In essence, the equality conception accepts the fundamental structure and assumptions of the marketplace of ideas, but it emphasizes that "market failures" are not only possible, but are in many cases *inevitable*, given the complexity of our society and the market's own inherent barriers to the free (and equal) exchange of ideas.[112] Referred to by some critics as "equalization," this conception sees the market as an essential tool for a self-governing people, but it rejects the premise that the market (and hence society) is best served by a state that maintains a *laissez faire* role. To the contrary, for the market to *truly* afford citizens a free exchange of ideas, honestly promote diversity of thought, and preserve generally open access and opportunities for all,[113] the government must assume an interventionist role—regulating the system of exchanges in order better to serve the essential interests and values of the

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[112] For an overview of the "market failures" position, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 37-46 (1989) (ultimately rejecting the marketplace model). For an earlier example of marketplace skepticism, see Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) ("Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist."). One should also consider Zechariah Chafee, Jr.'s acknowledgement of marketplace barriers in the form of an un-(or under-)educated populace:

> The last years have taught us that the melting-pot will not entirely take care of itself. Just as the merits of free trade in goods are lessened if the normal processes of competition are checked by monopolies and dumping, so free trade in ideas requires that the barriers to the interchange of argument presented by illiteracy and foreign languages shall somehow be broken down.

CHAFEE, *supra* note 25, at 240.

[113] Bertrand de Jouvenel, in a fascinating theoretical exercise undertaken well before the Court showed an interest in "equalization" of voice/speaking opportunities, discussed the difficulties inherent in any design endeavoring to offer all participants an "equal" chance to engage in a public discussion. *See Seminar Exercise: The Chairman's Problem*, 2 AM. POL. SCI. REV. 368-72 (1961). For a recent example of the "Chairman's Problem," see the Court's defense of an Arkansas public television station's policy of limiting participation in televised debates to viable party candidates in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). For the majority, Justice Kennedy wrote:

> [T]he Court of Appeals' holding [that stations may not use political viability to determine what candidates will participate in the debate] would result in less speech, not more. In ruling that the debate was a public forum open to all ballot-qualified candidates, the Court of Appeals would place a severe burden upon public broadcasters who air candidates' views. In each of the 1988, 1992, and 1996 Presidential elections, for example, no fewer than 22 candidates appeared on the ballot in at least one State. . . . Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all.

Id. at 680-81 (citations omitted).

market.[114] The equality conception, as I will argue, retains the operational metaphor established by its "liberty" cousin, while recasting the government's role, from that of "censor" or "paternalistic" obstructer to a well-situated *facilitator* of genuinely free and equal deliberation on public issues.[115]

Ironically, the equality conception of political speech was initiated, even as it was rejected, by the Court's *per curiam* decision in

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[114] For an excellent overview of this perspective, see Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986):

> We should learn to recognize the state not only as an enemy but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them. When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment.

Id. at 1416. *See also* OWEN FISS, LIBERALISM DIVIDED 31-46 (1996) and OWEN FISS, THE IRONY OF FREE SPEECH 1-26 (1996), (both arguing that the state has an affirmative duty to regulate the marketplace of ideas in the interest of genuinely free and open public debate); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994) (arguing that the current system of campaign finance undermines the system of representation); *see generally*, CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH; THE PARTIAL CONSTITUTION (1993) (rejecting the *laissez faire*, Holmesian marketplace as unworkable and, instead, advocating carefully-tailored regulations in the interest of promoting Madisonian ideals of democratic deliberation). For an alternative perspective, see R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AMER. ECON. REV. 384-91 (1974) (arguing that there should be consistency, in terms of regulation, between the economic marketplace and the marketplace of ideas); *see also* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 277-89 (1988) (arguing that campaign finance reforms are unworkable as they reflect republican assumptions and values that clash with the nature and practice of our liberal tradition); Lillian BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV 1258, 1279 (1994) (stating that "only reforms that are practically guaranteed to achieve a clearly specified and unquestionably legitimate corruption-prevention goal are worth the sacrifice of political freedom that their enforcement inevitably entails"); Sanford Levinson, *Politics, Government and Public Affairs: Regulating Campaign Activity—the New Road to Contradiction?*, 83 MICH. L. REV. 939 (1985) (explaining the difficulties inherent in all regulative efforts, especially in the distinction between money and political activities).

[115] Kenneth Karst explicated this spirit of equality and equality opportunity for expression in *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975) (arguing, among other things, that equality of expression "is indispensable to a society committed to the dignity of the individual"). According to Karst, adherence to the principle of equal liberty of expression—as represented by the Court's "public forum" doctrine, for example—is obviously a practical impossibility, but would at least require the courts to "start from the assumption that all speakers and all points of view are entitled to a hearing." *Id.* at 28. "Indeed," as Karst argues, "the first amendment demands an even greater degree of equality in the electoral process than does the equal protection clause." *Id.* at 53. For a more specific discussion of this principle, see Robert McChesney, *Campaign Spending and the First Amendment*, 14 MEDIA STUDIES JOURNAL at 8-13 (2000).

Buckley v. Valeo.[116] In a famous (or infamous, depending on your perspective) passage, the Court spoke unequivocally:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608 (e) (1)'s expenditure ceiling. *But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.[117]

Buckley seemed to make it clear that the Court would not sanction governmental efforts to promote equality if these efforts hindered the individual's exercise of her political speech rights. Thus, the liberty conception of the marketplace was empowered by the *Buckley* decision, as discussed above, but this prioritizing of liberty—over the conception of equal access and equal voice—did not go without criticism.[118]

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[116] 424 U.S. 1 (1976). This is the first point at which the Court explicitly discussed the idea of "equalization," though it is fair to say that the decision in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), laid the theoretical groundwork, as it found that broadcasters have an affirmative duty to provide media access, in certain cases, in the interest of fairness.

[117] *Buckley,* 424 U.S. at 48-49 (citations omitted) (emphasis added).

[118] Discussing the assumptions at work in both Courts, Cass Sunstein argues that *Buckley* "might well be seen as the modern-day analogue of the infamous and discredited case of *Lochner v. New York,*" especially as both cases treat existing distributions of resources as if they were pre-political and just. *See* SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 229 (1997). *See also* Barron, *supra* note 112, at 1643 (noting the irony in Justice Holmes' criticism of the "embodiment" of an economic theory in *Lochner,* but his apparent faith in the power of "free exchange" in the realm of ideas in *Abrams*).

Outlining many of the arguments he had made in his *Buckley* decision at the D.C. Circuit,[119] and explicating the theoretical principles of the Court's emerging equality conception, Judge Skelly Wright agreed that money certainly does enable the communication of political preferences and prejudices and it does influence the outcome of elections. But, he wondered, to what degree is money threatening the political process, even as it underwrites it?

> [A] veteran of political campaigns has declared that money is the mother's milk of politics. . . . But the real questions are these: To what extent does this kind of mother's milk poison the political process? To what extent does it distort the truth-seeking process that lies at the heart of the First Amendment conception?[120]

Judge Wright's concerns notwithstanding, the *Buckley* decision, as reinforced by the *Bellotti* Court's rejection of "systemic corruption" as a rationale for restricting speech of some parties, seemed to make it clear that the marketplace of ideas, as the Court understood it, was principally devoted to preserving liberty and not equality or "enhancement."[121]

As campaign finance cases came before the Court in the 1980's, however, the *Buckley* framework was reconsidered and, at times, transformed as concerns over access, the special nature of the corporate "voice," and "war chests"[122] were addressed. Relying on the

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[119] Outlining many of the arguments discussed by the court below, Judge Wright heard the case at the United States Court of Appeals for the District of Columbia. *See* Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975).

[120] J. Skelley Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001, 1004 (1976).

[121] Commenting on the speech cases of the recent years, L. A. Powe, Jr. speculated (prematurely, as it turned out) that the Court would never accept the "enhancement" reasoning: "Enhancement has never commanded a majority, and I doubt it will." *See* Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 269.

