Articles

Corporate Participation in the Democratic Process in the United States and Germany

By Sabine Weber[*]

A. Introduction

There are many factors that influence political elections, among them, money may be the most important one. The starting point of this Article is the judgment of the U.S. Supreme Court in *Citizens United v. Federal Election Commission*.[1] After this decision is described, the approaches of the United States and Germany in regulating political speech by campaign finance laws will be discussed, focusing on the role of companies. This Article will outline the status quo of federal American campaign finance laws (Part B). Regarding the German approach, this Article will outline the *Parteiengesetz* (Political Parties Act, hereinafter: Part G) and decisions of the *Bundesverfassungsgericht* (Constitutional Court, hereinafter: BVerfG) (Part C). European regulations[2] are not the subject of this Article. Both approaches will be compared and future prospects will be given as a conclusion (Part D).

B. The American Approach

The question of regulating political speech is governed by the First Amendment of the U.S. Constitution, which reads, in the pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." The First Amendment protects political speech.[3] Supporting

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[1] Citizens United v. FEC, 130 S. Ct. 876 (2010).

[2] *See* Regulation 2004/2003; of the European Parliament and of the Council of 4 November 2003 on the Regulations Governing Political Parties at the European Level and the Rules Regarding Their Funding, 2003 O.J. (L 297) 1; Wolfgang W. Mickel & Jan Bergmann, *Regelungen für die politischen Parteien*, *in* HANDLEXIKON DER EUROPÄISCHEN UNION (3d ed. 2005); Otmar Philipp, *Statut und Finanzierung europäischer politischer Parteien*, *in* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 643 (2003); Hans Herbert von Arnim, *Die neue EU-Parteienfinanzierung,* 2005 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 247–252.

[3] Citizens United v. FEC, 130 S. Ct. 876, 892 (2010); Eu v. San Francisco Cnty. Democratic Cent. Comm. 489 U.S. 214, 223 (1989); NAACP v. Button, 371 U.S. 415, at 428–45 (1963); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 984 (15th ed. 2004).

https://doi.org/10.1017/S2071832200020472 Published online by Cambridge University Press

a candidate by means of advertising or contributing money to further a political idea is one form of political speech. Campaign spending has a strong expression component. Dependence of a communication on money does not affect the communication's character as protected speech.[4] Campaign finance laws contain provisions that limit donation amounts or ban certain speakers from participating in those activities. Because these laws restrict freedom of expression, their constitutionality is open to question.

Campaign finance laws distinguish between express advocacy, e.g., express promotion of a specific candidate, and general political statements. A corporation may expressly advocate a candidate only if the candidate is within a restricted class (Chief Executive Officer, senior management, shareholders); general political statements are admitted as long as no specific candidate is promoted and these statements are not coordinated with the election campaign.[5] Another distinction is the one between hard and soft money. Soft money is not monitored by the Federal Election Commission (hereinafter: FEC),[6] whereas hard money is. Soft money is a contribution made to a party as a whole. It can be used for general party work, even for motivation and acquisition of voters. However, it may not be used to support a specific candidate. Examples of soft money are individual contributions in excess of the statutory dollar limits as well as all corporate and labor organization contributions.[7]

The American election process is hugely influenced by the FEC. In 1975 Congress established the FEC as an independent regulatory agency to administer and enforce the Federal Election Campaign Act (hereinafter: FECA)—the statute that governs the financing of federal elections. The duties of the FEC are to disclose campaign finance information, to enforce the law, and to oversee the public funding of Presidential elections. It publishes campaign finance laws and investigates alleged violations of those laws.[8] Although the FEC is said to be an independent agency, the commissioners are appointed by the President and confirmed by the Senate.[9]

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[4] *Cf.* SULLIVAN & GUNTHER, *supra* note 3, at 1424–25; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1004–21 (1976).

[5] Andrew Hammel, *Parteiensponsoring in den USA*, *in* SPONSORING—EIN NEUER KÖNIGSWEG DER PARTEIENFINANZIERUNG? 57, 60 (Martin Morlok et al. eds., 2006).

[6] Citizens United v. FEC, 130 S. Ct. 876, 940 (2010) (Stevens, J., dissenting); DIETMAR BETHGE, PARTEIENRECHT IN DEN VEREINIGTEN STAATEN VON AMERIKA 259 (2003); JOSEPH E. CANTOR & L. PAIGE WHITAKER, CRS REPORT FOR CONGRESS, BIPARTISAN CAMPAIGN REFORM ACT OF 2002: SUMMARY AND COMPARISON WITH PREVIOUS LAW 1 (2004), *available at* http://fpc.state.gov/documents/organization/41338.pdf.

[7] *Cf*. BETHGE, *supra* note 6, at 259.

[8] *Id*. at 252; Hammel, *supra* note 5, at 60.

[9] *Citizens United*, 130 S. Ct. at 895; List of Current Federal Election Commission Commissioners, FEDERAL ELECTION COMMISSION, http://www.fec.gov/members/members.shtml (last visited 14 Mar. 2012).

https://doi.org/10.1017/S2071832200020472 Published online by Cambridge University Press

I. Citizens United v. Federal Election Commission

In the 5-4 *Citizens United* decision, handed down on 21 January 2010, the Court held that corporate funding of independent political broadcasts in candidate elections, paid for by general funds, cannot be banned under the First Amendment.

The case involved a non-profit organization, Citizens United, which had released a ninety-minute documentary about then-Presidential candidate Senator Hillary Clinton. It contained critical voices highlighting her unfitness for the Presidency.[10] The material shows interviews with famous political commentators, although none expressly advocate the defeat of Senator Clinton. It was financed by Citizens United's general funds; ninety-nine percent of the amount of money used had been contributed by individuals, the remaining one percent by for-profit corporations.[11]

Citizens United wanted to make the material available through video-on-demand. Two ads were produced to promote the movie. To comply with existing provisions of the Bipartisan Campaign Reform Act of 2002,[12] Citizens United was required to restrict the access to the material in each state thirty days prior to the state's Democratic primary.[13] It would also have to show a disclaimer on all ads, stating that Citizens United was solely responsible for all content and that no candidate had approved the ad.[14] Citizens United would have had to file a report with the FEC disclosing the name of any contributor who had given more than $1000 to fund the material.[15] It brought its action before the U.S. District Court for the District of Columbia, seeking declaratory and injunctive relief against the FEC.[16] It argued that:

[10] *See* DVD: Hillary: The Movie (Citizens United 2008) (information available at http://www.hillarythemovie.com).

[11] Aaron Harmon, *Hillary: The Movie, Corporate Free Speech or Campaign Finance Corruption?*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 331, 334 (2009).

[12] Commonly known as the McCain-Feingold Act. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.).

[13] Harmon, *supra* note 11, at 332; *cf.* 2 U.S.C. § 434(f)(3)(A)(II)(bb).

[14] Harmon, *supra* note 11, at 332; *cf.* 2 U.S.C. § 441D(d)(2).

[15] Harmon, *supra* note 11, at 332; *cf.* 2 U.S.C. § 434(f)(2).

[16] Citizens United v. FEC, 530 F. Supp. 2d 274, 275 (D.D.C. 2008).

> (1) 2 U.S.C. (United States Code) § 441b[17] was unconstitutional as applied to the material; and
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> (2) The disclaimer and disclosure requirements (§§ 201, 311) of the BCRA were unconstitutional as applied to the material and the ads.

The court denied the relief requested. In the meantime, Barack Obama secured the Presidential nomination. The case reached the Supreme Court on appeal. The Court invalidated § 441b on its face.[18] The disclaimer and disclosure provisions were sustained.[19]

1. Corporate Independent Expenditure Bans

Until recently, 2 U.S.C. § 441b prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech defined as "electioneering communication" or for speech expressly advocating the election or defeat of a candidate.[20] The term "corporate independent expenditures" describes expenditures undertaken by a corporation without the cooperation or control of the candidate.[21] They are a kind of soft money. According to 2 U.S.C. § 434(f)(3)(A), an electioneering communication must refer to a clearly identified candidate for federal office, be published within sixty days of the election, and be targeted to the relevant electorate. The FEC's regulations further define it as a communication that is publicly distributed, meaning that it can be received by 50,000 or more persons in a State where a primary election is being held within thirty days.[22] The Court held that the documentary of Citizens United served as an electioneering communication. It stated that it was an appeal to vote against Senator Clinton and thereby served as a functional equivalent of express advocacy under § 441b(b)(2). The movie as well as the ads would have been covered by the ban, thus subjecting Citizens United to civil and criminal penalties under § 437g.

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[17] The provision prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate.

[18] *See* Citizens United v. FEC, 130 S. Ct. 876, 919 (2010) (seeing no problem as there is no difference in substance) (Roberts, C.J., concurring). *But see id.* at 932–36 (Stevens, J., dissenting).

[19] Two major procedural issues, i.e., whether a facial challenge was appropriate and the question of *stare decisis*, will not be discussed here.

[20] This is also stated in Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.), which amended the FECA codified in 2 U.S.C. §§ 431–457.

[21] Stephen M. Hoersting & Bradley A. Smith, *The Caperton Caper and the Kennedy Conundrum*, 2009 CATO SUP. CT. REV. 319, 323 (2009); Wright, *supra* note 4, at 1002.

[22] 11 C.F.R. § 1 (1980); 11 C.F.R.§§ 100.29 (a)(2), (b)(3)(ii) (2006).

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The Court tried to solve the case on narrow grounds, but found that it could not.[23] Therefore, it had to consider the implications of the First Amendment. Precedent reveals that the First Amendment stands against attempts to disfavor certain subjects or viewpoints. The government may not identify a preferred speaker; by adopting restrictions distinguishing between different speakers, the government may commit a constitutional wrong.[24] The First Amendment protects speech and speaker, as well as the ideas that flow from each.[25] It applies to corporations.[26]

The question before the Court was whether the government violated the First Amendment, i.e., whether the ban survived the applicable test.

