

**TOWN MEETINGS, TIGHT BUDGETS, AND FRUGAL YANKEES:
EXPLAINING THE CAMPAIGN-FINANCE JURISPRUDENCE OF
JUSTICE DAVID SOUTER**

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INTRODUCTION

An old story, perhaps apocryphal, recounts a chance meeting between a rancher from Texas and a New Hampshire dairy farmer. The following conversation ensued:

Rancher: How much land have you got?

Farmer: Two hundred acres.

Rancher: Two hundred acres? That's nothing. Why, I can get in my truck at dawn, drive all day, and still not reach the end of my ranch.

Farmer: I know what you mean. I used to have a truck like that, too.

New Englanders, especially northern New Englanders (i.e., residents of Maine, New Hampshire, and Vermont), like to use that story to illustrate the distinctness of their region, including its dry humor and its distrust of all things big, flashy, or expensive. Northern New England's "less is more, and small is beautiful" ethos is reflected in many aspects of life that make it different from its sister states to the south and west, including the absence of "mega-churches" and "big-time" college sports, and the prominence of town meetings and part-time, citizen legislatures.¹

Retired Supreme Court Justice David Souter, a small-town New Hampshire resident since age eleven, reflects the political culture of northern New England generally and of New Hampshire in particular,

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1. Nowhere is this philosophy more prominent than in Vermont. *See, e.g.*, FRANK BRYAN & JOHN MCCLAUGHRY, *THE VERMONT PAPERS: RECREATING DEMOCRACY ON A HUMAN SCALE* 62–66 (1989) (describing small Vermont communities and the ability for every member of a town to have a voice at town meetings); and Brian L. Porto, *Less Is More and Small Is Beautiful: How Vermont's Campaign-Finance Law Can Rejuvenate Democracy*, 30 VT. L. REV. 1, 3 (2005) (describing the "less is more and small is beautiful" philosophy of campaign finance in Vermont).

especially its preference for participatory democracy as symbolized by town meeting. Town meeting, the annual gathering of residents in New England towns to set policy and appropriate funds for the coming year, exudes political equality. The price of admission, namely, a few hours of one's time, is low, and the issues discussed, such as the need for a new fire truck or road grader, are often matters with which less-educated residents are more conversant than their better-educated neighbors.²

This Article will argue that Justice Souter's campaign-finance jurisprudence, which values political equality as well as freedom of speech, reflects not only his respect for precedent and inclination to balance conflicting constitutional rights, which other commentators have noted, but also the influences of New Hampshire's participatory political culture and town-meeting tradition.³ While serving on the Court, Souter consistently supported contribution limits and other regulations designed to produce a "fair fight" between candidates and to lower the price of admission to the political arena for candidates and their supporters.

Indeed, in *Randall v. Sorrell*, he dissented from the majority's conclusion that Vermont's limit on campaign spending was unconstitutional because it was not narrowly tailored to combat political corruption.⁴ He reasoned instead that the Vermont Legislature's findings regarding the amounts of time officeholders spent on fundraising and the decline in Vermonters' confidence in electoral politics because of the increasing sums spent on political campaigns warranted a remand to the district court to determine whether spending limits were the least restrictive means of accomplishing the Vermont Legislature's aims.⁵ Souter also dissented from the majority's conclusion that Vermont's contribution limits were too low

2. Admittedly, the cost of attending a town meeting held during the daytime is higher for an hourly worker, who would lose a day's pay by attending, than for a salaried professional, who would not. For thorough social-science analyses of this and many other issues affecting the town-meeting tradition in modern times, see DONALD L. ROBINSON, TOWN MEETING: PRACTICING DEMOCRACY IN RURAL NEW ENGLAND 130–31, 160–61 (2011) (discussing the inefficiencies and benefits of Ashfield, Massachusetts town democracy in solving local problems), FRANK M. BRYAN, REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING AND HOW IT WORKS 116, 180–84 (2004) (discussing how a town's socio-economic status is inversely related to attendance at town meetings), and JOSEPH F. ZIMMERMAN, THE NEW ENGLAND TOWN MEETING: DEMOCRACY IN ACTION 54, 74–75, 94, 184–89 (1999) (discussing low attendance, fear of standing up to town figures, and other social science issues affecting New England town meetings).

3. Regarding Souter's respect for precedent, see TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 196 (2005). Regarding his inclination to balance conflicting constitutional rights, see Liza Weiman Hanks, Note, *Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics*, 48 STAN. L. REV. 903, 932–33 (1996).

4. *Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (Souter, J., dissenting).

5. *Id.* at 283.

to ensure competitive elections.⁶ In an opinion filled with references to “endless fundraising,” “the fundraising treadmill,” and “the pernicious effect of the nonstop pursuit of money,”⁷ he deferred to the Vermont Legislature, which “evidently tried to account for the realities of campaigning in Vermont,” where low-cost, door-to-door appeals were commonplace and a gubernatorial candidate sent “thank-you” notes to five-dollar contributors.⁸ Souter saw “no evidence of constitutional miscalculation [by the Legislature] sufficient to dispense with respect for its judgments.”⁹

This Article also argues that, although Justice Souter’s concern for political equality is out of step with the current Supreme Court’s campaign-finance jurisprudence, which plainly favors the freedom of speech over political equality, his recognition of the importance of political equality has left a valuable legacy for advocates who will champion that principle before a future Supreme Court.¹⁰ Thus, three important reasons compel a careful examination of Justice Souter’s campaign-finance jurisprudence, even though he is no longer on the Court. First, his campaign-finance decisions illustrate the power of a Justice’s background, including the political culture of his or her home state, to influence that Justice’s jurisprudence. Second, Justice Souter’s emphasis on political equality is easy to lose sight of, but important to understand, amidst the current Court’s preoccupation with holding free speech above all other political values. Third, any recognition by a future Supreme Court that the First Amendment protects both political equality and the freedom of speech, and that campaign-finance laws should

6. *Id.* at 284.

7. *Id.* at 282–83.

8. *Id.* at 286–88 (quoting *Landell v. Sorrell*, 188 F. Supp. 2d 459, 471–72 (D. Vt. 2000)).

9. *Id.* at 288.

10. For examples of the current Court’s pronounced preference for free speech over political equality, see *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (striking down on First Amendment grounds a matching-funds provision of an Arizona public financing law providing that once a privately funded candidate exceeded a set spending amount, a publicly funded candidate would receive approximately one dollar in public funds for every additional dollar spent by the privately funded candidate and by independent groups supporting the privately funded candidate). See also *Citizens United v. FEC*, 130 S.Ct. 876, 913 (2010) (holding that the First Amendment prohibits government from barring independent expenditures, made from corporate or union treasuries, for electioneering communications); *Davis v. FEC*, 554 U.S. 724, 740 (2008) (invalidating a provision of federal law that permitted a candidate whose opponent spent more than \$350,000 of personal funds during a campaign to solicit contributions in amounts up to three times the customary contribution limit under federal law). Most recently, in *Am. Tradition Partnership v. Bullock*, 132 S.Ct. 2490, 2491 (2012) (per curiam), the Court reaffirmed its decision in *Citizens United* that upheld unlimited independent spending in political campaigns by corporations and labor unions. In *Bullock*, the Court, in a one-page order, without having heard arguments, reversed a longstanding Montana law requiring corporations wishing to make independent expenditures supporting political candidates to establish political committees for that purpose. *Id.* (citing MONT. CODE ANN. § 13-35-227(1) (2011)).

reflect both values, would likely draw from Justice Souter's opinions on this subject.