[122] *See* FEC v. National Right to Work Committee, 459 U.S. 197 (1982) (relying on United States v. Automobile Workers, 352 U.S. 567, 579 (1957)):

> The first purpose of §441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions.

Id. at 207.

reasoning spelled out in *Red Lion Broadcasting* Co. *v. FCC*,[123] the Court, in *CBS, Inc. v. FCC*,[124] advanced the "enhancement" cause by finding an affirmative right for political candidates to use the broadcast airwaves. For the Court, the arena of the airwaves was a public good, and thus the *liberty* of the broadcaster was trumped by the need for open and equal access to this manifestation of the marketplace: "Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information for the effective operation of the democratic process."[125] In this decision, the Court explained that the state has an affirmative duty to "enhance the voices" of the legitimate candidates for federal office, thus supporting the notion of the government as a facilitator of debate in the marketplace of ideas.[126]

In a move seemingly meant to minimize the potential "poisoning" of the process that Judge Wright feared, Justice Marshall explained for the Court, in *California Medical Assn. v. FEC*,[127] that the $5,000 limitation (for groups and individuals) on contributions to political committees was not akin to an unconstitutional expenditure limitation, as nothing in this section of FECA precluded members of the Association from *independently* spending money to advocate their views. Rather, the restrictions were legitimate, as they merely limited the amount that CMA could *contribute* to CALPAC. Contributions to political action committees could be limited because, for the Court,

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> *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

395 U.S. at 390 (citations omitted) (emphasis added). The Court refused to apply this rationale to newspapers, five years later, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Finally, in *Forbes*, 523 U.S. at 676, although not expressly citing *Red Lion*, the Court found that *Red Lion's* reasoning did not apply to televised political debates sponsored by public broadcasters, as this kind of forum was inherently "nonpublic."

124 453 U.S. 367, 395-97 (1981).

125 *Id.* at 396.

126 *Id.* Zechariah Chafee, Jr. also calls for "affirmative steps" to improve public discourse: "Physical space and lack of interference alone will not make discussion fruitful. We must take affirmative steps to improve the methods by which discussion is carried on." CHAFEE, *supra* note 25, at 559.

127 453 U.S. 182, 195 (1981).

"the 'speech by proxy' that CMA seeks to achieve through its contributions to CALPAC *is not the sort of political advocacy* that this Court in *Buckley* found entitled to full First Amendment protection . . . . [A]ppellants' claim that CALPAC is merely the mouthpiece of CMA is untenable."[128]

In *FEC v. Massachusetts Citizens for Life, Inc.* the Court continued to explain just what forms of "political advocacy" deserve the most protection.[129] In this case, the Court—albeit primarily in dicta—recognized that the government has an obligation to regulate the "marketplace of ideas," in order to account for the unfair (and state-conferred) advantages enjoyed by corporations.[130] In short, and in keeping with the "war chest" rationale, the Court expressed concern that wealth amassed in the economic marketplace would be illegitimately used to drown out competing voices in the political marketplace. Although "as applied" the requirements for a separate political fund did not compel MCFL to segregate its "political" money, due to the particular circumstances of this case, Justice Brennan's opinion for the Court explained that while "equal resources" were not necessarily required, the expenditure restrictions were "meant to ensure that competition among actors in the political arena is truly a competition among ideas."[131]

The equality conception of political speech in the marketplace found its most energetic support in *Austin v. Michigan State Chamber of Commerce.* Here, the Court for the first time ever, upheld the constitutionality of a spending limit, finding that the state regulation requiring that corporations "speak" only through segregated political funds—as opposed to general treasury funds—served a compelling governmental interest in protecting the integrity of the electoral process:

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[128] *Id.* at 196 (emphasis added). It is important to restate that, in *FEC v. National Conservative Political Action Committee,* 470 U.S.480 (1985), the Court refused to extend this reasoning to a limitation on the *expenditures* of PACs. For the Court, spending by PACs can be distinguished from contributions to PACs, as the latter is "speech by proxy," but the former is a legitimate collective action which allows for the "pooling" of resources and hence the "amplification" of voices." *Id.* at 495.

[129] 479 U.S. 238 (1986).

[130] David Cole refers to this as the beginning of "First Amendment Antitrust." *See First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance,* 9 YALE LAW & POL'Y REV. 264 (1991).

[131] Mass. Citizens for Life, Inc., 479 U.S. at 259.

> By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence *unfairly* the outcome of elections.[132]

Significantly, Justice Marshall's majority opinion introduces the idea of "fairness," suggesting that too much speech of a particular kind (the booming "voice" of corporate money, in this case) might in fact be *threatening* to the marketplace, and to a legitimately free exchange for all interested participants.[133]

The language, and consequently the imagery, in this opinion is remarkable. The Court accepted the state's interest in eliminating the "distortion caused by corporate spending"[134]; it acknowledged the "corrosive effect of political 'war chests'"[135]; and it therefore legitimized the state's interest in preventing corruption or the *appearance* of corruption in the political process.[136] Thus, the Court

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[132] *Austin*, 494 U.S. at 668-69 (emphasis added).

[133] *Id.*

[134] *Id.* at 660.

[135] *Id.* at 669.

[136] Recall the Court's decision, only twelve years before, in *First National Bank v. Bellotti*:

> If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

435 U.S. at 789-90 (citations omitted). The Court in *Austin* was willing to accept the premise of "apparent corruption," even though the state of Michigan had not met the evidentiary burden suggested by *Bellotti*. *See Austin*, 494 U.S. at 652. In an ironic way, this language came back to haunt Justice Marshall as the Court, one year later in *Renne v. Geary*, co-opted his "corruption" rationale and reasoned that California's restrictions on political endorsements were legitimate state efforts to prevent voter confusion and corruption in the electoral process. *See* 501 U.S. 312 (1991). Parties have considerable influence, argued the state in this case, and therefore should be treated like corporations. *Id.* Finding this analogy unpersuasive, Justice Marshall argued, unsuccessfully, that

> whereas the *Austin* Court worried that corporations might dominate elections with capital they had only accumulated by dint of "'economically motivated decisions of investors and customers,'" the party endorsements in this case represent an expenditure of *political* capital accumulated

supported the government's affirmative duty to amplify or temper particular voices, in the interest of promoting a fairer marketplace, free of perceived systemic corruption,[137] and arranged in a manner that would better support a diversity of voices and views.[138] *Buckley* had accepted the state's interest in a diversity of views as well;[139] thus, the *Austin* decision suggests that the liberty and equality conceptions differ as to the *means* employed in this process (active government intervention vs. a "hands off" approach). As *Austin* brought the "New Marketplace" mentality into constitutional law, it epitomized the values and concerns of the equality conception of the marketplace: Though capitalism and democracy are an uneasy mix, egalitarianism and democratic ideals can be pursued with appropriate government intervention.

Justice Stevens, joined by Justice Ginsburg, advocated the "enhancement" and "equalization" of voices in his dissent in *Colorado Republican Federal Campaign Committee v. FEC.*[140] Concluding that the state had established a compelling governmental interest in limiting the expenditures of political parties—and thus lowering the costs of elections overall—Stevens argued that restrictions on the amount of money spent not only would serve as an antidote to the "systemic corruption" discussed in *Austin*, but also would measurably increase the *quality* of political debate:

> through past voter support. . . . In sum, the prospect that voters might be persuaded by party endorsements is not a *corruption* of the democratic political process; it *is* the democratic political process.

Id. at 348-49 (Marshall, J., dissenting).

[137] Interestingly, Marshall's majority opinion resembled the tone and rhetoric of President Theodore Roosevelt, many years before. In his annual message to Congress on December 5, 1905, President Roosevelt recommended that: "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts." United States v. UAW-CIO, 352 U.S. 567, 572 (1957) (citing 40 CONG. REC. 96).