The first issue was whether § 441b constituted a governmental intervention into the protected sphere of the First Amendment. The Court held that speech is an essential element of democracy and a precondition to enlightened self-government of "we the people."[27] The provision was enacted by the government and enforced by the FEC. The Court further explained that campaign finance laws are very complex.[28] They are backed by civil and criminal sanctions. Those regulations must not amount to a prior restraint on political speech. The speakers are not compelled by law to seek advice from the FEC before they speak.[29] However, a speaker who wants to avoid sanctions should ask the FEC for a prior permission in order to speak.[30] This is what Citizens United did: Due to the fear of being confronted with sanctions, it refrained from showing the material through video-on-demand during the Democratic primary season.

The FEC has the power to license and enforce campaign finance laws—laws that restrict First Amendment rights. Many persons and institutions, therefore, prefer to ask the FEC prior to speaking in order to prevent litigation. This conduct harms those persons as well

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[23] Citizens United v. FEC, 130 S. Ct. 876, 892, 894 (2010). *But see id.* at 931–38 (Stevens, J., dissenting).

[24] *Cf. id.* at 899; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978), *reh'g denied*, Flynn v. Bauman, 438 U.S. 907 (1978); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2003).

[25] *Citizens United*,130 S. Ct. at 899.

[26] *Citizens United*, 130 S. Ct. at 900; *see also id.* at 925 (Scalia, J., concurring); *Bellotti,* 435 U.S. at 784; Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986).

[27] *Citizens United*, 130 S. Ct. at 898.

[28] *Id.* at 895–96.

[29] *Id.* at 895; *cf*. Near v. Minnesota (*ex rel.* Olson), 283 U.S. 697, 712–20 (1931).

[30] *Citizens United*, 130 S. Ct. at 895–96; *cf*. 2 U.S.C. § 437f (1986); 11 C.F.R. § 112.2 (1980).

as society as a whole. Society is deprived of a free marketplace of ideas, since the FEC's censorship is often final.[31] Additionally, a restriction on the amount of money a person or group spends on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of exploration as well as the size of the audience reached.[32] Considering these circumstances, the restrictions serve as an equivalent to a prior restraint.[33] According to the majority opinion, § 441b is an unprecedented government intervention into the realm of speech, a ban backed by sanctions.[34] Although other options of participating in the democratic process are still available to corporations (such as the formation of a political action committee, genuine issue advertising, advertising via internet, telephone or print media),[35] the Court had to consider the constitutionality of this intervention. It was necessary to invoke the Court's precedent.[36]

The issue was first addressed in *Buckley v. Valeo*. *Buckley* involved a challenge to two campaign-finance restrictions: An independent expenditure ban applying to individuals, corporations and unions, and a limit on contributions dealing with express advocacy.[37] The Court found no governmental interest justifying a restraint on expenditure bans, and thus ruled them unconstitutional. However, it decided differently regarding the limit on direct contributions to a candidate. The Court held that direct contributions posed a serious risk of *quid pro quo* corruption. This kind of corruption may be described as "dollars for political favors."[38] In the Court's opinion expenditures did not pose this risk of corruption.[39] The decision in *First National Bank of Boston v. Bellotti*[40] supported this

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[31] *Citizens United*, 130 S. Ct. at 896; Virginia v. Hicks, 539 U.S. 113, 119 (2003).

[32] Buckley v. Valeo, 424 U.S. 1, 19 (1976). Mr. Chief Justice Burger joined in the opinion in part, dissented in part, and filed an opinion. Mr. Justice White joined in the opinion in part, dissented in part, and filed an opinion. Mr. Justice Marshall joined in the opinion in part, dissented in part, and filed an opinion. Mr. Justice Rehnquist joined in the opinion in part, dissented in part, and filed an opinion. Mr. Justice Blackmun joined in the opinion in part, dissented in part, and filed an opinion.

[33] *Citizens United*, 130 S. Ct. at 895.

[34] *Id.* at 896–97.

[35] *Id.* at 942–45 (Stevens, J., concurring in part and dissenting in part); *cf*. 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i), 441b(b); 11 C.F.R. §§ 114.1–.15.

[36] *Citizens United*, 130 S. Ct. at 939, 942 (Stevens, J., dissenting).

[37] *Buckley*, 424 U.S. at 23, 29, 45.

[38] *Citizens United*, 130 S. Ct. at 910.

[39] *Buckley*, 424 U.S. at 44; *Citizens United*, 130 S. Ct. at 899.

https://doi.org/10.1017/S2071832200020472 Published online by Cambridge University Press

result regarding corporate independent expenditures. The Court found that the government cannot restrict political speech based on the corporate identity of the speaker, i.e., the donor.[41] However, one has to keep in mind that both decisions relied more on the public's right to know than on the corporation's right to speak.[42]

Austin v. Michigan Chamber of Commerce reversed the position taken in *Buckley* and *Bellotti*.[43] Michigan state law had prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation constituted a felony.[44] The Court upheld this restriction. It had identified a new governmental interest: An anti-distortion interest.[45] The provisions that were upheld only concerned express advocacy. Consequently, corporations continued to make independent expenditures, but avoided magic words like "vote for," "support," "defeat," etc. This lead to the enactment of the BCRA.[46] The BCRA was challenged in *McConnell v. FEC*, but was held to be facially constitutional. This decision found a valid governmental interest in avoiding corruption of the political process by corporations. It was held that a ban on independent expenditures was constitutional with regard to express advocacy and its functional equivalents.[47]

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[40] National banking associations and business corporations brought action to challenge the constitutionality of a Massachusetts criminal statute that prohibited business corporations from making contributions or expenditures to influence the outcome of a vote on any question submitted to voters other than questions materially affecting the property, business or assets of the corporation. Mr. Chief Justice Burger filed a concurring opinion. Mr. Justice White filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined. Mr. Justice Rehnquist filed a dissenting opinion.

[41] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784–86 (1978), *reh'g denied*, Flynn v. Bauman, 438 U.S. 907 (1978).

[42] STEVEN L. EMANUEL, CONSTITUTIONAL LAW 571 (19th ed. 2001).

[43] *Citizens United*, 130 S. Ct. at 958 (Stevens, J., dissenting).

[44] *Id.* at 903 (majority opinion).

[45] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 695 (1990); Justice Brennan filed a concurring opinion. Justice Stevens filed a concurring opinion. Justice Scalia filed a dissenting opinion. Justice Kennedy filed a dissenting opinion in which Justice Scalia and Justice O'Connor joined; *Citizens United*, 130 S. Ct. at 903.

[46] *Citizens United*, 130 S. Ct. at 958 (Stevens, J., dissenting); Harmon, *supra* note 11, at 337–38.

[47] McConnell v. FEC, 540 U.S. 93, 206 (2003), Justice Scalia concurred in part, concurred in the judgment in part, dissented in part, and filed an opinion. Justice Thomas concurred in part, concurred in the result in part, concurred in the judgment in part, dissented in part, and filed an opinion in which Justice Scalia joined in part. Justice Kennedy concurred in the judgment in part, dissented in part, and filed an opinion in which Chief Justice Rehnquist joined and Justices Scalia and Thomas joined in part. Chief Justice Rehnquist dissented in part and filed an opinion in which Justices Scalia and Kennedy joined.

Consequently, the Court was confronted with a conflicting line of precedent in *Citizens United*. It had to consider whether the governmental intervention into the protected sphere of the First Amendment survived the applicable test. Because § 441b served as an equivalent to a prior restraint on speech, the Court applied a strict scrutiny test. It required the government to prove that the restriction furthers a compelling governmental interest and is narrowly tailored to achieve that interest.[48]

The material would only be available through video-on-demand, meaning viewers had to decisively choose the program (in contrast to campaign ads that are shown through broadcast media). Yet, the Court found that the determination of how many people are able to see the movie has to consider the number of cable subscribers—34.5 million people in this case. Consequently, more than 50,000 individuals would have been able to see the material, and it therefore qualified as electioneering communication.[49]

Three governmental interests were considered. Firstly, in *Austin* the Court had recognized an anti-distortion interest. Yet, the government hardly relied on this interest in *Citizens United*. Still the Court demonstrated that this interest could not support § 441b.[50]

The First Amendment permits rich individuals to spend money on independent expenditures for speech defined as electioneering communication or for speech expressly advocating the election or defeat of a candidate.[51] The Court stated that the anti-distortion rationale would prevent corporations from engaging in the same sort of speech activity that rich individuals are permitted to engage in.[52] Corporations may possess valuable expertise, and may be best-equipped to point out errors and fallacies in speech of all sorts, including that of candidates as well as elected officials.[53] *Austin* interfered with

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[48] *Citizens United*, 130 S. Ct. at 898; FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007); William J. Rinner, *Maximizing Participation through Campaign Finance Regulation: A Cap and Trade Mechanism for Political Money*, 119 YALE L.J. 1060, 1070 (2010); SULLIVAN & GUNTHER, *supra* note 3, at 1427–28.

[49] *Citizens United*, 130 S. Ct. at 888–89.

[50] *Citizens United*, 130 S. Ct. at 904–908; this interest contradicted the holding of Buckley v. Valeo, 424 U.S. 1 (1976), and therefore had to be considered, *see Citizens United*, 130 S. Ct. at 904.

[51] *Citizens United*, 130 S. Ct. at 908; Laurence Tribe, *Laurence Tribe on Citizens United v. Federal Election Commission*, HARVARD LAW SCHOOL (25 Jan. 2010), http://www.law.harvard.edu/news/spotlight/constitutional-law/related/tribe.on.citizens.united.html.

[52] *Buckley*, 424 U.S. at 48–49; *Citizens United*, 130 S. Ct. at 904; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978), *reh'g denied*, Flynn v. Bauman, 438 U.S. 907 (1978); United States v. Cong. of Indus. Orgs., 335 U.S. 106, 154 (1948); United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am., 352 U.S. 567, 597 (1957).