Part I discusses the likely influence of New Hampshire's egalitarian political culture on David Souter. Part II shows how Justice Souter's concern for political equality informed his votes and his written opinions in campaign-finance cases decided during his tenure on the Supreme Court.¹¹ Part III explains that Justice Souter's service on the Court has left supporters of political equality a valuable jurisprudential legacy that should guide their future work. Finally, Part IV concludes that scholars and advocates of campaign-finance regulation should study Justice Souter's opinions for a better understanding of how the First Amendment can accommodate both free speech and political equality.

I. LESSONS IN PRACTICAL GOVERNMENT: EARLY INFLUENCES ON JUSTICE SOUTER'S VIEW OF POLITICAL EQUALITY

On September 13, 1990, the first day of then-Judge Souter's¹² confirmation hearings before the Senate Judiciary Committee, his close friend, Senator Warren Rudman (R-NH), stated: "Much has been made of David's New Englandness—I think that is a word. I am not sure what it means."¹³ Evidently, Souter's high school classmate Vicki Maiben, who told an interviewer that even in the 1950s, the future Justice was "an inveterate Yankee," better understood his "New Englandness" than did Senator Rudman and the Supreme Court press corps.¹⁴ Of Souter, Ms. Maiben said: "The woods, the farmland, the countryside—that's where his heart was, and is."¹⁵

Another feature of rural New England that intrigued the young David Souter was the annual exercise in direct democracy known as town meeting. That was evident in his opening statement to the Senate Judiciary Committee, during which he discussed learning as a boy about "the responsibility of people to govern themselves."¹⁶ Noting that "[i]t was a

11. Justice Souter served on the Supreme Court from 1990 until 2009. *David H. Souter*, OYEZ, http://oyez.org/justices/david_h_souter (last visited Nov. 21, 2012).

12. When nominated to the Supreme Court, Souter was serving as a judge on the United States Court of Appeals for the First Circuit. *Id.*

13. *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong., 2d Sess. 48 (1990) [hereinafter *Nomination Hearings*] (statement of Sen. Warren Rudman, R-NH).

14. YARBROUGH, *supra* note 3, at 9.

15. *Id.*

16. *Nomination Hearings*, *supra* note 13, at 50 (opening statement of Judge David H. Souter).

responsibility that they owed to themselves, and it was a responsibility that they owed and owe to their neighbors,”¹⁷ Souter recalled:

I first learned about that or I first learned the practicalities of that when I used to go over to the town hall in Weare, NH, on town meeting day. I would sit in the benches in the back of the town hall after school, and that is where I began my lessons in practical government.¹⁸

Those lessons continued for decades, while Souter served New Hampshire as Assistant Attorney General from 1968 until 1971, Deputy Attorney General from 1971 until 1976, and Attorney General from 1976 until 1978.¹⁹ He then served as a judge on the New Hampshire Superior Court from 1978 until 1983 and as a justice on the New Hampshire Supreme Court from 1983 until 1990, when President George H.W. Bush appointed him to the United States Court of Appeals for the First Circuit and, several months later, to the Supreme Court.²⁰ In light of the prominence that Souter attached to town meeting during his opening remarks to the Senate Judiciary Committee in 1990 and the egalitarian nature of his campaign-finance jurisprudence as a member of the Court, it appears that the lessons he learned while watching town meeting from the back benches of the Weare (pronounced “where”) Town Hall were powerful and enduring.

To be sure, Justice Souter is not the first, nor even the most famous, person to extol the virtues of town meeting in New England, which, save for some townships in Minnesota, is the only place in the United States where “small face-to-face assemblies of common citizens” make the laws.²¹ The renowned essayist and poet Ralph Waldo Emerson told the people of Concord, Massachusetts that town meeting reveals “the great secret of political science” and solves the “problem” it entails; namely, “how to give every individual his fair weight in the government.”²² But not only New Englanders and Americans found town meetings fascinating. Indeed, that most astute observer of American politics, Frenchman Alexis de Toqueville, observed that “[t]own meetings are to liberty what primary

17. *Id.*

18. *Id.*

19. *Id.* at 1069.

20. *Id.*

21. BRYAN, *supra* note 2, at xii.

22. 11 RALPH WALDO EMERSON, *Historical Discourse at Concord*, in THE COMPLETE WORKS OF RALPH WALDO EMERSON 27, 46–47 (AMS Press ed. 1968) (1904), *quoted in* BRYAN, *supra* note 2, at 26–27.

schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it."²³

For present purposes, though, perhaps the most useful commentary about town meeting is that of the late political philosopher Alexander Meikeljohn, which shows how this institution reconciles the two great antagonists of the modern debate about campaign finance; namely, freedom of speech and political equality. Professor Meikeljohn observed of town meetings:

The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He 'calls the meeting to order.' And the hush which follows that call is a clear indication that restrictions upon speech have been set up. The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed. Except as he is overruled by the meeting as a whole, he will enforce those rules.²⁴

In Meikeljohn's view, "The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged."²⁵ That is because a town meeting is not, in Meikeljohn's words, "a dialectical free-for-all."²⁶ Rather, "[i]t is self-government."²⁷ More specifically, it is a group of "free and equal" individuals "cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion."²⁸

Thus, David Souter's "first lesson in practical government" was learned in a "classroom" where political equality was valued as much as freedom of speech, and where the moderator's gavel protected both. Judging by Justice Souter's campaign-finance jurisprudence, which sought to reconcile those two values, the adult citizens of Weare were good teachers and young David absorbed their lessons well.²⁹

23. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 53 (Henry Steele Commanger, ed., Henry Reeve trans., 1947), *quoted in* BRYAN, *supra* note 2, at 27.

24. ALEXANDER MEIKELJOHN, *POLITICAL FREEDOM* 24 (Greenwood Press 1979) (1960).

25. *Id.* at 25.