[138] For an excellent analysis of this decision, see Julian Eule, *Promoting Speaker Diversity:* Austin and Metro Broadcasting, 1990 SUP. CT. REV. 105. (Professor Eule begins his analysis with an analogy to the classroom: The instructor might, quite deliberately, not call on certain students who always raise their hands in class, in the interest of increased diversity and "equalization" of voices and opinions. Doing so might "restrict the speech of some," but it would also allow the teacher to invite more participants (shy students, for example) into the conversation and thus avoid situations wherein a few voices could dominate the discussion.).

[139] *See Buckley*, 424 U.S. at 1.

[140] 518 U.S. 604.

> Finally, I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. . . . It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment.[141]

Like the rationale argued in the Affirmative Action setting, a "leveling" of the "playing field" is promoted as an appropriate compensation for the institutional advantages enjoyed by those with easier access to financial resources. Thus, in this passage, Justice Stevens articulates the central principles and expectations of the equality conception. Limiting the prevalence of money in the electoral process will not only "enhance the relative voice of some," but will also improve the overall *quality* of political discourse, thus preserving the spirit and true purpose of the marketplace of ideas—that of self-governance.

Finally, and most recently, Justice Breyer, joined by Justice Ginsburg, buttressed the equality conception[142] with a concurring opinion in *Nixon v. Shrink Missouri Government PAC.* Arguing that the state's contribution limits actually *supported*, rather than threatened, free speech and democracy, Breyer concluded that

> [b]y limiting the size of the largest contributions, such restrictions aim to democratize the influence that

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[141] Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604, 649-50 (1996) (Stevens, J., dissenting). This reasoning resembles that of Justice White, in his concurrence in part and dissent in part, in *Buckley v. Valeo*:

> There is nothing objectionable—indeed it seems to me a weighty interest in favor of the provision—in the attempt to insulate the political expression of federal candidates from the influence inevitably exerted by the endless job of raising increasingly large sums of money. I regret that the Court has returned them all to the treadmill.

424 U.S. at 265 (White, J., concurring in part, dissenting in part).

[142] The Breyer/Ginsburg argument also illustrates elements of the "civility conception" (discussed below), but it is more forceful in its demonstration of the equality conception.

> money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes. . . . [The statute] permits all supporters to contribute the same amount of money, in an attempt to make the process fairer and more democratic.[143]

In the spirit of the Court's treatment of "representation" in *Reynolds v. Sims*,[144] Breyer and Ginsburg explained that the influence of money should be restricted, rather than sublimated, in the interest of democracy and the public good.[145] Further, and perhaps most interesting in the elaboration of the equality conception, Breyer openly questioned the assertions in *Buckley* which introduced this section of the paper, and which have inspired the tug of war between liberty and equality ever since:

> [T]he statute imposes restrictions of degree. It does not deny the contributor the opportunity to associate with the candidate through a contribution, though it limits a contribution's size. Nor does it prevent the contributor from using money (alone or with others) to pay for the expression of the same views in other ways. . . .
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[143] *Nixon*, 528 U.S. at 401 (Breyer, J. concurring) (citations omitted).

[144] 377 U.S. 533, 565 (1964) (providing that each citizen must have "an equally effective voice")

[145] Breyer's discussion of the "democratization" of money's influence and the importance of public confidence recalls the justification for the Corrupt Practices Act 18 U.S.C.A. §610, (prohibiting national banks, corporations, and labor organizations from making contributions to candidates), as noted by Justice Frankfurter in *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567 (1957). As Frankfurter explained, Elihu Root, urging the Constitutional Convention of the State of New York to prohibit political contributions by corporations, as early as 1894, believed that legislation of this sort "strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government." 352 U.S. at 571.

> . . . Under these circumstances, a presumption against constitutionality is out of place. *I recognize that* Buckley *used language that could be interpreted to the contrary.* It said, for example, that it rejected "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others." *But those words cannot be taken literally.* The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate, Art. I, §6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate. Regardless, as the result in *Buckley* made clear, the statement does not automatically invalidate a statute that seeks a fairer electoral debate through contribution limits, nor should it forbid the Court to take account of the competing constitutional interests just mentioned.[146]

The decision to uphold state limits on contributions, and Justice Breyer's dicta, indicate that the emerging equality conception is becoming more of an established element in the Court's political speech jurisprudence. In sum, this conception accepts the idea of "free exchange" as a social good, instrumental to the effective maintenance of self-government, but it advocates a more active role for government—as the facilitator of debate—in the interest of a genuinely free and open marketplace of ideas. To keep with the metaphor, this conception promotes a "New Marketplace" that enhances the ability of all buyers and sellers to engage in the exchange of information and ideas.

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[146] *Nixon*, 528 U.S. at 401-402 (Breyer, J., concurring) (emphasis added) (citations omitted).

C. The Civility Conception

Borrowing from its reasoning in ballot access[147] and association[148] cases, we can also see the Supreme Court developing a "civility conception" of the marketplace of ideas, a conception that in some ways relates to and in other ways departs from the liberty and equality conceptions. The civility conception, much more than the other two, maintains a firm and qualitative vision of the form and functioning of political speech in the market and in the nature and essential integrity of the electoral process itself. This vision of political speech is ideologically diverse—at once conservative, "critical," and progressive[149]—as it emphasizes the integrity of the electoral process,

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[147] In *Storer v. Brown*, the Court explained that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." 415 U.S. 724, 730 (1974).

[148] The Court's decision in *Cox v. Louisiana*, 379 U.S. 536 (1965), demonstrates the balance involved, as the individual has an interest in expression and the state has an interest in public order. As Justice Goldberg explained,

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

379 U.S. at 554. Too, the civility conception understands that regulations on political speech serve the ultimate good of political speech, just as some degree of order responsibly shepherds liberty.

[149] The civility conception, in this sense, could be used to explain the divide between "liberals" and those on the "Left" when it comes to issues like hate speech codes on college campuses or the "Nazis in Skokie," for example. *See generally* HATE SPEECH ON CAMPUS: CASES, CASE STUDIES, AND COMMENTARY (Milton Heumann & Thomas W. Church eds., 1997); DONALD DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985). Critical theorists, like Richard Delgado, for example, argue that, as "words hurt" and have the power to intimidate and thus stifle free expression, certain types of speech should be prohibited . . . in the interest of dialogue and free deliberation itself. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARVARD C.R.-C.L. L. REV. 133 (1982) (discussing the psychological harm of racist speech). *See also* Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE (Barrington Moore, Jr. ed., 1969) (making related arguments, though he points out that the speech of the wealthy and powerful interests threatens dialogue by controlling the agenda). Think, as well, of the division between interest groups. Some "good government" groups, like Common Cause, are committed to reforming the system, while other groups, like the ACLU, argue that reforms of this sort are unconstitutional. The former are avowed critics of the "money = speech" equation, and advocate more progressive (and restrictive) campaign finance legislation; the latter, in their interpretation of the First Amendment, find that money is effectively speech, and thus money spent in campaigns is pure political speech that should not be restricted. For more information on the positions of Common Causes and the ACLU, see their websites at http://www.commoncause.org/moneyinpolitics/ and http://www.aclu.org/news/2002/n041002c.html, respectively.

the necessarily dignified and deliberative form speech *should* take, and the general restrictions that are essential to the maintenance of a marketplace that genuinely serves the public good.[150] This conception of political speech, I argue, comes closest in spirit to the "traditional American town meeting,"[151] as its basic values seek to preserve a particular form of political speech—civil deliberation. If speakers are civil, if they respect the chairman and the rules of the floor, and if they listen, contemplate, and wait their turn to talk, this conception seems to suggest, then political speech will realize its true place and purpose in the electoral process. The marketplace of ideas and the electoral process, generally, exist to promote political speech; but, at times, regulations (like those a chairman might employ) are essential to allow for honest debate and discussion within the community.[152] For these reasons, the state should be accorded some degree of discretion as it seeks to regulate the market, in the interest of purifying the electoral process and promoting deliberation for the good of self-government.[153]

The Hatch Act cases, *United Public Workers of America (C.I.O.) v. Mitchell*[154] and *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*[155] reflect the values and tensions of the civility conception of the marketplace. In *Mitchell*, the Court recognized that the provision of the Act prohibiting federal employees from taking an "active part in political management or in political campaigns" did cause a "measure of interference . . . with what otherwise would be the freedom of the civil servant" under the

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[150] It could be argued that this conception is in some ways "communitarian" or even "civic republican," but because of the freighted nature of both these labels, I have chosen the more general "civility" moniker.