[53] *Citizens United*, 130 S. Ct. at 912; *but see* FEC v. Beaumont, 539 U.S. 146, 162 (2003).

the free marketplace of ideas.[54] Hence, the Court found the government has no compelling interest in banning this kind of speech. What the majority opinion did not elaborate on is the fact that a corporation is able to raise more money to fund ads and broadcasts than the majority of individuals. Justice Stevens alone notices that the psychological impact of corporate prime time ads may lead to a loss of faith among individuals and that corporate prime time ads—in comparison to corporate support—can influence politics.[55]

The real question here is: Can a corporation be treated like an individual? Justice Stevens opposed the statement that there should not be an identity-based distinction between different kinds of speakers in his dissent.[56] A corporation is a legal entity. He observed that although corporations make huge contributions to society, they are not members of it.[57] Corporations have no feelings, no beliefs, no thoughts, and no desires. They may be controlled by non-residents. Their interests may collide with those of their shareholders or eligible voters.[58] Corporations have special features like limited liability, perpetual life, and separation of ownership and control. These attributes allow them to spend huge sums of general treasury funds on campaign messages that have little or no correlation with the beliefs of individuals.[59] Further, limits only exist for communication through the corporate form—the individuals behind a corporation are not deprived of any right to participate in the election process.[60]

On the other hand, corporations must engage the political process in instrumental terms if they are to maximize shareholder value.[61] In an era in which the media is vital to winning an election, the sole reason for corporations to make independent expenditures must be to gain influence over the candidate. A former Senator conceded that corporations are

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54 *Citizens United*, 130 S. Ct. at 973; N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008).

55 *Cf. Citizens United*, 130 S. Ct. at 974, 976 (Stevens, J., dissenting); *see also* GODFREY HODGSON, THE MYTH OF AMERICAN EXCEPTIONALISM 144–50 (2009).

56 *Citizens United*, 130 S. Ct. at 930 (Stevens, J., dissenting); Justices Ginsburg, Breyer, and Sotomayor joined this dissent, concurring in part and dissenting in part.

57 *Citizens United*, 130 S. Ct. at 930, 972 (Stevens, J., dissenting).

58 *Cf.* Lucian Bebchuk, *Bebchuk: Corporate Political Speech Is Bad for Shareholders*, HARVARD LAW SCHOOL (1 Mar. 2010), http://www.law.harvard.edu/news/2010/03/01_bebchuk.html.

59 *Citizens United*, 130 S. Ct. at 956 (Stevens, J., dissenting).

60 *Id.* at 972.

61 *Id.* at 965, 973.

successful at that.[62] Due to the fact that corporations face a ban on direct contributions, independent expenditures are a way to circumvent those limitations. Moreover, independent expenditures can have a far greater influence than contributions.[63] In *Caperton v. A.T. Massay Coal Co.*, a local businessman contributed his statutory maximum of $1000 for the election of a favorable judge. In addition, he spent $2.5 million for a § 527 corporation[64] that ran ads targeting the opponent. He also spent $500,000 on independent expenditures.[65] Thus, 99.97% of his contribution took the form of independent expenditures. The desired candidate won the election. Although the holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned, it showed that limits on hard money lead to circumvention and even greater corporate influence.

Justice Stevens also highlights many existing distinctions based on the identity of the speaker. Although protected by the First Amendment, corporate speech is furthest from the core of political speech, since its speech and association interests are derived largely from those of their members and of the public in receiving information.[66] It should be remembered that the individuals behind the legal entity retain their First Amendment rights and can privately support certain political ideas. The Government also restricts speech based on identity in other cases.[67] Moreover, in *FEC v. Massachusetts Citizens for Life, Inc.*[68] and *McConnell*[69] the court had held that § 441b was unconstitutional as applied to non-profit corporations that were founded only to promote political ideas, did not engage in business activities and did not accept contributions from for-profit corporations or labor unions. Justice Stevens also argues that the fact that corporations are not allowed

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62 *Id.* at 966.

63 *Id.* at 966; *cf*. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

64 26 U.S.C. § 527(h) (2003).

65 *Caperton*, 129 S. Ct. at 2257; the Court found that under circumstances where defendant had helped the judge to be elected, the judge has a duty to recuse himself from a case as a matter of due process. Justice Kennedy filed the opinion, joined by Justices Stevens, Souter, Ginsburg and Breyer. Justice Roberts dissented joined by Justices Scalia, Thomas and Alito.

66 FEC v. Beaumont, 539 U.S. 146, 161 (2003).

67 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (students); Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 129 (1979) (prisoners); members of the Armed Forces: Parker v. Levy, 417 U.S. 733, 758 (1974) (members of the Armed Forces).

68 FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, at 263–65 (1986); Justice O'Connor filed an opinion concurring in part and concurring in the judgment. Chief Justice Rehnquist filed an opinion concurring in part and dissenting in part, in which Justice White, Justice Blackmun, and Justice Stevens joined.

69 McConnell v. FEC, 540 U.S. 93, 209 (2003).

to vote would pose a problem to the majority opinion, as voting is a kind of political speech. He concludes that government interests are of the higher order and that an identity-based distinction is admissible.[70] This, he argues, is in accordance with the history of the First Amendment.[71]

Secondly, the government expressly asserted an anti-corruption interest.[72] The Court, in response, underlines that by definition independent expenditures do not have a potential to cause corruption, as there is no prearrangement with the candidate.[73] Consequently, there is no compelling governmental interest in this regard.[74] However, as Justice Stevens again correctly notes, the Court only dealt with one kind of corruption, *quid pro quo* corruption.[75] There are other kinds of corruption that have potential to influence politics.[76] Even in *Buckley* and *Bellotti*, it was recognized that the government has an important interest in preventing corruption through the creation of political debts.[77]

Thirdly, the government raised a shareholder-protection interest.[78] The Court rejected this interest by stating that it should be resolved by corporate law.[79] As Justice Stevens noted, unions are also affected by the judgment in *Citizens United*. Corporate law will not help them. "Corporate democracy," as the Court calls it, has so far failed to provide a mechanism for dissenting shareholders. The only mechanism available is a derivate suit for breach of fiduciary duty. In practice, this right is nearly nonexistent.[80]

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[70] Citizens United v. FEC, 130 S. Ct. 876, 947 (2010) (Stevens, J., dissenting).

[71] *Id.* at 948–60.

[72] *Id.* at 903, 908–11.

[73] Buckley v. Valeo, 424 U.S. 1, 47 (1976); *Citizens United*, 130 S. Ct. at 910. *But cf. id.* at 966 (Stevens, J., dissenting).

[74] *Citizens United*, 130 S. Ct. at 908.

[75] *Id.* at 961 (Stevens, J., dissenting).

[76] *See also,* Lawrence Lessig, *Democracy After Citizens United*, BOSTON REVIEW (Sept./Oct. 2010), http://www.bostonreview.net/BR35.5/lessig.php.

[77] *Buckley*, 424 U.S. at 45 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 (1978), *reh'g denied*, Flynn v. Bauman, 438 U.S. 907 (1978); *cf*. Lessig, *supra* note 76.

[78] *Citizens United*, 130 S. Ct. at 911.

[79] *Id.* at 911.

[80] *Id*. at 978 (Stevens, J., dissenting).

https://doi.org/10.1017/S2071832200020472 Published online by Cambridge University Press

The Court still invalidated all interests. Hence, § 441b did not survive the strict scrutiny test. In conclusion, the Court held:

> (1) *Austin* is overruled; the Supreme Court returns to the principle established in *Buckley* and *Bellotti* that the government may not ban political speech due to the speaker's identity;
>
> (2) This invalidates 2 U.S.C. § 441b and BCRA section 203; they cannot be applied to the documentary produced by Citizens United;
>
> (3) *McConnell* is overruled in part.

2. Disclaimer and Disclosure Requirements

The FECA requires candidate committees, party committees and Political Action Committees (PACs) to file reports disclosing the money they raise and spend.[81] Citizens United challenged the disclaimer and disclosure requirements of BCRA §§ 201, 311 as applied to its material. The Court held by an 8-1 majority that the Government may regulate political speech through such requirements.[82] The two provisions that were challenged had been held to be facially constitutional before.[83]

Firstly, according to § 311 BCRA, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that this person was responsible for the content.[84] This statement must be spoken in a clear manner, displayed on the screen in a clearly readable way for at least four seconds, it must contain a statement that the communication is not authorized by any candidate or his/her committee, and state the name and address of the funder.[85] The Court held that the ads of Citizens United fall within the scope of § 311 BCRA and that the requirements are constitutional as applied to them. They provide the voter with information needed to insure an informed vote.[86]

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[81] *The FEC and the Federal Campaign Finance Law*, FEDERAL ELECTION COMMISSION (Feb. 2011), http://www.fec.gov/pages/brochures/fecfeca.shtml#Campaign_Finance_Law.

[82] *Citizens United*, 130 S. Ct. at 980 (Thomas, J., dissenting alone).

[83] *Id.* at 914 (majority opinion); *cf.* McConnell v. FEC, 540 U.S. 93, 196–203, 230–31 (2003).

[84] *Cf.* 2 U.S.C. § 441d(d)(2) (2002).

[85] *Id.* § 441d(a)(3).

[86] *Citizens United*, 130 S. Ct. at 914.

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Secondly, according to § 201 BCRA, any person spending more than $10,000 on electioneering communication within one calendar year must file a disclosure statement with the FEC, identifying the person making the expenditure, the amount thereof and the election to which it was directed.[87] The Court stated that § 201 may only be unconstitutional as applied to a certain case if there was a reasonable probability that the group's members would face threats, harassment or reprisals if their names were disclosed.[88] Justice Thomas fears that upholding these provisions may lead to an industry intimidating voters due to their exercise of First Amendment rights.[89] Citizens United, however, did not present such evidence.

While such disclaimer and disclosure provisions burden political speech, they do not forbid it.[90] Therefore, only the exacting scrutiny test would apply, and the Government was required to prove a substantial relation between the disclosure requirement and a sufficiently important governmental interest.[91] A sufficient governmental interest would be to provide the electorate with information about the sources of election-related spending and help citizens to make informed decisions in the political marketplace.[92] Prompt disclosure of the information provides both citizens and, in the case of corporations, shareholders with the information needed in order to hold corporations and elected officials accountable. These requirements would ensure that large contributions become public. Voters would therefore know from what source the candidate got his money and from which source he/she may be influenced. Therefore, the Court held that disclaimer and disclosure provisions were constitutional as applied to Citizens United's ads.[93]

II. New Developments

In a recent decision handed down on 30 December 2011 the Supreme Court of the State of Montana had to elaborate on the question whether Montana State Law prohibiting a

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[87] *Cf.* 2 U.S.C. § 434(f)(1), (2) (2007).

