its political views, and its commitment to lawful political action are clear at the time the person makes a contribution.

By contrast, where the contributions are made to a complex nonprofit organization that pursues multiple purposes through various means, there is no basis for claims of consent at the time of making a contribution. The contributor cannot know how the contribution will be used and cannot know whether the organization will make independent expenditures or the nature of those expenditures. These complex organizations are engaged in substantial expressive activity, but they are also engaged in multiple forms of expressive activity as well as other types of activity. The contributor cannot know at the time of making a contribution or paying dues how their dues will be allocated among these various expressive purposes and whether any of their contributions will be used for political speech in the form of independent expenditures.

A business corporation offers an even more remote connection between purchasing stock or corporate debt and any basis for characterizing an investment activity as consent to expressive activity. At the same time, shareholders in business corporations have at least some voting rights with respect to policy issues, however attenuated these rights may be.

There are several mechanisms that corporations could use to ensure the consent of its members to any independent expenditures it makes. PACs provided an alternative to inferred consent. While *Citizens United* held that corporations cannot be required to finance independent expenditures through a PAC, a corporation could still choose to fund independent expenditures through a PAC, just as they fund candidate contributions through PACs. However, it seems highly unlikely that most corporations will choose to do this.

Alternatively, corporations could provide contributors with a mechanism to designate their contributions for one or more specific purposes. This is a common concept in nonprofit fundraising, particularly where very large contributions are made pursuant to a grant agreement with the organization. If the organization fails to use the contribution for the purpose specified in the grant agreement, the contributor can bring a breach of contract claim seeking return of the money contributed.[282]

Court strikes down statutes or redefines their meaning.

281. See discussion *infra* Part IV(A).

282. The issue of donor intent was at the center of the six-year litigation between Princeton University and the Robertson Family, which claimed that by operating the Woodrow Wilson School of Public and International Affairs as a center of scholarship the University failed to use the funds for training students for public service, particularly in foreign affairs. The parties settled the lawsuit at a cost to Princeton of some $90 million. *See* Ben Gose, *Princeton and Robertson Family Settle Titanic Donor-Intent Lawsuit,* THE CHRONICLE OF HIGHER EDUCATION, Dec. 10, 2008 (summarizing the litigation and the settlement). *See also* PRINCETON UNIVERSITY: ROBERTSON

Entering into grant agreements with each contributor would, of course, be a very cumbersome procedure in the case of smaller contributions. For these contributions, one workable mechanism would be to create a fund to be used solely for the exempt entity's exempt purpose, excluding independent expenditures. *Citizens United* did not, after all, compel organizations to use their general treasuries for independent expenditures. A fund that is not used for political speech is a far safer alternative under federal election law than would be a fund solely for political speech. This kind of a fund, the equivalent of an internal PAC, could quite easily be characterized as a political committee subject to reporting and disclosure requirements.[283]

A fund mechanism, however, would not solve the issue of consent in a business corporation. There is no structure that would permit a designation of the purchase price for a particular use at the time of a stock purchase or the purchase of corporate debt. Even if such a mechanism were to be developed, it is far from clear that corporate earnings from its business activities could reasonably be allocated to a particular shareholder's investment. Corporate earnings do not belong to shareholders. At the same time, using corporate earnings for independent expenditures based solely on the political preference of organization managers raises significant questions about corporate operations and the duties of corporate managers. Creating a fund mechanism in business corporations would depend on defining a range of new rights that appear inconsistent with corporate theory and that would not, in any case, offer shareholders much opportunity for meaningful consent. In the case of nonprofit organizations, the fund mechanism permits a contributor to opt out of supporting independent expenditures that the managers decide to make, but it does not permit members to influence the organization's policy of making independent expenditures rather than using all of the organization's resources for exempt activities. For members who wish to influence organizational policy or to have a voice with respect to which independent expenditures that an organization should make, a fund option is less useful than is a mechanism for voting on organizational policy.

The second type of mechanism is based on voting on organization policies with respect to independent expenditures. Internet voting could offer a workable method of determining shareholder preferences with respect to the use of general treasury funds for independent expenditures. Thinking of consent in transactional terms and identifying the elements of consent helps structure this kind of mechanism. The elements of an independent expenditure transaction are whether the organization should use general treasury funds for independent expenditures, how much should the organization commit to this purpose, what candidates should be supported or opposed and to what extent. Each of these

LAWSUIT, www.princeton.edu/robertson/about (last visited Apr. 4, 2011) (detailing the chronology of the litigation, with links to relevant documents, including the Settlement Agreement).

283. *See, e.g.*, 26 U.S.C. § 527(f) (2006) (covering what might be described as "embedded PACs").

elements is a potential question that could be submitted to a vote of members or shareholders. Some decisions about which candidates to support or oppose or how much money to spend raise issues of the appropriate level of specificity in these questions to members or shareholders. If, for example, a candidate surges toward the end of a campaign, how can an organization preserve the flexibility to spend more? In what situations would it want to spend more? In other words, how specific does member consent have to be? Understanding this element of consent requires taking account of the dynamics of election campaigns.