[151] Meiklejohn relies on this imagery in POLITICAL FREEDOM. *See supra* note 22, at 24. While Meiklejohn should most likely be considered a "liberty conception" advocate (even if the "liberty" is only extended to "political speech"), a genuine "town hall meeting," affording all interested parties the order and opportunity to speak, would require constraints more akin to the "equality" and especially "civility" conceptions.

[152] It is in this spirit that Justice Frankfurter essentially accepted the contribution and expenditure restrictions of the Criminal Appeals Act of 1907 (though he technically avoided a judgment on the constitutional question), as its "underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." United States v. UAW-CIO, 379 U.S. at 575.

[153] As Alexander Bickel explained, "[t]his is the point at which one asks . . . whether our experience has not taught us that . . . a marketplace without rules of civil discourse is no marketplace of ideas, but a bullring." THE MORALITY OF CONSENT 76-77 (1975).

[154] 330 U.S. 75 (1947).

[155] 413 U.S. 548 (1973).

First Amendment,[156] but held that this interference was justified, as it was understood that Congress had the responsibility to preserve the dignity, discipline, integrity and efficiency of public service. For the majority in this case, while civil servants were forbidden from engaging in certain political activities, the Act "leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency."[157]

With the opportunity to reconsider the constitutionality of the Act in *National Association of Letter Carriers*, the Court affirmed the holding in *Mitchell*.[158] Writing for the majority, Justice White explained that the statute was justified because "[f]orbidding activities like these will reduce the hazards to fair and effective government."[159] Most importantly, this provision of the Act was meant to maintain the integrity of the marketplace (as well as the public's perception of it), by merely prohibiting partisan political *activities* by federal employees, rather than the right to vote, speak, or engage in

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[156] *Mitchell*, 330 U.S. at 94-95.

[157] *Id.* at 99. The difficulty of cases like this is illuminated by Justice Black's dissent, which criticized the Act for essentially denying federal employees the enjoyment of the virtues of Aristotelian citizenship:

> Legislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. Forcing public employees to contribute money and influence can well be proscribed in the interest of "clean politics" and public administration. But I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his and his fellow citizens' votes are counted. Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly, and petition.

Id. at 111 (Black, J., dissenting). For an excellent discussion of the ways in which this kind of denial of the freedom to participate in public life inhibits full citizenship, in the form of self and community development, see Wilson Carey McWilliams, *Democracy and the Citizen: Community, Dignity, and the Crisis of Contemporary Politics in America*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 79-101 (Robert Goldwin & William Schambra eds., 1980).

[158] 413 U.S. 548 (1973).

[159] *Id.* at 565.

nonpartisan political activities.[160] Restrictions on some forms of expression were, in other words, essential to the civility of the exchange itself.

Reflecting a similar concern for the integrity and civility of the exchange of information, *Lehman v. City of Shaker Heights* demonstrates how the Court chose to regulate the marketplace of ideas and restrict political speech in the interest of aesthetics. As the difference between a *collection* and a *clutter* of ideas and voices is often a matter of perspective, the Court embraced the civility conception as it found that a ban on political advertising on city-operated transit vehicles did not constitute a violation of the right to free speech. Though political speech enjoys a "preferred position" and commercial advertising was allowed on these vehicles, the Court explained that a transit vehicle was not a public forum. Concurring with the opinion, but offering different reasons, Justice Douglas (no enemy of free speech) offered the somewhat perplexing argument that passengers on a bus were effectively "captive viewers":

> In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.[161]

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[160] In a similar fashion, the Court, in *Greer v. Spock*, 424 U.S. 828 (1976) determined that, while the military post was a public entity in some ways, it was not a traditional public forum and thus the restrictions prohibiting political meetings and the distribution of campaign literature were constitutional. For the majority it was essential that the military remain "insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates," and there was an important and necessary "distinction between the role of the soldier and that of the citizen." *Id.* at 839. For the dissenters, the Court was improperly exempting the military from the fundamental requirements of the First Amendment and the principles of an open society. *Id.* at 872-73 (Marshall, J., dissenting).

[161] Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring).

What Douglas and the Court are telling us here is that the marketplace of ideas exists in a particular domain; it has a particular *place*, that is, and that place is not on a bus. This restriction on political speech suggests that citizens, in the process of governing, ought to have an escape from politics; it tells us that, to stay with the metaphor, the "marketplace" really is a place that we go to, rather than some kind of atmosphere that surrounds us. Thus, political speech, in the form of campaign advertising, could be regulated in the interest of fairness (avoiding the appearance of favoritism); but more importantly, these restrictions were seen as essential to the integrity of the process, and the rights of listeners (viewers).

The Court carried on this notion of an uncluttered and civil marketplace in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent.*[162] In this case, the Court found that a municipal ordinance prohibiting the posting of signs on public property was not unconstitutional as applied to the context of political campaigns. While acknowledging that the ordinance "diminishes the total *quantity* of [the appellees'] communication in the City,"[163] the Court concluded that this was simply a First Amendment *issue*, as opposed to a First Amendment *violation.* The Justices embraced the civility conception of political speech as they explained the city's interest in maintaining the aesthetic appeal of the community, the safety of workers who would be called upon to remove signs, and the public welfare generally.[164] Further, the majority explained that the particular nature of "speech" involved—that of posting a temporary sign for the edification of passersby—was qualitatively different from modes of expression that relied on direct, one-to-one communication.[165] Because of this, and because the appellees (it was

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[162] 466 U.S. 789, 810-812 (1984) (accepting the District Court's characterization of the esthetic and economic interests in improving the beauty of the City by eliminating clutter and "visual blight" as legitimate and compelling).

[163] *Id.* at 817. Recall the "liberty conception"'s emphasis on the "quantity of speech" previously discussed. Reconciling the interest in the maximization of political voices, and the state's interest in a stable (and civil) political marketplace, demonstrates both the complexity of the issues involved and the multiple conceptions of political speech that we can see in cases pertaining to campaigns and elections.

[164] *Id.* at 810-812. Relying on its established police powers, the Court reiterated: "The concept of the public welfare is broad and intrusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Id.* at 805 (quoting Beiman v. Parker, 348 U.S. 26, 32-33 (1954)).

[165] *See id.* at 809-10.

assumed) had other alternative modes of expression, the Court made it clear that "more speech"—of this sort, at least—was not "better." Political speech, in this gaudy and congested sense, could not be imposed on the people.

An equally significant concern for the civility conception is the participation of the people. State regulations—some of which are vigorously rejected by proponents of the liberty conception—are acceptable, in terms of civility, to the extent that they increase (or aim to increase) deliberation on political issues. Justice White's dissent in *City of Berkeley* exemplifies this position. Arguing that the very idea of the initiative process itself was meant to "reform" the legislative system by removing it from the corrupting influence of money and special interests, Justice White explained that the city's $250 limit on contributions to committees formed to support or oppose ballot measures was constitutional because it served the original purpose of the initiative—that of increased citizen participation:

> The role of the initiative in California cannot be separated from its purpose of preventing the dominance of special interests. That is the very history and purpose of the initiative in California, and similarly it is the purpose of ancillary regulations designed to protect it. Both serve to maximize the exchange of political discourse. As in *Bellotti*, "[t]he Court's fundamental error is its failure to realize that the state regulatory interests . . . are themselves derived from the First Amendment."[166]

The initiative itself is a state-created entity, Justice White explained, and thus the state (or city) could legitimately enact restrictions meant to ensure that the process stayed true to its original design. If the city believed that participation was stifled on account of the influence of money in the process, that is, then the city should have been afforded the discretion to enact appropriate rules of procedure, to better promote civil discourse. To return to the earlier analogy, the chairman would order a participant to lower

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[166] *City of Berkeley*, 454 U.S. at 311 (White, J., dissenting) (emphasis added) (citations omitted).

his voice, for example, if he attempted to shout down other speakers. Why shouldn't the same reasoning apply to a political campaign, with unregulated spending being the equivalent of an obnoxious or raucous town hall discussant?