[88] *Citizens United*, 130 S. Ct. at 916; *McConnell*, 540 U.S. at 198.

[89] *Citizens United*, 130 S. Ct. at 980–82 (Thomas, J., citing Californian precedent); *cf.* Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 97–100 (2009).

[90] *Citizens United*, 130 S. Ct. at 914.

[91] *Id.* at 914; *cf.* Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976).

[92] *Citizens United*, 130 S. Ct. at 914.

[93] *Id.* at 916.

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corporation from making "a contribution or an expenditure in connection with a candidate"[94] violated the principles that were erected in *Citizens United v. FEC*.[95] Surprisingly, the court held with a 5-2 majority that the answer was no.[96] Trying to distinguish this case from *Citizens United*, the Court stated that *Citizens United v. FEC* did not state that restrictions upon speech are per se unlawful, but rather may be upheld if the government demonstrates a sufficiently strong interest.[97] The majority opinion reasoned that the State of Montana had a compelling interest in banning corporate expenditures when enacting the law in 1912. It referred to historical economic reasons, especially rough contests for political and economic domination primarily in the mining center of Butte.[98] The Court opined that Montana still retained this interest.[99] This decision is the first of its kind upholding a ban on corporate expenditures after *Citizens United v. FEC*. The Supreme Court has stayed the proceedings. This might be an indication that it will grant certiorari. Time will show whether a ban on corporate expenditures can survive just because of the singularities of a certain state in the United States.

III. Political Action Committees/527 Organizations

The Court mentioned the possibility for corporations to fund a PAC. Since 1976 the Court has attempted to work out a line of dividing types of election spending, beginning with its ruling in *Buckley*. Ever since this ruling, there is a distinction between contributions and expenditures that has enabled corporations to avoid restrictions.[100] Since then,

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[94] Montana Corrupt Practices Act of 1912, MONT. CODE ANN. § 13-35-227. It provides:

> (1) A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party. . . .
>
> (4) A person who violates this section is subject to the civil penalty provisions of [§] 13-37-128.

Id.

[95] W. Tradition P'ship v. Attorney Gen. of Mont., 2011 MT 328, 363 Mont. 220.

[96] *W Tradition P'ship*, 363 Mont. at 240.

[97] *W Tradition P'ship*, 363 Mont. at 22728.

[98] *W Tradition P'ship*, 363 Mont. at 230.

[99] *W Tradition P'ship*, 363 Mont. at 23536.

[100] Minn. Citizens Concerned for Life, Inc. v. Swanson, 741 F. Supp. 2d 1115, 112930 (D. Minn. 2010); Thalheimer v. City of San Diego, 706 F. Supp. 2d 1065, 1071 (2010); Rinner, *supra* note 48, at 1064, 1090; SULLIVAN & GUNTHER, *supra* note 3, at 1428; EMANUEL, *supra* note 42, at 576.

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corporations have been allowed to establish PACs.[101] This is a segregated fund for purposes of express advocacy or electioneering communication.[102] This definition weakens the Court's argument that the corporation is deprived of its right to speak;[103] the fund still belongs to the corporation. The difference to the old ban for corporations is that the general treasury fund is not used, but instead a separate fund solely for political purposes is used. This separate fund is comprised of money donated from stockholders and employees of the corporation. The amount of money is limited and the donating persons are aware of the general purposes their money is used for. What the decision in *Citizens United* does add to this issue is that under the PAC law examined in that decision, a corporation is indeed prohibited from making general treasury fund contributions to PACs for PAC expenditures.[104]

A problem with PACs is that donors have no influence as to which candidate or committee the money is given. This is a decision the manager makes; the opinion of the contributors is not even desired. The manager in return does not have to justify his/her decision.[105] Consequently, he may choose to support a candidate that opposes the interests of the contributors or those of the corporation.

PACs face contribution limits. Multicandidate PACs are committees with more than fifty contributors, which have been registered for at least six months and have made contributions to five or more candidates for federal office.[106] They may contribute $5000 per year to a certain candidate and up to $15,000 to a national party committee. The limits are $2500 and $30,800 for non-multicandidate PACs.[107]

A PAC has to file monthly reports with the FEC. The information that has to be provided is comparable with the disclaimer and disclosure requirements.[108] Yet, PACs have to comply

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[101] *Cf.* 2 U.S.C. § 441b(b)(2) (2002).

[102] PETER KULITZ, *UNTERNEHMERSPENDEN AN POLITISCHE PARTEIEN* 114 (1983).

[103] *Cf*. Citizens United v. FEC*,* 130 S. Ct. 876, at 897 (2010).

[104] *Id.* at 896–99.

[105] CHRISTINE LANDFRIED, *PARTEIFINANZEN UND POLITISCHE MACHT: EINE VERGLEICHENDE STUDIE ZUR BUNDESREPUBLIK DEUTSCHLAND, ZU ITALIEN UND DEN USA* 162, 164 (2d ed. 1994); Ciara Torres-Spelliscy, *Calling on Corporate Law to Defend Democracy*, BOSTON REVIEW (Sept./Oct. 2010), http://bostonreview.net/BR35.5/torres.php.

[106] *Cf.* 11 C.F.R. § 100.5(e)(3) (2009).

[107] *The FEC and the Federal Campaign Finance Law*, *supra* note 81.

[108] *See also* KARL-HEINZ NASSMACHER, THE FUNDING OF PARTY COMPETITION: POLITICAL FINANCE IN 25 DEMOCRACIES 251 (2009).

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with those regulations before engaging in political speech, not only afterwards.[109] Still, PACs are the most frequently-used way to avoid direct-contribution regulations in the United States. They have been very successful—there is empirical data that suggests that their money can make the difference between incumbents and challengers.[110] This is because organized money has a greater influence than many smaller distributed contributions.[111] Consequently, a large amount of indirect corporate political speech is allowed. The provision of 2 U.S.C. § 441b has not been a complete ban.[112]

Another option is to fund a 527 organization. It is an organization that is created to influence the nomination, election, appointment or defeat of candidates for public office. They were invented to promote freedom of speech and distribute general political statements without having to pay taxes.[113] As of this definition, 527s are comparable to PACs, yet, they are not subject to the FEC's jurisdiction as long as they do not engage in express advocacy communication.[114] A corporation wanting to support a certain candidate is allowed to distribute any amount of money to a 527.[115] The 527 promotes material that seems to speak against the election of a certain candidate, but does not explicitly recommend not voting for this candidate.[116] Using a 527, a corporation can gain access to political speech in an indirect, albeit unlimited way.

A recent judgment has specified the current state of law for 527/PACs. SpeechNow.org, a nonprofit, unincorporated association organized as a section 527 entity, planned to raise funds from individuals to pay for independent communications that contained express advocacy. This would have required it to register as a political committee.[117] Then contribution limits would apply in case it raised or spent more than $1000 per year. SpeechNow.org challenged the constitutionality of the FECA provisions governing political committee registration, contribution limits and disclosure as they violated the First

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[109] Citizens United v. FEC, 130 S. Ct. 876, at 897 (2010).

[110] Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 225657 (2009); LANDFRIED, *supra* note 105, at 160; NASSMACHER, *supra* note 108, at 341.

[111] LANDFRIED, *supra* note 105, at 143.

[112] FEC v. Beaumont, 539 U.S. 146, 162 (2003); McConnell v. FEC, 540 U.S. 93, 204 (2003).

[113] Hammel, *supra* note 5, at 61.

[114] *Id.* at 61.

[115] *Cf.* 11 CFR § 114.4(e)(3) (2007).

[116] Hammel, *supra* note 5, at 61.

[117] SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010).

https://doi.org/10.1017/S2071832200020472 Published online by Cambridge University Press

Amendment. The Appellate Court held that the contribution limits of 2 U.S.C. § 441a are unconstitutional as applied to individuals' contributions to SpeechNow.org.[118] Since the Supreme Court held that the government did not have an anti-corruption interest in *Citizens United v. FEC*, the Appellate Court found that contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption.[119] Consequently, the government also did not have an anti-corruption interest in limiting contributions to independent groups such as SpeechNow.org.[120] Both the ban to donate as well as the ban to receive individual donations would violate the First Amendment.[121] Furthermore, SpeechNow.org had argued that reporting requirements were unconstitutionally burdensome. However, those restrictions were upheld as they did not prevent anyone from speaking.[122]

IV. Direct Contributions to a Certain Candidate

Since the ruling in *Buckley,* the Court distinguishes between direct contributions and expenditures.[123] This is important, because independent expenditures are not coordinated with the candidate or his/her agent. They may well provide little assistance to the candidate's campaign and may even prove counterproductive.[124] In *Buckley*, a limit on individual contributions was held to be constitutional, whereas limits on expenditures violated the Constitution.[125] In contrast to a ban on independent expenditures, a limit on contributions is only a marginal restriction and, therefore, a limit must only be closely drawn to match a sufficiently important interest.[126]

As the law stands, there is a ban on direct contributions by corporations[127] and restrictions regarding contributions by individuals. In *Davis v. FEC*[128] the Court applied the rule that

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[118] *Id.* at 689, 696.

[119] *Id.* at 695.

[120] *Id.*

[121] *Id.* at 696.

[122] *Id.* at 696-98.

[123] *Cf.* Buckley v. Valeo, 424 U.S. 1 (1976).

[124] SULLIVAN & GUNTHER, *supra* note 3, at 1428; if they are coordinated with the candidate, they are considered to be contributions. *Cf*. EMANUEL, *supra* note 42, at 568.

[125] *Buckley*, 424 U.S. 1; *see also* Rinner, *supra* note 48, at 1065.

[126] Thalheimer v. City of San Diego, 706 F. Supp. 2d 1065, 1071 (2010).

[127] BETHGE, *supra* note 6, at 258; Hammel, *supra* note 5, at 59.