26. *Id.*

27. *Id.*

28. *Id.*

29. In David Souter's youth, New Hampshire towns followed the traditional model of town meeting, under which the board of selectmen, school board, or budget committee proposed a budget and a set of "warrant articles," which could include bond proposals to borrow money for capital projects, land acquisition, or other expenses. RICHARD A. MINARD, JR. & MELISSA GAGNON, SB2 AT 5: BONDS,

Although town meeting was not the only feature of New Hampshire's political culture to which David Souter was exposed as a child, young adult, and later, a public official, it was prominent because ever since the adoption of New Hampshire's 1784 Constitution, the town has been the basis of representation in the Granite State.³⁰ It remains so today, reflecting a long, historical struggle to unify the eastern and western parts of the state and the residents' passionate attachment to grassroots democracy.³¹

The continued prominence of town meeting also reflects what the late political scientist Daniel Elazar termed the "moralistic" element in New Hampshire's political culture.³² According to Elazar, three types of political culture exist in the American states: the moralistic, the individualistic, and the traditionalistic.³³ These political cultures, or "particular pattern[s] of orientation to political action in which each political system is embedded," are, in Elazar's view, "the historical source of differences in habits, perspectives, and attitudes that influence political life in the various states."³⁴ Put another way, "Political cultures vary in beliefs and values concerning the appropriate goals of a political system, the roles of political parties in achieving those goals, and the activities of citizens, elites, and professional politicians in politics."³⁵

In Maine, New Hampshire, and Vermont, the Puritan ethos of seeking to construct "the best possible earthly version of the holy commonwealth"

BALLOTS, AND THE 'DELIBERATIVE SESSION' 5 (2002), available at <http://www.nhpolicy.org/reports/sb2at5.pdf>. Residents assembled at an open meeting to hear the board present the articles, to debate them, and, ultimately, to vote on them. *Id.* But in 1995 the New Hampshire Legislature enacted and the governor signed Senate Bill 2, creating N.H. R.S.A. 40:13, which allows towns and school districts to replace the traditional town meeting with an "official-ballot process." *Id.* In the official-ballot towns, selectmen, school boards, and budget committees still prepare budgets and warrants and present them to voters for debate and a vote, but the deliberation and the final vote are held on different days. *Id.* at 6. At the deliberative session, which occurs between thirty-one and thirty-eight days before the balloting, boards and budget committees present the warrant articles for discussion and amendment. *Id.* Any registered voter present may move to amend an article, and a simple majority is required to pass the amendment. *Id.* Towns that have adopted the official-ballot process tend to be relatively large (i.e., having more than 3,000 residents and as many 27,802 residents) and have apparently concluded that they are too large to give residents meaningful opportunities to participate in the traditional open-meeting setting. *Id.* at 7–8. That conclusion is consistent with research by the New Hampshire Center for Public Policy Studies showing that as towns grow, smaller percentages of voters attend town meetings, increasing the risk that the attendees will not represent the town's residents effectively. *Id.* at 8.

30. NANCY COFFEY HEFFERNAN & ANN PAGE STECKER, *NEW HAMPSHIRE: CROSSCURRENTS IN ITS DEVELOPMENT* 77 (Updated ed. 1996).

31. *Id.*

32. DANIEL ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 117 (3d ed. 1984).

33. *Id.* at 115.

34. *Id.* at 109–110.

35. Jody L. Fitzpatrick & Rodney E. Hero, *Political Culture and Political Characteristics of the American States: A Consideration of Some Old and New Questions*, W. POL. Q., Mar. 1988, at 145, 145.

resulted in the establishment of a moralistic political culture.³⁶ This political culture views politics as a search for the good society, with power exercised for the betterment of the commonwealth.³⁷ The moralistic political culture sees government as a positive instrument for promoting the general welfare and politics as a matter of concern for every citizen, not just those who seek political careers.³⁸ This political culture views government service as honorable, and politicians are not expected to profit financially from holding office.³⁹ Perhaps because financial profit from politics is viewed negatively, political “amateurism,” that is, a tendency for elected officials to serve briefly then return to private life, is common.⁴⁰

Elazar notes that Maine and Vermont have retained moralistic political cultures, while New Hampshire’s political culture is partly moralistic and partly individualistic.⁴¹ The individualistic political culture views democracy as a marketplace and government as a utilitarian device for performing functions demanded by the voters.⁴² Citizens in this type of culture tend to believe politics is dirty business; hence, they expect corruption and are slow to anger when it occurs, unless it occurs on a grand scale.⁴³ New Hampshire’s political culture retains the moralistic elements of high citizen participation and a low tolerance for corruption, while also exhibiting the individualistic element of hostility toward government.⁴⁴ Town meeting reflects the moralistic element because it features participatory democracy in pursuit of the common good, but it also mirrors the individualistic element because it offers citizens a chance to make public policy at the grassroots level, where their trust in government is greatest.

36. ELAZAR, *supra* note 32, at 127. According to Elazar, predominantly moralistic political cultures also exist in the Upper Midwest (Michigan, Wisconsin, and Minnesota) and part of the Pacific Northwest, notably, Oregon. *Id.* at 124–25.

37. *Id.* at 117.

38. *Id.*

39. *Id.*

40. *Id.* at 118.

41. *Id.* at 135.

42. *Id.* at 115. According to Elazar, this political culture predominates in Southern New England (Massachusetts, Rhode Island, and Connecticut), the Middle Atlantic States, and parts of the Pacific Coast, notably, California and Washington State. *Id.* at 124–25.

43. *Id.* at 116.

44. In contrast to the moralistic and individualistic political cultures, the traditionalistic political culture, which predominates in the South, is characterized by a paternalistic conception of the commonwealth. *Id.* at 118–19, 124–25. It accepts a hierarchical society, authorizing and expecting those at the top of the social pyramid to dominate government. *Id.* at 118–19. Although this political culture views government favorably, it seeks to use government to preserve rather than improve the existing social order. *Id.* Social and family ties are paramount in the traditionalistic political culture. *Id.* at 119.

Aside from town meeting, the most visible institutional reflection of New Hampshire's passion for grassroots democracy, and the town-based representation that passion produces, is the state's 400-member House of Representatives, the largest deliberative body among the fifty state legislatures.⁴⁵ The most noteworthy policy implication of New Hampshire's political culture is its hostility to taxes, particularly to state and federal taxes.⁴⁶ New Hampshire is one of only two states (Alaska is the other) having neither an income tax nor a sales tax.⁴⁷ The roots of New Hampshire's anti-tax ethos are twofold. First, the ancestors of the state's largest ethnic group, French-Canadians, left Quebec partly because they resented the taxes the English-speaking majority imposed on their modest incomes.⁴⁸ Therefore, the original French-speaking residents of New Hampshire brought with them from Canada a deep-seated hostility to government in general and taxation in particular.⁴⁹ Second, New Hampshire was the only colony to be ruled directly from England, which bred among the residents a profound suspicion of centralized authority.⁵⁰

Hostility to taxation persists as a key feature of New Hampshire's political culture. Indeed, political scientist Duane Lockard's characterization of the state in 1959 as "obsessed" with the tax question and dominated by politicians who are inclined to "convert *all* policy to questions of economy-in-government" still rings true today.⁵¹ Many candidates take "The Pledge" not to support the enactment of a "broad-based" (i.e., income or sales) tax.⁵² Others, most often Democrats, refuse to do so; indeed, a 2012 Democratic gubernatorial candidate has reiterated the argument most frequently made by opponents of New Hampshire's tax structure, namely, that opposition to income and sales taxes results in excessive reliance on regressive and inadequate local property taxes to fund services.⁵³ Thus far, though, despite the inequities and the limits of relying on local property taxes, that reliance continues to reflect New Hampshire's pronounced preference for grassroots democracy.