Rules promoting civil discourse are often related, in spirit at least, to rules meant to promote the "equalization" of voices. As was explained above, the Court endorsed state regulations meant to promote increased citizen participation in *Austin v. Michigan Chamber of Commerce*. Again, in this case, the Court found that the state had a legitimate interest in requiring that corporations draw campaign contributions only from segregated "political" funds, as it was feared that corporations would "influence *unfairly* the outcome of elections."[167] This interest in "fairness"—chided by the dissenters[168]—suggests that the Court (or these particular Justices) has some clear sense of what constitutes a "fair" degree of influence. This unequivocally normative appraisal of the electoral process demonstrates the ways in which the civility conception, like the equality conception, has co-opted the framework of the marketplace and employed it to encourage something decidedly different from the "unfettered" free trade of ideas.

So significant was the Court's interest in civil discourse in *Burson v. Freeman*,[169] that the marketplace of ideas was, in effect, "closed for the day." At issue was Tennessee's prohibition of the solicitation of votes and the distribution or display of campaign materials within 100 feet of the entrance to a polling place. Finding a competing right at hand, namely the right to vote,[170] the Court found for the state and

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[167] *Austin*, 494 U.S. at 670 (emphasis added).

[168] Justice Scalia referred to the Court's decision as "illiberal." *Id.* at 684 (Scalia, J., dissenting). Justice Kennedy went a step further in dissent:

> The Court's hostility to the corporate form used by the speaker in this case and its assertion that corporate wealth is the evil to be regulated is far too imprecise to justify the most severe restriction on political speech ever sanctioned by this Court. . . . [T]he Court imposes its own model of speech, one far removed from economic and political reality. It is an unhappy paradox that this Court, which has the role of protecting speech and of barring censorship from all aspects of political life, now becomes itself the censor.

Id. at 713 (Kennedy, J., dissenting).

[169] Burson v. Freeman, 504 U.S. 191 (1992).

[170] *See id.* at 198 ("This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy.").

accepted the notion of a "campaign free zone" around the polling place.[171] Persuaded by the state's argument that "these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible," the Court agreed that the state had a compelling interest in protecting against voter intimidation and election fraud.[172] Again, to return to the earlier analogy, political speech like that in a town meeting must be curtailed at times in the interest of the greater enterprise of civil deliberation and self-governance. We may be less apt to participate, the Court seems to be saying, if we are forced to endure the overbearing or intrusive speech of others as we proceed from the market to the ballot box. The only solution, therefore, is to temporarily suspend "trading" and clear a harassment-free (speech-free) path for citizens to the polling place.[173]

The level of civility in campaign debate was confronted next in *McIntyre v. Ohio Elections Commission.* As mentioned above, this case dealt with a section of the Ohio Election Code that prohibited anonymous pamphleteering in political campaigns. The state, in the interest of preventing fraud and discouraging libel, had enacted legislation that required the disclosure of the name and business address of the party responsible for the pamphlet. Writing for the Court, Justice Stevens explained that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[174] Anonymity, for the Court—relying on John Stuart Mill—is a "shield from the tyranny of the majority."[175] While the majority sought to encourage participation in a non-oppressive dialogue of sorts, the more forceful exposition of the civility conception came from Justice Scalia, in dissent. Upbraiding the majority for "[p]referring the views of the English

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[171] *See id.* at 193, 211.

[172] *See id.* at 210.

[173] Propounding the liberty conception in his dissent, Justice Stevens found this regulation to be unconstitutionally targeted at a particular subject matter (campaign speech). What this section of the Tennessee Election Code does, he pointed out, is prohibit core political speech within a 30,000 square foot area around each polling place. *See id.* at 218 (Stevens, J., dissenting). Finally, he explained, while "[t]he hubbub of campaign workers outside a polling place may be a nuisance . . . it is also the sound of a vibrant democracy." *Id.* at 228.

[174] *McIntyre*, 514 U.S. at 342.

[175] *Id.* at 357 (citation omitted).

utilitarian philosopher John Stuart Mill . . . to the considered judgment of the American people's elected representatives from coast to coast," Scalia dismissed the "right-to-be-unknown while engaging in electoral politics."[176] For Scalia, the central issue was that of campaign *quality*,[177] something the state had a compelling interest in maintaining and something the majority had failed to appreciate. Thus, the question was not, to what degree should we preserve the individual's right to self-expression, but rather, how can we best promote civil campaign discourse, and thus preserve the integrity of the electoral process itself? Requiring the identification of "speakers", would, in this sense, provide an essential check against "gutter politics" and thus raise the level of discourse:

> [The usefulness of a signing requirement] lies also in *promoting a civil and dignified level of campaign debate*—which the State has no power to command, but ample power to encourage by such undemanding measures as a signature requirement. Observers of the past few national elections have expressed concern about the increase of character assassination—"mudslinging" is the colloquial term—engaged in by political candidates and their supporters *to the detriment of the democratic process.* Not all of this, in fact not much of it, consists of actionable untruth; most is innuendo, or demeaning characterization, or mere disclosure of items of personal life that have no bearing upon suitability for office. Imagine how much all of this would increase if it could be done anonymously. The principal impediment against it is the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression. Consider, moreover, the increased potential for "dirty tricks."[178]

This is, perhaps, the most vibrant illustration of the civility conception. Scalia, though quite happy to promote virtually

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[176] *Id.* at 371 (Scalia, J., dissenting) (citation omitted).

[177] *See id.* at 382.

[178] *Id.* at 382-83 (emphasis added).

unfettered "speech" when it comes to campaign finance, sees these disclosure requirements as good for democracy. While anonymity might invite more speakers to participate openly, it might also invite more "bad" speech, sour the public on anything political, encourage cynicism, and thus undermine the very purpose of speech itself—engaged and active self-governance.

In *Buckley v. American Constitutional Law Foundation*,[179] the civility conception was developed further. In *ACLF*, the Court struck down three components of Colorado's initiative petition circulation requirements.[180] For the Court, these restrictions acted as "undue hindrances to political conversations and the exchange of ideas" as they "significantly inhibit[ed] communication with voters about proposed political change."[181] Thus, the majority embraced the liberty conception in this case,[182] relying on the reasoning discussed above. Justice Ginsburg, in her opinion for the Court, found that these regulations unnecessarily inhibited the "conversation" that goes on between petition circulators and citizens.[183]

But if the Court is truly interested in promoting *dialogue*, the state argued and three dissenters agreed, then certain restrictions and rules are essential. Prohibiting those not registered to vote—"political dropouts"[184] for Justice Rehnquist—from participating was

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[179] 525 U.S. 182 (1999).

[180] Affirming the decision of the Tenth Circuit, the Court found the requirements that petition circulators be registered voters; that circulators wear identification badges; and that petition proponents file financial reports to be unconstitutional infringements upon "core political speech." *Id.* at 186-187.

[181] *Id.* at 191.

[182] At other points in the opinion, the Court rejects the state regulations as an unconstitutional "speech diminution," because they decrease "the number of message carriers in the ballot-access arena." *Id.* at 194, 197.

[183] *See id.* at 192. It is worth noting that much of the available evidence, including the testimony of those involved in petition circulation (professionals and volunteers), indicates that circulators actually *avoid* "conversations" with potential signers. Those paid per signature, employing a kind of cost-benefit analysis, often find it more efficient to simply move on to the next person if the signer's inquiries go beyond the initial "What is this about?" or "What am I signing?" probe. This is important to consider because the Court, in *ACLF*, based its opinion partly on the (flawed) assumption that the circulator is engaged in an "endeavor to persuade electors to sign the petition." *Id.* at 199. While they are, strictly speaking, trying to persuade people to sign, they are not typically interested in engaging in a genuinely discursive exchange regarding the merits of the proposed ballot measure. Volunteer circulators might engage in conversations, but then again, the regulations were not aimed at them. *See* Daniel Lowenstein & Robert Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 198 (1989).