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political speech cannot be limited according to the speaker's wealth; *Citizens United* repeatedly states that the identity of the speaker is irrelevant. However, wealthy corporations are not allowed to directly contribute to a certain candidate, whereas wealthy individuals ("fat cats")[129] are allowed to do so. This illustrates the importance of the speaker's identity. In 2011–12, a contribution to a candidate was limited to $2,500 per person per year.[130] This limit could be avoided by contributing money to a multi-party-candidate-committee ("Vote for Democrats!").[131] In that case the limit is $30,800.[132] This illustrates that wealthy individuals will be affected by restrictions whereas individuals with a lower income will not reach the amount in which restrictions apply. Wealth, therefore, is important in influencing the outcome of elections.

The ban on corporate contributions has, however, been questioned. In *Thalheimer v. City of San Diego*, Thalheimer, who was running for a city council seat, challenged a San Diego state law contribution limit for corporations. The District Court found that the holding of *Citizens United* did not deal with and could not be extended to contribution limits.[133] The Court reasoned that contribution limits had been upheld in *Beaumont*. The reasoning in *Beaumont* partly relied on the reasoning of *Austin*. The District Court realized that insofar as it relied on *Austin* the reasoning was not persuasive any more.[134] However, it recognized both an interest in the influence of political war chests funneled through the corporate form as well as an anti-circumvention interest—which were both not addressed in *Citizens United.*[135] Therefore, it granted injunctive relief despite the ruling in *Citizens United*.

Although there is a closely drawn line in American campaign finance law between contributions and independent expenditures, both affect First Amendment rights (albeit in different intensity). *Citizens United* emphasized the fact that identity should not matter in

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[128] Davis v. FEC, 554 U.S. 724 (2008).

[129] NASSMACHER, *supra* note 108, at 255.

[130] *The FEC and the Federal Campaign Finance Law*, *supra* note 81.

[131] Hammel, *supra* note 5, at 84.

[132] *The FEC and the Federal Campaign Finance Law*, *supra* note 81.

[133] Thalheimer v. City of San Diego, 706 F. Supp. 2d 1065, 108385; *see also* Minn. Citizens Concerned for Life, Inc. v. Swanson, 741 F. Supp. 2d 1115, 112930 (D. Minn. 2010). Compare Preston v. Leake, 743 F. Supp. 2d 501, 50809 (E.D.N.C. 2010), in which the District Court found that the strict scrutiny test applied in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), to limits on independent expenditures cannot be extended to contributions as well.

[134] *Thalheimer*, 706 F. Supp. 2d, at 1084, as it had been overruled by the Court in *Citizens United*, 130 S. Ct. 876.

[135] *Thalheimer*, 706 F. Supp. 2d, at 1084.

the scope of First Amendment rights. This, however, only regarded independent expenditures. The distinction between expenditures and contributions relies on the different potential to cause corruption. This argument remains undefeated. Adding the two interests mentioned in *Thalheimer*, there is the strong suggestion that the distinction between contributions and expenditures should remain and that corporate contributions should remain banned.

V. Foreigners

The Court did not deal with the question whether foreign associations are allowed to influence national elections. The core of the ruling was to underline that the First Amendment applies to political speech regardless of the identity of the speaker. It was left open whether the same would apply if the speaker was foreign.[136] Yet, the Court did not invalidate BCRA § 303 or 2 U.S.C. § 441e, which forbid any foreign national contributing in connection with a federal, state or local election or making an (independent) expenditure or disbursement for an electioneering communication. Therefore, foreign companies and individuals will still not be allowed to influence American elections.

VI. Conclusion

Corporations are now allowed to make independent expenditures in the amount they want. However, they still face disclaimer and disclosure provisions. Although corporations cannot directly contribute to a certain candidate, they are allowed to fund a PAC or 527. This leaves enormous potential for corporate money to influence elections. History has shown that this is a very effective mechanism. Foreigners are not allowed to interfere with elections.

Citizens United is in many ways of high importance.[137] Statements that it does not have a broad impact on corporate funding should be analyzed critically. Justice Stevens emphasizes that it is now possible for corporations to spend as much general treasury money as they wish on ads that support or attack candidates. National parties, in contrast, will not be able to spend money on ads of any kind.[138] This poses not only constitutional but also corporate law questions. It enhances the role corporations play in the political

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[136] Lawrence Lessig, *The Democrats' Response to* Citizens United*: Not (Even Close To) Good Enough*, THE HUFFINGTON POST (10 Feb. 2010), http://www.huffingtonpost.com/lawrence-lessig/the-democrats-response-to_b_462412.html.

[137] *See also,* Donna F. Edwards, *A Call to Bold Action*, BOSTON REVIEW (Sept./Oct. 2010), http://bostonreview.net/BR35.5/edwards.php; Lessig, *supra* note 76; Marvin Ammori, Corruption Economy, BOSTON REVIEW (Sept./Oct. 2010), http://bostonreview.net/BR35.5/ammori.php.

[138] *Citizens United*, 130 S. Ct. at 940 (Stevens, J., dissenting).

process, as they have much more money at hand in comparison to the narrow interests they represent.

However, the first State Supreme Court has already ruled in a different direction. Campaign finance laws are currently in a row. Time will show whether the Supreme Court or the legislature will end the reversal.

C. The German Approach

In Germany the right to participate in politics rests not on the freedom of speech but on Art. 21 GG (*Grundgesetz*, Basic Law).[139] It is derived from the principle of democracy.[140] The provision of Art. 21 GG has a double-function: A party as an institution is protected from the state and the fulfillment of the parties' tasks is protected.[141] The latter describes the process of forming and articulating opinions, interests and needs regarding the maintenance, change or abolition of the status quo of society.[142] Contributing money is one way of expressing a political opinion and participating in democracy.[143]

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[139] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 21, 23 May 1949, BGBl. I (Ger.):

> [Political parties]
>
> (1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.
>
> (2) Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.
>
> (3) Details shall be regulated by federal laws.

[140] Martin Morlok, *Art. 21*, *in* GRUNDGESETZ: KOMMENTAR, para. 19 (Horst Dreier ed., 2d ed., bd. 2 (arts. 2082), 2009); Bodo Pieroth, *Art. 21*, *in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR, para. 3 (Hans D. Jarass & Bodo Pieroth eds., 11th ed. 2011).

[141] Morlok, *supra* note 140, at para. 27; Pieroth, *supra* note 140, at para. 15.

[142] Morlok, *supra* note 140, at para. 21; Pieroth, *supra* note 140, at para. 15; Hans Klein, *Art. 21*, *in* GRUNDGESETZ: LOSEBLATT-KOMMENTAR, para. 155 (Theodor Maunz & Günter Dürig eds., 56th ed. 2009).

[143] Martin Morlok, *Spenden, Rechenschaft, Sanktione: Aktuelle Rechtsfragen der Parteienfinanzierung*, 2000 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 761, 763; Hans Herbert von Arnim, *Parteienfinanzierung: Zwischen Notwendigkeit und Missbrauch: Alte Probleme und neue Entwicklungen*, 2003 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 1076, 1077.

Political parties have certain enumerated tasks.[144] To fulfill those tasks the parties need money. Campaign finance laws can be found in the Part G. Funding is governed by the transparency regulations,[145] the equal treatment doctrine[146] and the freedom of the parties. Freedom of the parties means that the parties are independent of any state entity and free to act.[147] These principles face restrictions to avoid dependence of the parties on contributors.[148] This system has a high potential for abuse, which became evident in the 1970s, which saw a high-profile party-financing scandal known in Germany as the *Flick* scandal.[149]

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[144] *Compare* GG art. 21(1), cl. 1, *and* Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 149, art. 1(2) (Ger.), *available at* http://www.iuscomp.org/gla/statutes/ParteienG.htm#2:

> Article 1. Constitutional Status and Functions of the Parties . . .
>
> (2) The parties shall participate in the formation of the political will of the people in all fields of public life, in particular by: Bringing their influence to bear on the shaping of public opinion; inspiring and furthering political education; promoting an active participation by individual citizens in political life; training talented people to assume public responsibilities; participating in Federal, Land and Local Government elections by nominating candidates; exercising an influence on political trends in parliament and the government; initiating their defined political aims in the national decision-making processes; and ensuring continuous, vital links between the people and the public authorities.

[145] *Compare* GG art. 21(1), S. 4, *and*, Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, arts. 24, 25. The latter deal with a duty for political parties to file a statement of income and expenditures as well as regulations for accepting donations.

[146] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvF 1/57 (*Party Financing I*), 24 June 1958, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 8 (51), 63-71 (Ger.); *cf.* GG arts. 3(1), 21(1); Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 5.

[147] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvF 1/65 (*Party Financing II*), 19 July 1966, BVERFGE 20 (56), 101 (Ger.); CHRISTOPH GRÖPL, *STAATSRECHT I, STAATSGRUNDLAGEN STAATSORGANISATION* § 6, para. 416 (2d ed. 2009); KULITZ, *supra* note 102, at 59-61; *cf.* GG art. 21(1), S. 2 & art. 21(2).

[148] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 383/03 (*Party Financing X*), 17 June 2004, BVERFGE 111 (54), 83 (Ger.); GRÖPL, *supra* note 147, § 6, at para. 417.

[149] The Flick-scandal describes a huge political scandal that was revealed in Germany in the 1980s. The Flick concern had donated money to political parties and had hidden this fact from the public. It was assumed that these donations led to a favorable decision of the Department of Commerce.

Party financing relies on three pillars: Governmental support, membership fees as well as private contributions, and additional payments by members of parliament.[150] The government supports political parties directly by government funds[151] and indirectly by tax benefits. The BVerfG decided that it is constitutional that political parties receive financial support from the Government as partial help for their general political work.[152] Governmental funding is thought to avoid dependence on huge contributions.[153] Many preexisting provisions of campaign finance laws have been found unconstitutional.[154] The last major decision is the judgment of the BVerfG dated 9 April 1992 (*Party Financing VII*), which will be discussed below.

I. Tax Benefits

Granting contributors tax benefits is an indirect way of supporting political parties.[155] Those benefits serve as a stimulus for contributors to donate money. While the right to accept contributions is unlimited, tax benefits are not. Corporations are allowed to donate money. However, since the decision in *Party Financing VII,* tax benefits are no longer available to them.[156] The BVerfG stated that granting this benefit would give an advantage to the person behind the legal entity. This person would get an additional opportunity to

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[150] *Cf*. Gesetz über die politischen Parteien [PartG], 31 Jan. 1994, BGBl I at 149, art. 27(1), S. 2; Schwarz, *§ 18*, *in* Parteiengesetz (PartG) und Europäisches Parteienrecht, para. 16 (Jens Kersten & Stephan Rixen eds., 2009); Klein, *supra* note 142, at para. 407.