45. HEFFERNAN & STECKER, *supra* note 30, at 191.

46. NIAL PALMER, *THE NEW HAMPSHIRE PRIMARY AND THE AMERICAN ELECTORAL PROCESS* 38 (1997).

47. Jake Berry, *N.H. Gubernatorial Candidate Cilley Has It Right on Taxes*, VALLEY NEWS, Aug. 4, 2012, at A1.

48. PALMER, *supra* note 46, at 38.

49. *Id.*

50. *Id.* at 40.

51. DUANE LOCKARD, *NEW ENGLAND STATE POLITICS* 47 (1959).

52. PALMER, *supra* note 46, at 44.

53. Berry, *supra* note 47, at A1.

Also important to New Hampshire's political culture is that despite substantial population growth and suburbanization in the southern counties in recent decades, approximately half of the state's population is located in rural areas.⁵⁴ As a result, "the voluntary character of political service in New Hampshire," has largely been preserved, keeping politics, at least with respect to state and local offices, "small-scale" and "more of a sideline than a career."⁵⁵ The \$100-per-year salary that state senators and representatives earn helps to ensure that politics remains "more of a sideline than a career" for most New Hampshire officeholders.⁵⁶

A key feature of New Hampshire's small-scale politics is relatively inexpensive campaigning, especially for House candidates. Each House member represents 3,089 constituents,⁵⁷ so campaign costs include print literature to leave with residents of the districts, voter lists purchased from town clerks, and transportation, especially in rural areas, where the distances between houses can be great.⁵⁸ Because these costs are minimal, election outcomes will turn on party affiliations, personal relationships between voters and candidates, issue positions, and the time candidates spend meeting and listening to voters, but not on the amounts of money candidates spend.⁵⁹ And because fundraising is not crucial, voters can rest assured that their influence will not be subordinated to that of large contributors.⁶⁰ In this environment, voters have political freedom to participate in campaigns if they wish, such as by making lawn signs or hosting a "meet the candidate" gathering, while also enjoying a political equality that enables them to get the candidate's attention without contributing money to the campaign.⁶¹

Thus, the New Hampshire experience matches political science research results showing that the size of the electorate affects the nature of campaigns and the degree to which money is important to electoral success.⁶² Candidates in places with small electorates, such as the districts for the New Hampshire House of Representatives, can campaign chiefly by knocking on doors, thereby reaching all of the district's voters while spending little money.⁶³ This small-scale, low-budget style of politics was

54. PALMER, *supra* note 46, at 37.

55. *Id.* at 40.

56. *Id.*

57. *Constituents per State Legislative District*, NAT'L CONFERENCE OF ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/redist/constituents-per-state-legislative-district.aspx> (last visited Nov. 21, 2012).

58. ANTHONY GIERZYNSKI, MONEY RULES: FINANCING ELECTIONS IN AMERICA 14 (2000).

59. *Id.*

60. *Id.* at 15.

61. *Id.*

62. *Id.* at 14-15.

63. *Id.* at 28.

integral to the political culture in which Justice Souter grew up and later functioned as a public official. His comfort with, if not preference for, this style of politics was evident in his dissent in *Randall v. Sorrell*, noted earlier, in which he advocated remanding to the district court “for further enquiry bearing on the limitations on candidates’ expenditures.”⁶⁴

The influences of New Hampshire’s participatory political culture generally and its town-meeting tradition in particular are evident in Justice Souter’s campaign-finance opinions, both majority and dissenting, which seek to protect the freedom of speech without sacrificing political equality in the process. Part III will analyze those opinions.

III. BALANCING FREE SPEECH AND POLITICAL EQUALITY: JUSTICE SOUTER’S CAMPAIGN-FINANCE OPINIONS

A. The Pre-Souter Years: Supreme Court Ambivalence Toward Campaign-Finance Regulations

Any journey into the weeds of campaign-finance law must start at *Buckley v. Valeo*, the Supreme Court’s foundational decision in this field.⁶⁵ The prelude to *Buckley* was the enactment by Congress of the Federal Election Campaign Act of 1971 (FECA) and the 1974 Amendments to FECA, respectively.⁶⁶ The 1971 law attempted to promote disclosure of campaign contributions and expenditures by institutionalizing reporting requirements.⁶⁷

The 1974 Amendments were more ambitious than the original law.⁶⁸ The Amendments: (1) “prohibited individuals from contributing more than \$1,000 to any one candidate in any one primary or general election”; (2) capped the amount of personal or family funds a candidate for federal office could spend during a campaign; (3) limited the “aggregate expenditures that might be made by or on behalf of a candidate for federal office”; and (4)

64. *Randall v. Sorrell*, 548 U.S. 230, 281 (2006) (Souter, J., dissenting). Those limits were \$300,000 for gubernatorial candidates; \$100,000 for candidates for lieutenant governor; and \$45,000 for candidates for secretary of state, treasurer, auditor, and attorney general during a two-year election cycle. See Porto, *supra* note 1, at 12.

65. *Buckley v. Valeo*, 424 U.S. 1, 6 (1976) (per curiam).

66. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431 (1975)).

67. Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 612 (2008).

68. See Frank J. Sorauf, *Introduction to Chapter Five* of CAMPAIGN FINANCE REFORM: A SOURCEBOOK 123 (Anthony Corrado et al., eds., 1997) (noting that one of the motivations for the 1974 Amendments was the goal of reducing the influence in political campaigns of wealthy individuals, who had contributed millions of dollars to President Richard Nixon’s 1972 reelection campaign).

barred any person from spending “more than \$1,000 in ‘advocating the election or defeat’ of a ‘clearly identified candidate,’” even if the expenditure was made without having consulted the candidate or an agent of the candidate.⁶⁹

At issue in *Buckley v. Valeo* was the constitutionality of the 1974 FECA Amendments and related revisions to the Internal Revenue Code.⁷⁰ The Court upheld the limits that the 1974 law placed on contributions made by individuals and political action committees (PACs) because “a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.”⁷¹ The theory behind this view was that “[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”⁷²

But, in the Court’s view, limitations on campaign spending were another matter entirely. The *per curiam* opinion observed:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.⁷³

Besides, the *Buckley* Court continued, “The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions.”⁷⁴ The best way to thwart such *quid pro quo* corruption was to impose contribution limits and disclosure requirements, not expenditure limits.⁷⁵

Consequently, the *Buckley* Court upheld limits on contributions made by individuals (\$1,000 per candidate, per federal office, per election, and

69. Pasquale, *supra* note 67, at 614.

70. *Buckley*, 424 U.S. at 6.