[184] *ACLF*, 525 U.S. at 230 (Rehnquist, C.J., dissenting).

a perfectly legitimate means, it was argued, of ensuring that those who propose political change, and who seek to petition for political change, are actually invested in the political system. Furthermore, disclosure requirements, not unlike those upheld in *Buckley v. Valeo*, invite a truer sense of dialogue, deter fraud and abuse, and encourage participants "to be truthful and self-disciplined."[185] Finally, the dissenters explained—articulating the basic values of the civility conception—the public benefits from restrictions of this sort, as the marketplace is oriented in such a way that civil discourse permeates the process.

In the most recently decided case involving restrictions on electoral speech, four members of the Court, dissenting in *Republican Party of Minnesota v. White*[186], argued that a state restriction prohibiting judicial candidates for office from announcing their views on disputed legal and political issues was not only constitutional, but was in fact a prudent act of electoral supervision. At the outset, Justice Ginsburg, with Justices Stevens, Souter, and Breyer, emphasized the particular institutional characteristics and the unique role of the judge in American politics and history. Judges, she explained, "are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation."[187] Put simply, she stated—confronting directly the conclusion of many students of judicial behavior—judges "are not political actors."[188] Rather, they assume a "magisterial role" in our system of justice, "a role that removes them from the partisan fray," and, thus, "[s]tates may limit judicial campaign speech by measures impermissible in elections for political office."[189] Simply because judges are elected in most states, in other words, does not mean that they should enjoy the same generally permissive standards of political speech; to the contrary, as a special class of candidates, special rules of decorum and expression were required.[190]

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[185] *Id.* at 224 (O'Connor, J., concurring in part and dissenting in part).

[186] 122 S. Ct. 2528 (2002).

[187] 122 S. Ct. at 2550 (Ginsburg, J., dissenting).

[188] *Id.* at 2551 (Ginsburg, J., dissenting).

[189] *Id.*

[190] In his dissent, joined by Justices Ginsburg, Breyer, and Souter, Justice Stevens explained,

But apart from the argument that judges are different, the dissenters also explained that to allow judicial candidates to profess their opinions on contestable legal and political issues that may come before them on the bench would be an offense to basic principles of judicial integrity. The "very purpose of most statements prohibited by the announce clause," Justice Stevens pointed out in his dissent, "is to convey the message that the candidate's mind is not open on a particular issue."[191] And what, wondered Justice Ginsburg along the same lines, was the difference between the integrity and disinterestedness we expect to see in a federal judge and that which we expect in a state judge? Certainly the electorate has an "interest" (a reference to the majority's emphasis on the needs and interests of the electorate) in knowing the explicit intentions and policy preferences of U.S. Supreme Court nominees, for example, but, she explained, "every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well."[192] "Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench,"[193] Ginsburg concluded, thus demonstrating the emphasis on rules, behavior, and integrity that we see as functions of the civility conception of the marketplace of ideas.

> There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.

Id. at 2547 (Stevens, J., dissenting).

[191] *Id.* at 2549.

[192] *Id.* at 2552, n.1 (Ginsburg, J., dissenting). Further along in her opinion, Justice Ginsburg took her colleague, Justice Scalia, to task for apparently failing to recall his own reticence with regard to the expression of his views during his confirmation hearings: "The author of the Court's opinion," she noted before quoting from the transcript of Justice Scalia's confirmation hearing, "declined on precisely these grounds to tell the Senate whether he would overrule a particular case:

> Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.

Id. at 2558, n.4 (Ginsburg, J., dissenting) (quoting Scalia, J.).

[193] *Id.* at 2557 (Ginsburg, J., dissenting).

V. THE PERSISTENCE OF THE MARKETPLACE METAPHOR

While a "funny thing" has "happened on the way to the market," it is interesting to consider why these three conceptions remain directed toward the same general destination. That is, why has each maintained the essential framework of the marketplace of ideas, and thus why has this metaphor persisted in American jurisprudence? While it is difficult to note the exact reasons, I will offer some possible explanations for the lingering power of the marketplace metaphor—explanations that most likely work in conjunction.

The marketplace of ideas, I suggest, was originally conceived, and has "stuck around" because it generally "works" for us (forgive the colloquialism) and our nation's basic values and political faith. That is, in a liberal, democratic society that values individual rights, the idea of "free exchange" is appealing as it empowers individual members of society and embodies the idea of freedom itself. In this sense, not only do we relish—and, indeed, rely upon—freedom from censorship, but we also enjoy the symbolic value inherent in the very concept of a "marketplace" that affords us the opportunity and access to pursue our preferences.[194] Instrumentally then, this pursuit of tastes and passions—following the underlying logic of economics—inevitably contributes to the greater good as individual consumers in this bazaar of information and ideas eventually emerge, having made "purchases" that allow them, individually and collectively, to derive utility from the exchange.[195] We presume that, as rational, free, and

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[194] The marketplace metaphor, Professor Rodney Smolla tells us,

> thus appeals to our optimism that good will finally conquer evil. . . . The marketplace metaphor reminds us to take the long view. Truth has a stubborn persistence. Persecution may eliminate all visible traces of a truth, like the scorched earth after a napalm bombing. Yet truth somehow comes back, because its roots are in the soil or its seeds in the air. Cut down again and again, truth will still not be stamped out; it gets rediscovered and rejuvenated, until it finally flourishes. . . .

RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 7-8 (Alfred Knopf ed., 1992). Smolla thus defends the principles of the marketplace of ideas, though he recognizes the need for "pragmatic measures to give it its best fighting chance" and realizes that not everything that emerges will be truth, but rather that the market is the best procedural test for truth that we have, even if a truly empirical verification is impossible. *Id.*

[195] David Strauss has offered an important critique of these assumptions. Arguing that economic theories cannot be so easily folded into constitutional jurisprudence, he explains a central operational and even epistemological problem with the notion of the "marketplace of ideas":

equal individuals, we are not only capable of responsibly enjoying this liberty, but indeed, we also expect and even demand it.[196]

A second possible reason for the persistence of the marketplace metaphor is the doctrine of *stare decisis.* While not always adhered

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> There is a theory about how economic markets lead to outcomes that are in some sense desirable: if certain conditions hold, then we know that the market will produce an efficient outcome. There is no such theory for the so-called marketplace of ideas. We do not know what constitutes perfect competition or the equivalent of market power in the realm of ideas. No matter how we define the ground rules, there is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable outcomes.

David Strauss, *Persuasion, Autonomy & Freedom of Expression*, 91 COLUM. L. REV. 334, 349 (1991).

More generally, Laurence Tribe criticizes the assumptions of the marketplace:

> How do we know that the analogy of the market is an apt one? Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that "free trade in ideas" is likely to generate truth? And what of falsity: is not the right to differ about what *is* "the truth" subtly endangered by a theory that perceives communication as no more than a system of transactions for vanquishing what is false?

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 577 (1978).

[196] This is, I argue, the presumption that we generally make. *But see* KATHLEEN HALL JAMIESON, DIRTY POLITICS (Oxford University Press, 1992). Jamieson provides an excellent assessment of political messages and voter understanding and processing of information. We are, Jamieson notes, much like "pack rats"; we gather bits and pieces of information along the way, but in the mental storage of data we tend to mix that which we get from the news and that which we get from political/partisan advertisements. Furthermore, Jamieson tells us that,

> [c]ognitive psychologists tell us that there are two modes of cognitive processing: central and peripheral. The first is analytic; it tests evidence and frames and evaluates propositions. The second is less conscious and more accepting of the visual cues. Some believe that visuals are always processed peripherally, on the edges of consciousness, where critical acuity does not come into play. Increasingly, cognitive psychologists are arguing that much of what we absorb from the world around us is peripherally processed. We are influenced by things that don't go through evidence testing. Testing requires time for reflection and demands that we have not been distracted from this process by information overload or alternatively deflected from it by our own fears.