[151] *Cf*. Gesetz über die politischen Parteien [PartG], 31 Jan. 1994, BGBl I at 149, art. 18.

[152] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvE 2/89 (*Party Financing VII*), 9 Apr. 1992, BVerfGE 85 (264), 285-95 (Ger.); Klein, *supra* note 142, at para. 479; Inge Wettig-Danielmeier, Hans Feldmann & Klaus Wettig, Handbuch Zur Parteienfinanzierung 10 (2d ed. 1997).

[153] Morlok, *supra* note 140, at para. 43; Hans Herbert von Arnim, *Parteien in der Kritik*, 2007 Die Öffentliche Verwaltung [DÖV] 221, 224; *cf*. Günter Olzog & Hans-J. Liese, Die politischen Parteien in Deutschland: Geschichte, Programmatik, Organisation, Personen, Finanzierung 38 (21st ed. 1992); *cf*. Uwe Schleth, Parteifinanzen, Eine Studie über Kosten und Finanzierung der Parteientätigkeit, zu deren politischer Problematik und zu den Möglichkeiten einer Reform 300, 300-26 (1973).

[154] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvF 1/57 (*Party Financing I*), 24 June 1958, BVerfGE 8 (51), 65-71 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvF 1/65 (*Party Financing II*), 19 July 1966, BVerfGE 20 (56), 97-112, 113-119 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case Nos. 2 BvE 2/84 & 2 BvR 442/84 (*Party Financing V & Party Contributions III*), 14 July 1986, BVerfGE 73 (40) (Ger.).

[155] Klein, *supra* note 142, at para. 460.

[156] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvE 2/89 (*Party Financing VII*), 9 Apr. 1992, BVerfGE 85 (264), 315 (Ger.).

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influence the political process.[157] This contradicts the principle of equality of each vote codified in Art. 38(1) GG.

Individuals can claim a partial tax deduction by contributing. According to § 34g EStG (*Einkommensteuergesetz*, Income Tax Law Act) the amount of taxes is directly reduced by fifty percent of the contributions per year per taxpayer up to 825€ for a single person.[158] Contributions exceeding this amount can be deducted from the taxable income in the amount of 1650€ for a single person.[159] The amount of this second reduction depends on the individual tax rate. Individuals with a low income will profit less from contributing.[160] The tax rate and consequently the reduction of taxes for rich people are higher. This system favors rich people.

II. Contributions

The third means of financing is the additional payment made by a member of parliament exceeding his/her contributions[161] as well as contributing in general. The focus shall be on the latter.

There is no ban on contributions by corporations or individuals.[162] This is guaranteed by the freedom of political parties laid out in Art.21 I 1 GG.[163] Contributions show that wealthy individuals as well as wealthy corporations are able to influence politics in a broad way. Germany also faces the problem of wealthy persons and entities having a higher influence on political parties, even though the different influence of contributions has already been found to be unconstitutional by the BVerfG in its decision *Party Financing I*.[164] The "one man, one vote" principle is endangered.[165]

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[157] *Id.* at 312315; Klein, *supra* note 142, at para. 451.

[158] *See also* NASSMACHER, *supra* note 108, at 228.

[159] *Cf.* Einkommensteuergesetz [EStG] [Income Tax Law Act], § 10b(2), 16 Oct. 1934, *available at* JURIS.

[160] Horst Sendler, *Verfassungsgemäße Parteienfinanzierung?*, 1994 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 365, 366.

[161] Members of parliament are being paid for their democratic work. A part of this "wage" can be given to the party. This is normally agreed upon by the member of parliament and the party. Contributions on the other hand are completely voluntary regarding the decision to contribute and the amount that is donated.

[162] NASSMACHER, *supra* note 108, at 270.

[163] Jens Kersten, *§ 25*, *in* PARTEIENGESETZ (PARTG) UND EUROPÄISCHES PARTEIENRECHT, *supra* note 150, at para. 12. For the content of Art. 21 GG, compare *supra* note 139.

[164] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvF 1/57 (*Party Financing I*), 24 June 1958, BVERFGE 8 (51), 65-71 (Ger.); Jörn Ipsen, *Art. 21*, *in* GRUNDGESETZ: GG: KOMMENTAR, paras. 116-17

As there is no ban on corporate contributions, the representative of a corporation is allowed to decide to contribute.[166] Yet, in addition to control mechanisms of the Part G there are means in corporate law to control the Chief Executive Officer or the board of directors.[167] Thus, if a corporation decides to contribute, it faces two stages of control (by shareholders and the public). Further, the board of directors may be confronted with a claim for damages.[168] Consequently, the possibility of corporate influence is subject to a higher stage of control than a contribution by an individual.

Further, accepting some kinds of contributions is forbidden, as described in Section 25(2) Part G. For example, the provision of § 25(2) No. 3 Part G bans the acceptance of contributions made by non-nationals. If a political party accepts forbidden contributions, it faces sanctions according to § 31c Part G.

III. Disclaimer and Disclosure Requirements

Since 1967, disclaimer and disclosure provisions exist in Germany.[169] This is due to the transparency provision of Art. 24(1) S. 4 GG.[170] The parties have to make known the interrelation between themselves and (especially) corporations in a statement of accounts.[171] They have to disclose the name and address of the contributor and what the

(Michael Sachs ed., 6th ed. 2011). The decision of the BVerfG dealt with tax benefits; it did not consider advertisements made by corporations.

165 Von Arnim, *supra* note 143, at 1076, 1077; *cf.* GG art. 38(1); *see* Reynolds v. Sims, 377 U.S. 533, 558 (1964), for explanation of the doctrine.

166 Bundesgerichtshof [BGH] [Federal Court of Justice], WM 2002, 564 (566) (Ger.); Sandra Kind, *Darf der Vorstand einer AG Spenden an politische Parteien vergeben?*, 2000 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 567, 567-70, 573; Franz Jürgen Säcker, *Gesetzliche und satzungsmäßige Grenzen für Spenden und Sponsoringmaßnahmen in der Kapitalgesellschaft*, 2009 BETRIEBSBERATER [BB] 282.

167 Kind, *supra* note 166, at 567, 570-73; *cf.* Aktiengesetz [AktG] [Stock Corporation Act], § 111(4), S. 2, § 142(1), § 58(3), S. 2, § 131(1), 6 Sept. 1965, *available at* JURIS; Gesetz betreffend die Gesellschaft mit beschränkter Haftung [GmbHG] [Limited Liability Companies Act], § 51a, 20 Apr. 1892, *available at* JURIS.

168 *Cf.* Aktiengesetz [AktG] [Stock Corporation Act], § 93(2) , 6 Sept. 1965, *available at* JURIS.

169 DORIS WERTHMÜLLER, PARTEIENFINANZIERUNG UND SPENDENPRAXIS, DARGESTELLT AM BEISPIEL DES GESCHEITERTEN GESETZESVORHABEN ZUR AMNESTIE VON STRAFTATEN IM ZUSAMMENHANG MIT SPENDEN AN POLITISCHE PARTEIEN 31 (1990).

170 Jörn Ipsen, *Parteiensponsoring als Spende?*, *in* SPONSORING—EIN NEUER KÖNIGSWEG DER PARTEIENFINANZIERUNG? 93 (Martin Morlok, Ulrich von Alemann & Thilo Streit eds., 2006); Klein, *supra* note 142, at para. 465.

171 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 383/03 (*Party Financing X*), 17 June 2004, BVERFGE 111 (54), 83 (Ger.); KULITZ, *supra* note 102, at 66.

https://doi.org/10.1017/S2071832200020472 Published online by Cambridge University Press

party used the money for.[172] The provisions are meant to limit the influence of wealth on the political process.[173] Political parties have to disclose all assets, income and expenses as well as an explanation at the end of each calendar year in their statement of accounts.[174] Many predefined grants exceeding a certain amount have to mention these separately.[175] According to § 25(2) S. 2, 3 Part G a single contribution exceeding 50,000€ has to be disclosed immediately with the German Parliament. This is called ad-hoc disclosure.[176] Thereby, contributions in the amount that can influence political decisions are made known to the public at once. This is a first step to solving the real problem regarding the statement of accounts, namely, that it is published on 30 September of the year following the contribution.[177] By the time the contribution is published, the political decision will have long since been made and may have been influenced by the contribution, without a mechanism to retroactively change it.

These requirements are subject to monitoring. First, the statement of accounts is reviewed by an accountant.[178] Second, the statement is handed over to the President of the Parliament for further review.[179] A party who violates these rules will suffer civil and criminal sanctions.[180] Additionally, a party always faces "democratic sanctions" in the event a non-disclosed contribution becomes public: It loses its reputation and voters.[181]

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[172] *Cf*. Stephan Rixen, *§ 24*, *in* PARTEIENGESETZ (PARTG) UND EUROPÄISCHES PARTEIENRECHT, *supra* note 150, at para. 37; KULITZ, *supra* note 102, at 66; Klein, *supra* note 142, at para. 473; Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 23(1), S. 1.

[173] Klein, *supra* note 142, at para. 417.

[174] *Cf*. Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 24(1), S. 1.

[175] *Cf*. Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, arts. 24(8), 25(3), S. 1.

[176] BURKHARD KÜSTERMANN, DAS TRANSPARENZGEBOT DES ART. 21 ABS. 1 SATZ 4 GG UND SEINE AUSGESTALTUNG DURCH DAS PARTEIENGESETZ 161 (2004).

[177] *Cf*. Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 19a(3) S. 1.; Morlok, *supra* note 143, at 761, 766; Hans Herbert von Arnim, *Grundfragen der Parteienfinanzierung*, *in* 40 JAHRE PARTEIENGESETZ: SYMPOSIUM IM DEUTSCHEN BUNDESTAG, 35, 42 (Jörn Ipsen ed., vol. 3, 2009).

[178] Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 23(2).