71. *Id.* at 20–21. See also Porto, *supra* note 1, at 7 (quoting *Buckley*, 424 U.S. at 20–21) (describing the Court’s holding in the *Buckley* decision).

72. *Buckley*, 424 U.S. at 21. See also Porto, *supra* note 1, at 7 (quoting *Buckley*, 424 U.S. at 21) (explaining the basis for the Court’s decision in *Buckley*).

73. *Buckley*, 424 U.S. at 19 (footnote omitted). See also Porto, *supra* note 1, at 7–8 (quoting *Buckley*, 424 U.S. at 19) (stating the Court’s position on campaign spending limits).

74. *Buckley*, 424 U.S. at 55. See also Porto, *supra* note 1, at 8 (quoting *Buckley*, 424 U.S. at 55) (explaining the Court’s reasoning in *Buckley*).

75. *Buckley*, 424 U.S. at 55.

\$25,000 in total contributions in a calendar year) and PACs (\$5,000 per candidate for federal office per election), but invalidated limits on independent expenditures made on behalf of candidates (\$1,000 per candidate per calendar year), on expenditures made by candidates from personal or family resources (\$50,000 for presidential and vice-presidential candidates, \$35,000 for candidates for the United States Senate, and \$25,000 for candidates for the House of Representatives), and on total expenditures during a campaign.⁷⁶

Since *Buckley*, the Supreme Court's campaign-finance jurisprudence has vacillated between periods of skepticism about regulation, which *Buckley* reflects,⁷⁷ and periods of deference to state and federal legislative judgments about the wisdom of such regulation.⁷⁸ The years immediately after the *Buckley* decision witnessed skepticism in the Court's campaign-finance decisions. For example, the Justices invalidated a Massachusetts law that aimed to limit corporate participation in ballot-measure campaigns by prohibiting a corporation from contributing to such a campaign or spending money to influence its outcome unless the ballot measure at issue materially affected the corporation's property, business, or assets.⁷⁹ They

76. *Buckley*, 424 U.S. at 51, 58, 59 n.67; 2 U.S.C. § 441a(a) (2006). Although the Court invalidated the \$50,000 limit on contributions by presidential and vice-presidential candidates (and their immediate family members) to their own campaigns, as provided for in the 1974 FECA Amendments, it upheld that limit as included in Subtitle H of the Internal Revenue Code, which contains the public-financing system for presidential elections. See *Buckley*, 424 U.S. at 108 (explaining that the contribution limits of § 608(c) are the same as those in Subtitle H of the Internal Revenue Code); see also I.R.C. § 9035(a) (2006) (establishing expenditure limitations for federal candidates opting into the public-financing system). Thus, the limit on the expenditure of personal and family funds presently applies only to presidential and vice-presidential candidates who accept federal funds for their campaigns.

77. The Court issued a now-famous statement in *Buckley* reflecting skepticism toward campaign-finance regulations generally and particular hostility toward such regulations as forces for political equality. The Court wrote:

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."

Buckley, 424 U.S. at 48–49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

78. Richard L. Hasen, *Justice Souter: Campaign Finance Law's Emerging Egalitarian*, 1 ALB. GOV'T L. REV. 169, 172 (2008).

79. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 765 (1978). But see the *Bellotti* opinion's footnote 26, which states that "a corporation's right to speak on issues of general public interest," as in a referendum campaign, "implies no comparable right in the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26. "Congress might well be able," the footnote continues, "to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Id.* Thus, despite the Supreme Court's skepticism toward campaign-finance regulation following *Buckley*, it acknowledged

also struck down a city ordinance limiting contributions to committees operating ballot-measure campaigns to \$250.⁸⁰

The Court declared unconstitutional a portion of the Presidential Campaign Fund Act⁸¹ that prohibited independent spending of more than \$1,000 to promote the election of a presidential candidate who had agreed to participate in the public financing system.⁸² And the Court refused to apply a provision of FECA restricting corporations to funding express advocacy for or against specific candidates from segregated funds (i.e., not their corporate treasuries) to an ideological group that did not engage in business activities, had no shareholders, and was neither established as, nor would take contributions from, a business corporation or a labor union.⁸³

Only once during the 1980s did the Court abandon its customary skepticism about a campaign-finance regulation. In that case, it upheld a federal law prohibiting corporations without shareholders from soliciting anyone but their “members” (defined as persons who played a part in the operation or administration of the corporation) for contributions to their PACs.⁸⁴ Then in early 1990, just six months before David Souter joined the Court, the Justices again departed from their usual skepticism by upholding, in *Austin v. Michigan Chamber of Commerce*, a Michigan law that prohibited corporations other than media corporations from using their general treasury funds to make independent expenditures in state election campaigns.⁸⁵ In so doing, the Court appeared to expand its definition of “corruption” from the financial *quid pro quo* variety emphasized in *Buckley* to what it now termed “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁸⁶

This reasoning can be traced to the majority opinion, four years earlier, in *FEC v. Massachusetts Citizens Concerned for Life, Inc.*,⁸⁷ stating that for candidates, “[r]elative availability of funds is after all a rough barometer of

the possibility that Congress could demonstrate a need for limitations on corporate expenditures in candidate elections. In *Citizens United*, though, the Court rejected the *Bellotti* footnote as the basis for limiting independent expenditures by corporations, stating that the footnote misinterpreted *Buckley*, which, after all, “struck down a ban on independent expenditures to support candidates that covered corporations.” *Citizens United v. FEC*, 130 S.Ct. 876, 909 (2010).

80. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981).

81. I.R.C. §§ 9001–9013.

82. *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 482–83 (1985).

83. *FEC v. Mass. Citizens Concerned for Life, Inc.*, 479 U.S. 238, 263–64 (1986).

84. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 206 (1982).

85. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668 (1990).

86. *Id.* at 660.

87. *Mass. Citizens*, 479 U.S. at 263–64.

public support,” but noting that “[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers.”⁸⁸

As a result of its apparent definitional expansion, the Court upheld an expenditure limitation in a campaign-finance case for the first time.⁸⁹ Still, as the 1990s progressed, it was unclear whether the new definition, which the *Austin* Court had cautiously limited to corporations instead of recognizing a broad equality rationale for campaign-finance regulations, would drive the Court’s decisions in future cases or would instead recede from view as skepticism again commanded a majority among the Justices.⁹⁰

B. Justice Souter and the Court’s “New Deference” Toward Campaign-Finance Regulations

According to Professor Hasen, although *Austin v. Michigan Chamber of Commerce* was important, a more “dramatic shift [in the Court’s campaign-finance jurisprudence] began in 2000,” led by Justices Souter, Breyer, and O’Connor.⁹¹ In Professor Hasen’s view, “The Court . . . replaced a general skepticism of campaign finance regulation with unprecedented deference to legislative determinations on both the need for regulation and the means best suited to achieve regulatory goals.”⁹² Such deference represented a marked change from *Buckley*, whose “overall tenor and tone . . . was one of skepticism of legislative judgments about the need for campaign finance regulation.”⁹³

The height of the “new deference” occurred between 2000 and Justice O’Connor’s retirement in 2006, during which time the Court decided *Nixon v. Shrink Missouri Government PAC*;⁹⁴ *FEC v. Colorado Republican Federal Campaign Committee*;⁹⁵ *FEC v. Beaumont*;⁹⁶ and *McConnell v.*

88. *Id.* at 258. For an interesting discussion of the influence of *Massachusetts Citizens Concerned for Life* (MCFL) on *Austin*, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 111–14 (2003).

89. Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 42 (2004).

90. *Id.*

91. *Id.*

92. *Id.* at 34.

93. *Id.* at 38.

94. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 377 (2000).

95. *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431 (2001).

96. *FEC v. Beaumont*, 539 U.S. 146, 162 n.9 (2003).

FEC.⁹⁷ No member of the Supreme Court was more important to the shift away from skepticism and toward deference, hence political equality, than Justice Souter, who wrote the majority opinions in *Shrink Missouri*, *Colorado Republican*, and *Beaumont*, and joined the majority opinion in *McConnell*. Indeed, Professor Hasen wrote in 2008: “Justice Souter, more than any other Justice on the current Supreme Court, has freed those who would craft campaign finance regulation in the name of political equality from Supreme Court interference.”⁹⁸ Accordingly, the Souter opinions in these cases merit scrutiny to determine whether the influences of Weare’s town meetings and New Hampshire’s political culture were evident decades later.

1. *Nixon v. Shrink Missouri Government PAC*

The first of the post-2000 cases in which the Supreme Court deferred to campaign-finance regulations was *Shrink Missouri*.⁹⁹ At issue was a Missouri law that imposed limits on campaign contributions ranging from \$250 to \$1,000, depending on the office at stake or the size of the constituency represented.¹⁰⁰ The maximum allowable contribution to a candidate for a statewide office was \$1,000.¹⁰¹ The State adjusted the limits in each even-numbered year by multiplying the base-year amount by the Consumer Price Index (CPI) and then rounding off the result to the nearest twenty-five-dollar amount.¹⁰² As a result, by the time the suit was filed, the permissible amounts ranged from a high of \$1,075 for contributions to candidates for statewide office and for any office for which the constituency exceeded 250,000 people, to a low of \$275 for contributions to candidates for state representative or any office representing fewer than 100,000 people.¹⁰³

The Shrink Missouri Government PAC, one of the respondents in this case brought by Missouri Attorney General Jay Nixon, sought to enjoin enforcement of the contribution statute,¹⁰⁴ which the group viewed as violating its First and Fourteenth Amendment rights, although the

97. *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

98. Hasen, *supra* note 78, at 193.

99. *Shrink*, 528 U.S. at 397–98.

100. *Id.* at 382.

101. *Id.* (quoting MO. REV. STAT. § 130.032.1(1) (Cum. Supp. 1998)).

102. *Id.* at 382–83 (quoting MO. REV. STAT. § 130.032.2 (Cum. Supp. 1998)).

103. *Id.* at 383 (citing *Shrink Mo. Gov’t PAC v. Adams*, 161 F.3d 519, 520 (8th Cir. 1998)).

104. MO. REV. STAT. § 130.032, *repealed by* L.2008, S.B. No. 1038, § A.

complaint had not specified which rights in particular.¹⁰⁵ According to the PAC, Missouri's claim that it had a compelling interest in avoiding corruption, or the appearance thereof, associated with large campaign contributions was insufficient to satisfy the strict-scrutiny standard required by *Buckley*.¹⁰⁶

Writing for the majority, Justice Souter identified the questions to be answered as whether: (1) *Buckley* was authority for state-imposed limits on contributions to candidates for state office, and (2) "the federal [contribution] limits approved in *Buckley*, with or without adjustment for inflation, define[d] the scope of permissible state limitations" in 2000.¹⁰⁷ He quickly answered both questions by noting that *Buckley* was "authority for comparable state regulation [on campaign contributions], which need not be pegged to *Buckley*'s dollars."¹⁰⁸

Justice Souter observed that "under *Buckley*'s standard of scrutiny, a contribution limit involving 'significant interference' with associational rights . . . could survive if the Government demonstrated" that the limit was "'closely drawn' to match a 'sufficiently important interest.'"¹⁰⁹ He added that *Buckley* had "recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."¹¹⁰ That concern motivated the Court's "recognition that the Congress could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery."¹¹¹ Besides, Souter noted, the *Buckley* Court had written about the "perception of corruption 'inherent in a regime of large individual financial contributions' to candidates . . . as a source of concern 'almost equal' to *quid pro quo* improbity."¹¹² Indeed, Souter emphasized, "[t]he public interest in countering that perception" had caused the Court to reject the petitioners' overbreadth claim against the FECA Amendments in *Buckley*.¹¹³

Despite acknowledging that the *Buckley* Court had rejected the use of intermediate scrutiny for reviewing communicative action, Souter stressed that the Court in *Buckley* had drawn a line between contributions and expenditures, and had found that the prevention of corruption and its appearance was a

105. *Shrink*, 528 U.S. at 383.

106. *Id.* at 384 (citing *Adams*, 161 F.3d at 521–22).

107. *Id.* at 381–82.

108. *Id.* at 382.

109. *Id.* at 387–88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

110. *Id.* at 389 (citing *Buckley*, 424 U.S. at 28).

111. *Id.* (footnote omitted) (quoting *Buckley*, 424 U.S. at 28).

112. *Id.* at 390 (quoting *Buckley*, 424 U.S. at 27).

113. *Id.* (citing *Buckley*, 424 U.S. at 30).

“constitutionally sufficient justification” for restricting rights of speech and association.¹¹⁴ In response to the Eighth Circuit’s conclusion that *Buckley* had mandated strict scrutiny of regulations on contributions, he added that “[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion.”¹¹⁵

In Justice Souter’s view, the *Buckley* Court’s concern for the perception of corruption attendant to large campaign contributions “made perfect sense.”¹¹⁶ “Leave the perception of impropriety unanswered,” he reasoned, “and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”¹¹⁷ “Democracy works,” he continued, “only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”¹¹⁸

Moreover, in the estimation of Justice Souter and the Court majority, the evidence introduced by Attorney General Nixon and cited by the trial court demonstrated that Missouri’s concerns about the corruptive consequences of large campaign contributions were valid.¹¹⁹ That evidence included testimony by the co-chair of the state legislature’s Interim Joint Committee on Campaign Finance Reform, news articles about the state treasurer’s decision to give Missouri’s banking business to a bank that had contributed \$20,000 to his election campaign, and various scandals involving “kickbacks” to public officials for favorable decisions or the misuse of state property.¹²⁰

Besides, contrary to the respondents’ claims, no evidence indicated that the disputed contribution limits prevented candidates and political committees from “amassing the resources necessary for effective advocacy.”¹²¹ For example, during the 1994 elections, 97.62% of all contributions to the candidates for state auditor in Missouri (the office sought by Respondent Zev David Fredman) were \$2,000 or less.¹²² And the trial court found that the imposition of the disputed contribution limits had

114. *Id.* at 386–88 (quoting *Buckley*, 424 U.S. at 25–26).