Id. at 60. *See also* FISH, *supra* note 37 at 16-17. ("The marketplace of ideas is supposed to regulate in a purely formal way the contest between conflicting agendas; 'purely formal' means 'without regard to content,' because the marketplace (sometimes called the forum of public discourse) leans in no particular ideological direction. It works, we are told, only to assure that each party will get its turn at bat. In fact, however, the marketplace has to be set up—its form does not exist in nature—and since the way in which it is to be set up will often be a matter of dispute, decisions about the very shape of the marketplace will involve just the ideological considerations it is meant to hold at bay."); SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 30 at Chapter 2 (providing a similar argument, at least in terms of the "partial" (biased) nature of ostensibly "neutral" arrangements and structure).

to,[197] the usual inclination of the Supreme Court, and courts in general, is to follow previously established rules or doctrine, so long as these rules are not found to contravene core principles of justice.[198] In this sense then, once the idea of the marketplace found a majority on the Court, it became an established element of our legal and cultural tradition,[199] and thus the metaphor has survived as an explanatory (or justificatory) device.[200] Justice Benjamin Cardozo understood the enduring power of tropes of this sort, but also warned of the dangers inherent in their exaltation: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end up often enslaving it."[201]

A certain propensity that exists in any metaphorical depiction—one that simultaneously entrenches it and thus makes it deserving of criticism and suspicion—is the tendency for the metaphor to congeal. Commenting on this, political scientist Martin Landau warns of the dangers that result when the concept, or our understanding of the concept, becomes fixed and thus take on a life for itself:

> Difficulty arises, however, when we allow a metaphor to congeal, to harden into a rigid set—when we take it literally. What we then do is to allow a presumed analogy to become an identity, an assertion of fact that may be, and usually is, entirely erroneous. To take a metaphor literally is to create a myth, and the more conventional myths become, the more difficult they are to dislodge.[202]

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[197] *See e.g.* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943).

[198] *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that segregation in education does not violate the Fourteenth Amendment), *with* Brown v. Board of Education, 347 U.S. 483 (1954) (overruling *Plessy* and holding that segregation in education violates the guarantee of equal protection under the Fourteenth Amendment) as a pair of cases exemplary of the Court valuing core principles of justice over *stare decisis*.

[199] For a powerful critique of the Court's continued fascination with the marketplace metaphor, and the consequent negative effects on our society, see Ingber, *supra* note 38.

[200] Metaphors "stick around" in general because of their parsimony and because they help us to ground abstract ideas: "Metaphors have entailments through which they highlight and make coherent certain aspects of our experience." GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 156 (1980).

[201] Berky v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

[202] MARTIN LANDAU, POLITICAL THEORY AND POLITICAL SCIENCE 83 (1972).

Landau's concerns are prescient and have been, I contend, acknowledged by the Court. That is, the *laissez faire* conception of the marketplace had "congealed," in the sense that it failed to adjust to the realities of electoral politics. Thus, other conceptions of political speech, and hence other conceptions of the marketplace itself challenged it, and in some instances, replaced it. When the meaning of a metaphor becomes fixed, and when it is not adapted to changing conditions, we get a kind of mechanical jurisprudence as the Court simply relies on a outdated model, or set of values, that may no longer be appropriate.

VI. CONCLUSION

Sometimes in tension, sometimes in concert, the three distinct conceptions of political speech in the electoral process discussed in this article, all find their way to the marketplace of ideas. While the liberty conception is the more established speech value, in this work I have proposed two emerging conceptions of political speech in campaigns and elections. Rooted in different (though, again, not *necessarily* contradictory) core principles, each of these conceptions imagines political speech in a different way, and consequently envisions a different manifestation and organization of the marketplace of ideas. Self-government is the desired and anticipated result of free political speech as the Court has made clear. Whether this end is best achieved through a market "exchange" that emphasizes liberty, equal opportunity, a particular notion of "civil" discourse, or some combination thereof is the issue in this debate.

Thus, what I am proposing is, in a sense, an alternative way of understanding the outcomes of these cases—and thus the decision making that produced them—that goes beyond the liberal/conservative or speech values/state interest dichotomy. A classification of political speech that distinguishes the values of liberty, equality, and civility supports the proposition that there are, within the Court's jurisprudence in this context, multiple conceptions of the marketplace of ideas. This notion of "multiple marketplaces" allows us to understand why, for example, Justice Kennedy—typically coded as a "Conservative"—is, in many ways, the most vigorous opponent of state restrictions on political speech, and

thus the most vigorous advocate of the "liberty conception."[203] If we accept the premise that different justices have different understandings of the marketplace of ideas, then we can explain why Justice Marshall (a "Liberal") might have accepted a state interest, while Justice Scalia (a "Conservative") voted in favor of the asserted speech interest, as was the case in *Austin v. Michigan State Chamber of Commerce.*[204] A careful analysis of the content and rhetoric of this case, however, shows that Marshall did not value speech any less than Scalia did; rather, each justice envisioned the marketplace of ideas in a different way. (Should the market be unregulated so as to protect the principle of *liberty*, as Scalia argued, or should the market be supervised by the state in order to promote *equal opportunity* and access for a wider range of potential speakers, as Marshall proposed?)

While informed and insightful studies of judicial decision-making often allow us predict how certain members of the Court might vote,[205] it is still difficult to predict which manner of market "exchange" the Court will embrace in the future—and thus how these conceptions might be balanced. As technology has restructured the world of campaigns and elections, and consequently the place of political speech in the electoral process, the Court has been forced to apply certain basic principles to situations never before imagined. The street corner pundit no longer typifies basic political speech. Increasingly, in the future, the Court will be forced to consider exactly what form of marketplace is appropriate for our

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[203] Discussing the unique domain of freedom of speech law Professor Eugene Volokh argues that the justices, and especially the "conservative" justices are "unpredictable." *See* Eugene Volokh, *Where the Justices are Unpredictable*, N.Y. TIMES, 30 October 2000, at A23. In a similar vein the columnist Nat Hentoff has compared Justice Clarence Thomas' defense of the First Amendment to those of Justice William O. Douglas and Justice William Brennan, Jr. *See* Nat Hentoff, *First Friend*, LEGAL TIMES, July 3, 2000, at 62.

[204] 494 U.S. 652 (1990). In this sense then, I have attempted to go beyond the "how" and offer reasons "why" the justices approach political speech cases in the way they do. The distinctions between decisions are not the products of policy disputes, but rather reflect alternative visions of the marketplace of ideas and the very nature and operation of the market "exchange." On the need to address the "why" when studying judicial decision-making, see CORNELL CLAYTON & HOWARD GILLMAN, THE SUPREME COURT IN AMERICAN POLITICS 1-2 (1999).

[205] *See, e.g.*, C. HERMAN PRITCHETT, THE ROOSEVELT COURT (1948); GLENDON SCHUBERT, THE JUDICIAL MIND (1965); and JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) as but a few examples of studies in judicial attitudes. While these studies are comprehensive and instructive in many ways, one of the goals of this article is to suggest that the coding of "liberal" and "conservative," for example, is insufficient (and even contradictory, in some cases) for understanding the outcomes, dispositions, and decision-making in this particular body of law.

increasingly diverse, global, and high-tech society. Consider, for example, the Internet. Within the last decade, the Internet has dramatically changed the world of politics—affording under-financed campaigns the exposure they need, transforming the cultivation of campaign contributions, and organizing and mobilizing citizens with list-serves and web sites, as but a few examples. In a sense, the computer server has replaced the "soap box," and electronic mail and bulletin boards are just as common as yard signs.[206]

"Electronic speech," of this sort, is troubling for some as it diminishes actual face-to-face communication between citizens. That is, while we may be more "connected" in the sense that we are literally more "wired" together, we may actually be less attached to each other in terms of relationships and affective bonds.[207] With less genuine "interaction" of this sort, it could be argued that the quality of our political discourse has suffered. Will the Court be inclined to address this issue, perhaps embracing the civility conception as a way to encourage more traditional forms of deliberation in the marketplace of political speech and ideas?