[179] Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 23a(1).

[180] C*f*. Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, arts. 31a31d.

[181] KÜSTERMANN, *supra* note 176, at 241-42.

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IV. Sponsoring

Sponsoring is a collaboration between political parties and corporations performing services. The corporation pays a certain amount of money or confers a pecuniary advantage on the party; the political party implicitly advertises the company in return.[182] For example, a caterer may serve food for free at a political party's reception; the brand of the catering firm will be displayed.[183]

Sponsoring has a different character than contributing: A corporation sponsoring a political party does so in its own business interest. Expenditures for sponsoring are operating expenditures that cut the company's profits. In case of a contribution, on the other hand, the party and the corporation have the common aim of furthering a political opinion. Contributions are not operating expenditures for entities.[184]

Political parties that receive contributions must disclose them, whereas in case the corporation sponsors the party this is only reflected in the result of the business activity.[185] Because sponsoring is different from contributing, it is not subject to the regulations for contributions. Currently, there are no regulations dealing with sponsoring at all. Sponsoring is said to be a loophole in the transparency regulations.[186] Yet looking closely, sponsoring is an even more transparent way of financing than contributions[187]—the brand of the corporation can be seen everywhere at once. This, however, does not diminish the influence sponsoring has on a candidate.

V. Corporate Independent Expenditures

There is no separate provision on corporate independent expenditures. They are defined as expenditures which are made out of the party's control and cannot be influenced by it.

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[182] Bundesgerichtshof [BGH] [Federal Court of Justice], WM 2002, 564 (566) (Ger.); KÜSTERMANN, *supra* note 176, at 138; Martin Morlok, *Sponsoring—ein neuer Königsweg der Parteienfinanzierung?*, *in* SPONSORING—EIN NEUER KÖNIGSWEG DER PARTEIENFINANZIERUNG?, *supra* note 5, at 9, 11-13.

[183] Sebastian Roßner, *Politiksponsoring in der Bundesrepublik Deutschland*, *in* SPONSORING—EIN NEUER KÖNIGSWEG DER PARTEIENFINANZIERUNG?, *supra* note 5, at 69, 75.

[184] Morlok, *supra* note 182, at 9, 14; *cf*. Einkommensteuergesetz [EStG] [Income Tax Law Act], § 4(6), 16 Oct. 1934.

[185] Morlok, *supra* note 182, at 9, 13; Roßner, *supra* note 183, at 69, 76; *cf*. Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 24(4), no. 5.

[186] Roßner, *supra* note 183, at 69, 79.

[187] Morlok, *supra* note 182, at 9, 19.

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This conduct has been known in Germany as *Parallelaktionen*.[188] Similar to sponsoring, those expenditures are not considered a contribution.[189] Therefore, they are not published in the statement of accounts. Still, they help the party. In some cases, corporate independent expenditures have been higher than campaign costs of the party itself.[190] This illustrates what great importance those expenditures have for corporations without being regulated. Only if the corporation explicitly advocates a certain party and this party has no influence on the material does the party have to publish the amount paid by the corporation in its statement of accounts.[191] If the party does have influence on the material, the expenditures serve as a contribution which has to be published in any case.[192]

Regarding these provisions shows that Citizens United would not have had to file suit in Germany. Funding and publishing the documentary and ads would have been lawful.

VI. Conclusion

German campaign finance laws are sophisticated. The most important restrictions are the disclaimer and disclosure provisions, which are rooted in the Constitution. Parties get their support from three different sources. This distribution helps to keep dependence on a single source—be it the state or contributor—as low as possible.

The biggest problems German campaign finance laws face are those of sponsoring and *Parallelaktionen*. No regulations exist for these kinds of corporate support. They pose a high potential for huge amounts of corporate money influencing elections. Here, parliament should find a way to regulate such payments.

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188 KULITZ, *supra* note 102, at 101; Roßner, *supra* note 183, at 69, 79.

189 Von Arnim, *supra* note 177, at 35, 43.

190 KULITZ, *supra* note 102, at 102.

191 C*f.* Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 26(1), S. 2, 2. HS (half sentence).

192 Roßner, *supra* note 183, at 69, 79.

D. Conclusion

I. The Environment of Campaign Finance Laws

The United States and Germany have both been rocked by political scandals.[193] Before highlighting the common aspects and differences in campaign finance laws, one should consider the difference in society, history, and political systems between the two nations.

American campaign finance laws are historically based on a system without party membership fees or governmental funding of political parties; they are based on voluntariness.[194] For example: Whereas the German State grants tax benefits to political contributors, the United States has abolished them as a result of the Reagan tax cut package in 1986.[195] Unlike German candidates, U.S. political candidates have to win two elections to become President: First, one has to beat other nominees of his/her own party to become the candidate; then he/she has to beat the candidate of the other party.[196] Candidates have to come up with the money themselves, whereas in Germany campaign expenditures are paid by a party as a community.[197] Modern American campaigns are largely comprised of media advertisement. This requires high levels of spending for political competition. Therefore, the American political landscape depends largely on fundraising; corporate funding plays an especially large role. Fund raising is conducted in a very professional manner. Small donations are not as important as they once were.[198] Due to these circumstances, some states began very early to try to regulate campaign finance. There were disclaimer and disclosure provisions as early as in the 1890s.[199] These early

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[193] Compare the Watergate scandal in the U.S., KULITZ, *supra* note 102, at 115; LANDFRIED, *supra* note 105, at 149–54, 203; Wright, *supra* note 4, at 1001, 1003; with the Flick scandal in Germany, HANS WERNER KILZ & JOACHIM PREUß, FLICK. DIE GEKAUFTE REPUBLIK 91–312 (1983); Dieter Spöri, *Sponsoring von Parteien: Hört endlich auf mit der Mauschelei!*, STERN.DE (1 Mar. 2010), http://www.stern.de/politik/deutschland/sponsoring-von-parteien-hoert-endlich-auf-mit-der-mauschelei-1547365.html, climaxing in the resignation of German President Christian Wulff on 17 February 2012.

[194] KULITZ, *supra* note 102, at 107; NASSMACHER, *supra* note 108, at 255.

[195] KARL-HEINZ NASSMACHER, BÜRGER FINANZIEREN WAHLKÄMPFE: ANREGUNGEN AUS NORDAMERIKA FÜR DIE PARTEIENFINANZIERUNG IN DEUTSCHLAND 76 (1992).

[196] PETER HAY, US-AMERIKANISCHES RECHT 2122 (4th ed. 2008); LANDFRIED, *supra* note 105, at 125; SCHLETH, *supra* note 153, at 285.

[197] KULITZ, *supra* note 102, at 108; LANDFRIED, *supra* note 105, at 125, 237; SCHLETH, *supra* note 153, at 298–300.

[198] *Cf.* LANDFRIED, *supra* note 105, at 136–38.

[199] Citizens United v. FEC, 130 S. Ct. 876, 900 (2010); United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am., 352 U.S. 567, 570–72; KULITZ, *supra* note 102, at 109.

efforts were meant to prevent corruption, as Theodore Roosevelt noted in 1905.[200] The ban on corporate contribution dates back to 1907.[201]

In Germany there is a well-structured system of governmental support for political parties. There are three major pillars of party financing, only one of which is fundraising. Corporate influence is not as important as in the United States. Still, there has repeatedly been speculation that certain political decisions were bought.[202] Disclaimer and disclosure provisions have a very dark history. They originate from the assumption that corporations helped end the Republic of Weimar and enabled the rise of Adolf Hitler.[203] Ever since the end of World War II, corporations have been thinking about ways to financially support political parties.[204] The psychological importance of tax benefits and corporate reliance thereon became visible when benefits for corporations were abolished: Most corporations completely stopped contributing. The reason is that corporations only had to pay one-third of the expenses after being granted a tax benefit. This loss led to a drastic drop in contributions.[205]

II. Comparison and Future Prospects

The fundamental difference between the two systems is the treatment of corporations. Whereas in the United States corporate contributions are forbidden, there is no such ban in Germany. After *Citizens United* both nations treat corporate independent expenditures alike. Corporations are allowed to spend as much money as they like on such expenditures as long as they do not expressly advocate the election or defeat of a candidate. Elections in the future will be heavily influenced by corporations, as they can spend considerable sums on ads implicitly promoting a certain candidate.

To reduce dependence on large contributions in the United States, Presidential candidates can use money out of the Presidential Election Campaign Fund. This fund is established by taxpayers who use the so-called tax check-off. Three dollars of their income tax can be donated to that fund. This poses a possibility of political participation of every citizen who can vote. In case a candidate accepts money out of this fund, he/she cannot accept any

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200 *Cf*. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. at 572; SCHLETH, *supra* note 153, at 301; also Hammel, *supra* note 5, at 58.

201 *Citizens United*, 130 S. Ct. at 952 (Stevens, J., dissenting).

202 KILZ & PREUß, *supra* note 193, at 13–41; OLZOG & LIESE, *supra* note 153, at 38.

203 KULITZ, *supra* note 102, at 64–65.

204 *Id.* at 42; SCHLETH, *supra* note 153, at 306, 315.

205 WERTHMÜLLER, *supra* note 169, at 31.

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private contributions. This is monitored by the FEC.[206] It is an interesting approach: Both nations rely on public funding to reduce dependence on large contributions. Whereas in Germany party financing is based on a combination of funding and contributions, candidates in the United States have to choose which kind of money they want to accept. If they opt for public money they will not be allowed to receive contributions. The candidates solely depend on the fund's money. However, the negative side of this approach is obvious: The taxpayer can never know in advance to which candidate his money is given. He/she does not know what political idea will be supported. It may even be an idea the taxpayer does not support.

The role of advertising is still different. In the United States, TV spots seem to be the backbone of campaign spending.[207] The use of these spots has lead to candidate-oriented campaigns.[208] Televised debates and ads have long since dominated the American election process. German parties, on the other hand, are reluctant to buy TV spots. They rely on airing via public networks, which grant spots for all competitors free of charge.[209] Yet, parties do have the chance to buy additional spots from private TV channels. This could lead to a higher importance of ads in the future. Over the past years debates similar to those in the United States have found their way into the election process in Germany. Parties have begun to professionalize the election process and even employ experts from the United States.[210] Thus, the use of TV spots may develop to be a means of campaigning as in the United States.