115. *Id.* at 386.

116. *Id.* at 390.

117. *Id.*

118. *Id.* (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

119. *Id.* at 393.

120. *Id.* at 393–94 (quoting *Shrink Mo. Gov’t PAC v. Adams*, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998) and *Carver v. Nixon*, 72 F.3d 633, 642 n.10 (8th Cir. 1995)).

121. *Id.* at 396 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (*per curiam*)).

122. *Id.* (citing *Adams*, 5 F. Supp. 2d at 741).

not prevented candidates for state offices in Missouri from amassing impressive campaign war chests.¹²³

Justice Souter's majority opinion also rejected the respondents' claim that Missouri's contribution limits were different in kind from the \$1,000 limit approved in *Buckley* for federal campaigns because of the effect of inflation.¹²⁴ Souter wrote that the respondents were incorrect in assuming that "*Buckley* set a minimum constitutional threshold for contribution limits, which in dollars adjusted for loss of purchasing power are now well above the lines drawn by Missouri."¹²⁵ Indeed, he explained, *Buckley* had rejected the notion that \$1,000, or any other amount, was "a constitutional minimum" for contribution limits.¹²⁶ Instead, *Buckley* had stated that contribution limits were too low only when they impeded candidates' ability to "amas[s] the resources necessary for effective advocacy."¹²⁷ The issue, then, in determining whether a particular limit was too low, was "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."¹²⁸ In light of the evidence presented above, Justice Souter concluded that Missouri's contribution limits were compatible with *Buckley*; hence, they were constitutionally permissible.¹²⁹

Thus, *Shrink Missouri* expanded the definition of the kind of corruption sufficient to justify the limits on contributions that *Buckley* authorized.¹³⁰ The expanded definition included not only exchanges of votes for financial support, but also the perception that large contributors enjoyed privileged access to candidates and officeholders and undue influence over public policy. Justice Souter's opinion, despite moving the judicial needle toward political equality (and deference to legislative judgments), emphasized the centrality of the *Buckley* anticorruption rationale and the compatibility between that rationale and Missouri's contribution limits.¹³¹ It is unclear whether Souter's faithfulness to the *Buckley* standard in *Shrink Missouri* resulted primarily from what his biographer has termed his "unwilling[ness] to uproot or substantially modify existing precedents"¹³² or from a desire to

123. *Id.* (quoting *Adams*, 5 F. Supp. 2d at 741).

124. *Id.*

125. *Id.*

126. *Id.* at 397.

127. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam)).

128. *Id.*

129. *Id.* at 397–98.

130. Hasen, *supra* note 78, at 173.

131. *Id.*

132. YARBROUGH, *supra* note 3, at 196.

retain the support of Chief Justice Rehnquist and Justice O'Connor, respectively, for his majority opinion.¹³³

In any event, his majority opinion not only broadened the definition of corruption that warrants campaign-finance regulations, but also set a high bar for a plaintiff seeking to show that disputed contribution limits were too low.¹³⁴ It required evidence that the limits were “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”¹³⁵ Finally, it lowered the level of judicial scrutiny applicable to contribution limits from *Buckley*’s “exacting” scrutiny¹³⁶ to a standard calling for regulations to be “‘closely drawn’ to match a ‘sufficiently important interest.’”¹³⁷

Thus, *Shrink Missouri* helped states to reduce the price of admission to the political process for persons interested either in running for office or in supporting those who do. It therefore enhanced political equality for persons unable to contribute or raise vast sums of money for political campaigns. In short, it offered much to like for a supporter of Professor Meikeljohn’s town-meeting model of democracy.

2. *FEC v. Colorado Republican Federal Campaign Committee*

The next decision to reflect the Supreme Court’s post-2000 deference to legislative judgments about campaign finance was *FEC v. Colorado Republican Federal Campaign Committee*, in which Justice Souter again wrote the majority opinion, joined this time by Justices Stevens, O’Connor, Ginsburg, and Breyer.¹³⁸ This case was a reprise of an earlier case by the same name in which the Court held that the spending limits set by the FECA were unconstitutional as applied to the Colorado Republican Party’s independent expenditures in support of a Senatorial campaign.¹³⁹ In the earlier case, the Court had “remanded for consideration of the [Colorado GOP’s] claim that all limits on expenditures by a political party in connection with congressional campaigns are facially unconstitutional and

133. Besides Justices Souter, Rehnquist, and O’Connor, the *Shrink Missouri* majority included Justices Stevens, Ginsburg, and Breyer. Justice Stevens wrote a concurrence only for himself, and Justice Breyer wrote a concurrence in which Justice Ginsburg joined. *Shrink*, 528 U.S. at 380.

134. Hasen, *supra* note 89, at 43.

135. *Id.* at 44 (quoting *Shrink*, 528 U.S. at 297) (internal quotation marks omitted).

136. *Id.* at 42–43 (citing *Shrink*, 528 U.S. at 388).

137. *Shrink Missouri*, 528 U.S. at 378–88, (quoting *Buckley*, 424 U.S. 1, 25 (1974) (per curiam)).

138. *Colorado II*, 533 U.S. 431, 436 (2001).

139. *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 613 (1996), *rev’d*, 533 U.S. 431 (2001).

thus unenforceable even as to spending coordinated with a candidate.”¹⁴⁰ In the present case, the Court “reject[ed] that facial challenge to the limits on parties’ coordinated [campaign] expenditures.”¹⁴¹

Justice Souter observed that despite *Buckley*’s distinction between contributions and expenditures, the FECA’s definition of “contributions” included “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.”¹⁴² Justifying *Buckley*’s differential treatment of contributions and expenditures, Souter wrote that “[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do.”¹⁴³ Besides, he added, “limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder’s judgment, and the appearance of such influence).”¹⁴⁴ “At least this is so,” he concluded, “where the spending is not coordinated with a candidate or his campaign.”¹⁴⁵

The Colorado Republican Party challenged this view, arguing that because its most important speech was aimed at electing candidates and was expressed through them, any limit on party support for candidates “impose[d] a unique First Amendment burden” on the Party’s expressive and associative purposes.¹⁴⁶ And in the Party’s view, whatever level of scrutiny the Court applied, “the burden on a party [imposed by the coordinated-expenditure limitations] reflects a fatal mismatch between the effects of limiting coordinated party expenditures and the prevention of corruption or the appearance of it.”¹⁴⁷ The Government countered that a political party’s right to make unlimited expenditures coordinated with a candidate would encourage individuals and other nonparty contributors to donate to the party in order to facilitate additional spending by a favored candidate, thereby circumventing FECA’s contribution limits.¹⁴⁸

Accepting the Government’s position, Justice Souter buttressed its anticorruption rationale by noting that the political scientists who had

140. *Colorado II*, 533 U.S. at 437.