Further, with campaign spending reaching record levels during each subsequent election cycle,[208] the realities of electoral politics may cause the Court to privilege equality over liberty (or civility) in future campaign finance cases. The public seems to feel that some kind of change is necessary, and Congress has been forced to consider various "reform" packages. Legislative efforts to reduce the overwhelming role of money in elections could legitimately "equalize" the electoral process,[209] to some degree; however, reform

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[206] For a thorough discussion of the First Amendment and technological changes, see *Symposium, Emerging Media Technology and the First Amendment*, 104 YALE L.J. 1613 (1995).

[207] *See* Norman Nie, *Tracking Our Techno-Future*, 21 AMERICAN DEMOGRAPHICS 50-52 (July 1999).

[208] The Democratic and Republican national Party committees raised a record $463,123,755 in soft money from January 1, 1999 through December 31, 2000. *See* Common Cause, *National Parties Raise $463 Million in Soft Money During 1999-2000 Election Cycle* (visited Nov. 4, 2001) at http://commoncause.org/publications.feb01/020701st.htm. The Democratic party committees raised $243 million compared with $244 million raised by the Republican ones. At the Congressional level, however, the Democratic committees that raised money for House and Senate races, raised $120 million, compared with $94 million for the Republicans. *See* Katharine Seeyle, *Senate Democrats Surpassed G.O.P. in Soft Money in 2000*, N.Y. TIMES, Mar. 16, 2001, at A1.

[209] One of the amendments to the McCain-Feingold bill, the "Millionaire's Amendment," allows for larger "hard money" contributions to candidates facing opponents who seek to spend

efforts could also have "unintended consequences.[210] If money is to politics as surging water is to a dam (it finds a way in, no matter how consistently you plug the leaks),[211] then future cases might force the Court to assess the constitutionality of legislative designs (state and federal) that seek to protect political speech, yet minimize the detrimental effects it brings in its most "lucrative" form.[212]

How far will the Court advance these emerging conceptions of political speech in the marketplace of ideas? How will it negotiate the difficult balance of interests and issues? What form, in essence, will the marketplace of the twenty-first century take? What will be its fundamental values and how will the market be organized around these values? Certainly liberty will continue to be central to our political self-understanding as Americans. We look in the mirror of our society and see ourselves as a free people, capable and responsible enough to enjoy the freedoms of thought, expression,

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a considerable amount of their own money. *See* Alison Mitchell, *Senate Votes to Aid Candidates Facing Deep Pockets*, N.Y. TIMES, Mar. 21, 2001, at A16. Fourteen Senate millionaires—including Jon Corzine, who spent nearly $65 million of his own money to win a Senate seat in New Jersey—voted for the amendment. Lizette Alvarez, *A Multimillionaire Votes to Level the Playing Field*, N.Y. TIMES, Mar. 21, 2001, at A16.

[210] *See* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 231-237 (1997), for an example of a reformer who still acknowledges the potential pitfalls of reform efforts; *see also* Bradley Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L. J. 1049 (1996), for a current FEC Commissioner and perennial critic of reforms who happily explains how the "solutions" make the problems worse. *But see* Joel Gora & Peter Wallison, *If Soft Money Goes, Then So Does Free Speech*, N.Y. TIMES, Mar. 17, 2001, at A11, general counsel to the New York Civil Liberties Union, who argues that a ban on soft money will cripple the parties and deprive voters of information; *see also* Richard Berke, *Campaign Finance Overhaul May Enhance Influence of Big Political Action Committees*, N.Y. TIMES, Apr. 2, 2001, at A12, arguing that PACs will absorb the power squeezed out of the political parties; Mitch McConnell, Editorial, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, §4, at 17.

[211] "There are two things that are important in politics," explained Mark Hanna, the wealthy Republican stategist, at the end of the nineteenth century, "the first is money, and I can't remember what the second one is." Michael Kazin, *One Political Constant*, N.Y TIMES, Apr. 1, 2001, §4, at 17.

[212] In discussing amendments to the Hatch Act in 1940, Senator Bankhead essentially described what we now know as "soft money," and that which McCain-Feingold has its sights fixed on: "We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio." United States v. UAW-CIO, 352 U.S. 567, 577-8 (1957). Similarly, Senator Robert Taft, speaking of amendments meant to plug loopholes in the Smith-Connally Act, forecasted one of the key distinctions of *Buckley v. Valeo* and the eventual proliferation of what we know as issue ads: "If 'contribution' does not mean 'expenditure,' then a candidate for office could have his corporation friends publish an advertisement for him in the newspapers every day for a month before election." *Id.* at 583.

and self-government. Yet equality, at least as an ideal, recalls our better nature, and sits in tandem with liberty. It is, after all, "self-evident" that all men are created equal, and our legal-political system pursues truth-in-advertising as the Supreme Court reminds us that we are entitled to "equal justice under law." Finally, civility—a set of values promoting a normative vision of political discourse—will be tested in its particular understanding of the marketplace of ideas, especially as our society grows larger and more diverse. Thus, as we can see three conceptions of political speech and three understandings of the marketplace of ideas, the question for the future is: What will the next "funny thing" be?

APPENDIX

Case Selection:

The thirty-four cases selected for this study involve "speakers" (individuals, corporations, parties, unions, and PACs) and state or federal regulations that restrict or promote various forms of "speech" during campaigns and elections (Consider, for example, the FECA.) This study includes cases that involve political parties, to the extent that the primary issue is "speech" and not "association" or ballot access, and so long as the state interest pertains to the regulation of expression in the context of campaigns and elections. Some of the cases selected will obviously involve other constitutional concerns as well, but the principal issue in each is political speech. Thus, while this study will be informed by the Court's general speech doctrine, my primary emphasis is political speech within the electoral process.

Cases: N=34

United Public Workers of America (C.I.O.), et al. v. Mitchell, et al. (1947)
United States v. Congress of Industrial Organizations, et al. (1948)
United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) (1957)
Mills v. Alabama (1966)
St. Amant v. Thompson (1968)
Red Lion Broadcasting Co. v. Federal Communications Commission (1969)
Ocala Star-Banner Co., et al v. Damron (1971)
Monitor Patriot Co. v. Roy (1971)

United States Civil Service Commission, et al. v. National Association of Letter Carriers, AFL-CIO, et al. (1973)
Lehman v. City of Shaker Heights, et al. (1974)
Buckley v. Valeo (1976)
Greer, et al. v. Spock, et al. (1976)
First National Bank v. Bellotti (1978)
Citizens Against Rent Control v. Berkeley (1981)
California Medical Ass'n. v. FEC (1981)
CBS, Inc. v. Federal Communications Commission, et al. (1981)
Common Cause v. Schmitt, et al. (1982)
FEC v. National Right to Work Committee (1982)
Brown v. Hartlage (1982)
Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, et. al (1984)
FEC v. National Conservative Political Action Committee (1985)
FEC v. Massachusetts Citizens for Life (1986)
Meyer v. Grant (1988)
Eu v. San Francisco Cty. Democratic Central. Comm. (1989)
Austin v. Michigan Chamber of Commerce (1990)
Renne, et al. v. Geary, et al. (1991)
Burson v. Freeman (1992)
McIntyre v. Ohio Elections Commission (1995)
Colorado Republican Federal Campaign Committee, et al. v. FEC (1996)
Arkansas Educational Television Commission v. Ralph P. Forbes (1998)
Buckley v. American Constitutional Law Foundation (1999)
Nixon v. Shrink Missouri Government PAC (2000)
Federal Election Commission v. Colorado Republican Federal Campaign Committee [aka "Colorado II"] (2001)
Republican Party of Minnesota v. White (2002)