Thinking about an independent expenditure transaction as a transaction beginning with shareholders, members, or contributors suggests that compulsion and consent are complex concepts that are not easily addressed by any one remedy. It also highlights the nature of the multiple forms of compulsion that arise under an entity theory of association in which managers are accorded unfettered discretion. Nonprofit organizations, whether simple single issue organizations or complex multipurpose organizations, would have to establish procedures that do not exist with respect to other aspects of organizational governance because few exempt entities have members with any form of voting rights. Similarly, it is far from clear that the mechanisms currently available to shareholders in business corporations, who vote for members of the board of directors but do not vote on discrete operational decisions, would be effective in election campaigns taking place in a short period of time with a defined termination date, which is Election Day.

In addition to the problem of compelled speech, which is the focus of this Article, it is worthwhile to refer very briefly to the collateral damage that is likely to arise from *Citizens United.* The greatest concern for nonprofit organizations should be the risk of diversion of resources from exempt activities to political speech.[284] The only reason for operating as an exempt entity is to perform activities consistent with exempt status. One form of diversion arises from the substitution of managers' agendas for the agendas of the organization.[285] This risk is acute in nonprofit corporations because there are very limited mechanisms for holding managers accountable. Indeed, it may be even greater in nonprofit corporations than in taxable business corporations

284. *See generally* Frances R. Hill, *Targeting Exemption for Charitable Efficiency: Designing a Nondiversion Constraint,* 56 SMU L. REV. 675 (2003) (analyzing diversion in terms of activities unrelated to exempt purposes even when such activities do not provide impermissible private benefits to organization managers and other insiders).

285. *See, e.g.*, Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax,* 91 YALE L.J. 54 (1981); Henry B. Hansmann, *Reforming Nonprofit Corporation Law,* 129 U. PA. L. REV. 497 (1981); Henry B. Hansmann, *The Role of Nonprofit Enterprise,* 89 YALE L.J. 835 (1980). Professor Henry Hansmann's concept of a "nondiversion constraint" is based on the need to create sufficient confidence among contributors that exempt entities will use their contributions or dues for exempt purposes that they will continue to support organizations in which they play no role in governance. The "nondiversion constraint" is based on ensuring that organization managers will not use organization funds for personal benefit.

because nonprofit organizations so rarely have members with the right to vote on organizational policies or for the members of the board of directors. Problems of diversion will become more serious if the appealing prospect of general treasuries controlled by organization managers attracts greater rent-seeking demands by officeholders. The majority in *Citizens United* largely ignored rent-seeking and did not link it to diversion of organizational resources.[286]

The two forms of operational responses discussed in this section—creating funds within the general treasury and voting on policies relating to making independent expenditures—offer some concrete expression of consent as a constitutional principle. Neither mechanism resolves the difficult issue of balancing the rights of members with the rights of the organizations, and neither solves the issue of the role of managers and the roles of members in defining this balance.

VII.
CONCLUSION

Without considering consent mechanisms operating inside organizations, ordinary people will be deprived of their rights under the Association Clause of the First Amendment to voluntarily band together in order to amplify their voices during election campaigns. The Association Clause does not give each individual absolute rights, but it does give some right to participate without compelled speech. This is the right that *Citizens United* makes far more problematic.

While the operational remedies discussed here are partial responses that do not restore the rights of members newly burdened by *Citizens United,* this does not mean that they are unimportant. Nevertheless, the constitutional stakes require consideration of their limits. These mechanisms will not resolve the larger problem of entrenching managerial power over general treasuries that can now be used for political speech at the core of the First Amendment. They do not safeguard the role of ordinary people as the arbiters of system legitimacy. These issues require a jurisprudence of association that takes account of both entities and their members and that treats consent as an important constitutional principle in the area of political speech. Ascribing to ordinary people, including members of expressive associations, a role only as listeners, and failing to recognize their role as speakers, is corrosive of the principle of consent that lies at the heart of the Constitution. The distinction between speakers and listeners is a far more serious matter than the distinctions among entities that the Court condemned in

286. *Citizens United* discounts the constitutional significance of corruption apart from the *quid pro quo* corruption that the Court appears to equate with bribery. Questions of which party takes the initiative in transactions amount to *quid pro quo* corruption cannot be answered in the abstract, but they should at least consider the possibility of extortion as well as of bribery. The current law of coordination is unlikely to interdict most of these transactions and is especially unlikely to interdict them during the campaign. *See* 11 C.F.R §§ 109.20–.22 (2010) (providing rules relating to the coordination of expenditures).

Citizens United. Whether or not *Citizens United* is overruled by a different court in a different time, these larger issues of legitimate government require a much more participatory jurisprudence of association so that ordinary people can claim the rights of the Association Clause of the First Amendment, and thereby reclaim both their rights under the First Amendment's speech clause and the operational significance of consent as a constitutional principle.