Another difference between the two nations is the nature of provisions that grant the right to support political parties. The same event—political participation—is governed by a different type of provision. The American system relies on the First Amendment, a fundamental right. Any regulation restricting this right must survive a strict scrutiny test. The German system relies on Art. 21 GG. This is not a fundamental right. Neither a political party nor an individual may appeal to the BVerfG with a constitutional complaint relying solely on Art. 21 GG.[211] The way to the BVerfG can only be gone by relying on

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206 *Cf*. LANDFRIED, *supra* note105, at 77; *The $3 Tax Checkoff*, FEC (Dec. 1993), http://www.fec.gov/info/checkoff.htm.

207 NASSMACHER, *supra* note 108, at 167–71; SCHLETH, *supra* note 153, at 285.

208 LANDFRIED, *supra* note 105, at 296.

209 NASSMACHER, *supra* note 108, at 168.

210 LANDFRIED, *supra* note 105, at 297.

211 *Cf*. GG art. 93(1), cl. 4a; Morlok, *supra* note 140, at para. 48; Pieroth, *supra* note 140, at paras. 3, 17.

fundamental rights. The test of an accused violation of the fundamental right will then be influenced by Art. 21 GG.[212]

The question is whether the incorporation of the right to participate in democracy into Art. 21 GG, which is derived from Art. 20(2) GG, grants a higher protection than the First Amendment. The First Amendment may be abolished by a two-thirds majority in both the Senate and the House of Representatives as well as a three-fourths majority of the States, a requirement that can hardly be achieved.[213] In Germany this is different. If the right to support a political party is a part of democracy as defined in Art. 20(2) GG, this right is forever protected by the ban to change the constitution.[214] This right could only be abolished by the adoption of a wholly new constitution. Consequently, Americans could abolish the First Amendment by a mere change of the existing constitution, whereas Germans would have to adopt a new one. This is a higher wall to protect this right.

The constitution in Art. 21(1) S. 4 GG requires parties to be free to accept any contribution. Yet, the fact that Art. 21 GG applies to individuals as well as to political parties poses the question whether it also applies to corporations. Although corporations can contribute money—a way of forming a political opinion—this question is open.[215] If the right to support a political party is derived from Arts. 20(2), 21 GG and these articles do not apply to corporations, a ban on corporate financing might also be possible in Germany. The BVerfG denied corporations a tax benefit, as this would be an advantage for the persons behind those corporations. Other voices claim that the fact that a corporation is an association of individuals makes it unconstitutional to ban corporate contributions. The individuals' right to participate in the political process would be violated.[216] However, the individuals themselves have a right to vote. The corporation they work for, on the other hand, does not have a right to vote. Democracy is defined as the power of the people. Additionally, it is the parties' task to further political participation by the people—not corporations. Their political participation is not protected by the Constitution. Consequently, if a corporation cannot vote and the individual behind the corporation retains his/her political rights, there is no violation of a right if a corporation is banned from contributing. A ban would be constitutional in Germany as well and might be a future option to avoid dependence on corporate interests.

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[212] Morlok, *supra* note 140, at para. 49.

[213] HAY, *supra* note 196, at 18–19.

[214] *Cf*. GG art. 79(3); Morlok, *supra* note 140, at para. 19.

[215] Pieroth,*supra* note 140, at para. 28.

[216] Klein, *supra* note 142, at para. 422.

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Both nations rely on disclaimer and disclosure provisions. They aim at making political money an issue of public interest. If the public gains knowledge of donations exceeding a certain amount, people get suspicious and discussions about the origin of the money will begin. In Germany, this is the only restriction on party funding.[217] However, contributions are only disclosed in the year following the contribution. To address this flaw, Dübbers' suggestion of ad-hoc disclosure of contributions that have a potential to influence political elections[218] was realized in § 25(3) S. 2 Part G. Ad-hoc disclosure of contributions does not exist in the United States. However, the nature of this mechanism is not unknown. It exists for transactions in securities.[219] It would be a small step to extend those regulations to contributions. Corporate influence would thereby become more evident.

Another fact that the two nations have in common is the definition of the term contribution. It comprises not only donating money but also non-cash assistance.[220] A broad interpretation of the meaning of "contribution" may make it possible to include at least soft money into the meaning of it by interpretation. Then campaign finance laws would apply and all expenditures would at least be disclosed. The problem with sponsoring and *Parallelaktionen* is that corporations receive something in return; thus, these activities cannot qualify as contributions. In these cases a change of the Part G, which has repeatedly been suggested,[221] might be a solution.

The influence of money is most effectively shown when considering the possibility of sanctioning a bad political decision: The people can vote politicians out of office every few

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[217] KULITZ, *supra* note 102, at 67.

[218] Robert Dübbers, *Ad-hoc-Rechenschaftspflicht für Spenden an politische Parteien*, 2000 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 481, 481–483.

[219] Michael Gruson & William J. Wiegmann, *Die Ad-hoc-Publizitätspflicht von Unternehmen nach amerikanischem Recht und die Auslegung von § 15 WpHG*, available at http://www.jura.uni-frankfurt.de/ifawz1/baums/Bilder_und_Daten/Arbeitspapiere/a0295.pdf (2010).

[220] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvE 2/89 (*Party Financing VII*), 9 Apr. 1992, BVERFGE 85 (264), 320-21 (Ger.); KÜSTERMANN, *supra* note 176, at 121; Klein, *supra* note 142, at para. 420; *cf* Gesetz über die politischen Parteien [PARTG], 31 Jan. 1994, BGBL I at 149, art. 26(1). S. 1; U.S.: *Citizens' Guide*, FEC (Feb. 2011), http://www.fec.gov/pages/brochures/citizens.shtml.

[221] *Cf*. Lutz Kinkel, *Konsequenzen aus Wulff-Affäre: Schluss mit Bussi-Bussi*, STERN.DE (21 Feb. 2012), http://www.stern.de/politik/deutschland/konsequenzen-aus-wulff-affaere-schluss-mit-bussi-bussi-1789861.html; *Parteienfinanzierung: FDP-Minister Niebel lobt das Sponsoring*, STERN.DE (1 Mar. 2010), http://www.stern.de/politik/ deutschland/parteienfinanzierung-fdp-minister-niebel-lobt-das-sponsoring-1547404.html; Theresa Breuer & Hans Peter Schütz, *Sponsoring-Affäre: Wie der Bundestag die Debatte vergeigt*, STERN.DE (4 Mar. 2010), http://www.stern.de/politik/deutschland/sponsoring-affaere-wie-der-bundestag-die-debatte-vergeigt-1548353.html; *Sponsoring-Affäre: Opposition fordert Strafen für die CDU,* STERN.DE (4 Mar. 2010), http://www.stern.de/politik/deutschland/sponsoring-affaere-opposition-fordert-strafen-fuer-die-cdu-1548361.html.

years. Contributors can immediately stop donating and thereby influence a politician at once.[222] The distinction between corporate and individual contributions is not the only one that should be made. The disproportionate influence that wealth of either an individual or a corporation can have is incompatible with democracy.[223] If politicians fail to equalize this influence, we will see elections in which the voice of the poor will no longer be heard. Each person has one vote, but not all persons have the same amount of money. Eventually, economic inequality will translate into political inequality.[224] Yet, the protection of the First Amendment does not depend on wealth.[225]

William J. Rinner proposes a cap and trade system for political financing.[226] This mechanism would mirror the system of pollution permits known in environmental politics. However, a permit to donate money, e.g., a constitutional right, should not be a good one can trade. Leaving aside the fact that corporations cannot vote, if a corporation was allowed to trade a permit to donate, it could choose who it wanted to sell the permit to and thereby influence the political idea for which it is used. Furthermore, the corporation would profit by selling its permit.[227] This would lead to a market for political rights. Wealthier interests could bid poorer ones out of the market. This contradicts the aforementioned idea that wealth should not influence an election.

The fear of corporate influence on elections is great. Both in the United States and in Germany regulations exist that aim to avoid this influence. Yet, the counterpart to the abuse of influence of corporations is to strengthen the power of the people. Senator Richard Durbin has introduced a campaign-reform bill.[228] It sets up a financing-system that rewards candidates for attracting small donors. Citizen-funded elections would lead to politicians worrying about and representing the peoples' interest. This would assure that neither wealth nor corporate interests have a big influence on the election process. The

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222 SCHLETH, *supra* note 153, at 319.

223 *Cf*. Davis v. FEC, 554 U.S. 724, 737-42 (2008); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994); Rinner, *supra* note 48, at 1066–72.

224 Foley, *supra* note 223, at 1257; Noveck, *supra* note 89, at 75, 78; Spöri, *supra* note 193.

225 *Cf*. Citizens United v. FEC, 130 S. Ct. 876, 904; SULLIVAN & GUNTHER, *supra* note 3, at 1428.

226 Rinner, *supra* note 48, at 1099–1104.

227 *Id.* at 1100–1104.

228 The Fair Elections Now-Act, *see* PUBLIC CAMPAIGN: CLEAN MONEY, CLEAN ELECTIONS, *available at* http://www.publicampaign.org/node/38166 (last visited 16 Mar. 2012); Jonathan Alter, *High-Court Hypocrisy: Dick Durbin's Got a Good Idea*, NEWSWEEK, 22 Jan. 2010, *available at* http://www.thedailybeast.com/newsweek/2010/01/22/high-court-hypocrisy.html; *cf*. Edwards, *supra* note 137, who fears that the Act is being threatened by *Citizens United*.

system would favor the votes of individuals. Corporate influence might be diminished this way (which is not at all certain, as huge donations of corporations remain possible). Moreover, this system would not violate the principle discussed in *Citizens United*, i.e., that political speech is not based on the identity of the speaker.

In case regulations are changed, one must remember that contributing campaign money is a modern way of participating in democracy. All future plans have to be measured against democracy. Yet, the question is which democratic principle should prevail: If it is maximizing political participation, no limits should exist for wealthy individuals or corporations. If the principle is equality, regulations have to be issued that treat all donors equally and that disregard the influence of wealth. Both principles cannot be combined.

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