141. *Id.*

142. *Id.* at 438 (quoting 2 U.S.C. § 441(a)(7)(B)(i)).

143. *Id.* at 440.

144. *Id.* at 440–41 (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388–89 (2000)).

145. *Id.* at 441 (citing *Colorado I*, 518 U.S. 604, 615 (1996), *rev’d*, 533 U.S. 431 (2001); *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)).

146. *Id.* at 445.

147. *Id.* at 446.

148. *Id.*

served as amici in this case had argued that “there [wa]s little evidence to suggest that coordinated party spending limits . . . have frustrated the ability of political parties to . . . support their candidates.”¹⁴⁹ Indeed, Souter noted, an amicus brief filed by political scientists argued that “[i]n reality, political parties are dominant players, second only to the candidates themselves, in federal elections.”¹⁵⁰

Returning to the anticorruption theme, Justice Souter emphasized that the money political parties spend comes from contributors (individuals and PACs) motivated by various personal and ideological interests.¹⁵¹ Therefore, parties often act as the agents, for spending purposes, of individuals and groups seeking to produce officeholders who are “obliged” to them.¹⁵² This agent role, Souter observed, “provides good reason to view limits on coordinated spending by parties through the same lens applied to such spending by donors, like PACs, that can use parties as conduits for contributions meant to place candidates under obligation.”¹⁵³ He asked:

If the coordinated spending of other, less efficient and perhaps less practiced political actors can be limited consistently with the Constitution, why would the Constitution forbid regulation aimed at a party whose very efficiency in channeling benefits to candidates threatens to undermine the contribution (and hence coordinated spending) limits to which those others are unquestionably subject?¹⁵⁴

Answering his own question (and the Colorado GOP’s argument), Justice Souter reasoned that a political party is not in a unique position in relationship to individuals and PACs; rather, “[i]t is in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid”¹⁵⁵ Thus, the Court applied to a political party’s coordinated spending the same level of scrutiny that it applied to other political actors; namely, whether a particular campaign-finance regulation was “closely drawn” to match the “sufficiently important” governmental interest in combating political corruption.¹⁵⁶

149. *Id.* at 449–50 (quoting Brief for Paul Allen Beck et al. as Amici Curiae Supporting Petitioners at 5–6, *Colorado II*, 533 U.S. 431 (2001) (No. 00-191)).

150. *Id.* at 450 (quoting Brief for Paul Allen Beck, *supra* note 149, at 5–6).

151. *Id.* at 450–51.

152. *Id.* at 452.

153. *Id.*

154. *Id.* at 454.

155. *Id.* at 455.

156. *Id.* at 456 (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387–88 (2000)).

In Souter's view, treating political parties like individuals and PACs regarding coordinated expenditures was necessary because substantial evidence showed that "candidates, donors, and parties test the limits of the current law, and [that] . . . contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."¹⁵⁷ To illustrate his point, Souter began by explaining that under FECA, a donor was limited (at the time of *Colorado II*) to giving a candidate for federal office \$1,000 for a primary election and another \$1,000 for a general election, or a total of \$2,000 in a two-year election cycle.¹⁵⁸ But the same law permitted the donor to give as much as \$20,000 per year to the national committee of a political party supporting that candidate.¹⁵⁹ And one need not be a political scientist to know that "[d]onors give to the party with the tacit understanding that the favored candidate will benefit."¹⁶⁰

Under these circumstances, Souter reasoned, "If suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent [the individual contribution limits] would almost certainly intensify."¹⁶¹ More specifically:

If a candidate could arrange for a party committee to foot his [or her] bills, to be paid with \$20,000 contributions to the party by his supporters, the number of donors necessary to raise \$1,000,000 could be reduced from 500 (at \$2,000 per cycle) to 46 (at \$2,000 to the candidate and \$20,000 to the party, without regard to donations outside the election year).¹⁶²

And even if this example was unlikely to occur in practice,¹⁶³ it illustrated how allowing coordinated spending would reduce the number of donors necessary to reach a particular fundraising target, thereby undermining the purpose of the 1974 FECA Amendments to diminish the influence of large donors in election campaigns,¹⁶⁴ and increasing the danger that expenditures

157. *Id.* at 457.

158. *Id.* at 458.

159. *Id.*

160. *Id.*

161. *Id.* at 460.

162. *Id.*

163. The example cited was unlikely because 2 U.S.C. § 441a(a)(8) (2006) states that "all contributions . . . earmarked or otherwise directed through an intermediary or conduit to [a] candidate, shall be treated as contributions from [the donor] to such candidate." Thus, contributions of this type would be subject to the limitations imposed by the FECA Amendments.

164. *Colorado II*, 533 U.S. at 460 n.23. Justice Souter pointed out in this footnote that even though the sort of direct pass-through of money from an individual to a political party to a candidate

would serve “as a *quid pro quo* for improper commitments from the candidate.”¹⁶⁵

Thus, the Supreme Court reversed the decision of the Tenth Circuit in *Colorado II*. It held that “a party’s coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits.”¹⁶⁶ In so doing, the Court, led by Justice Souter, struck another blow for political equality even though the majority opinion was couched in the language of opposing corruption; specifically, political parties acting as conduits for circumventing limits on campaign contributions by individuals and PACs.¹⁶⁷ By limiting coordinated expenditures arranged between parties and candidates, the Court increased the number of donors required to achieve a fundraising target, thereby offering more donors the opportunity to participate in the political process and diminishing the influence on candidates of the most generous donors. If those ends do not necessarily evoke images of town meetings in snowy, bucolic New England villages, they nonetheless reflect, albeit on a much larger scale, the egalitarian roots and aims of Justice Souter’s campaign-finance jurisprudence.

3. *FEC v. Beaumont*

The third and final Supreme Court decision after 2000 that featured both deference to a legislative judgment about campaign finance and a majority opinion written by Justice Souter was *FEC v. Beaumont*.¹⁶⁸ In *Beaumont*, the Court applied to “nonprofit advocacy corporations” a prohibition against corporations “contributing directly to candidates for federal office” that had existed since 1907.¹⁶⁹ The modern version of this statute, 2 U.S.C. § 441b(a), barred corporations from making “a contribution or expenditure in connection with certain federal elections,” and a companion provision, § 441b(b)(2), defined “contribution or expenditure” to include “anything of value.”¹⁷⁰ But this prohibition did not

envisioned by the above example is unlikely, “the example illustrates the undeniable inducement to more subtle circumvention.” *Id.*

165. *Id.* at 464 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)).

166. *Id.* at 465.

167. *Id.* at 450–52, 455–56.

168. *FEC v. Beaumont*, 539 U.S. 146, 149, 155 (2003).

169. *Id.* at 149.

170. *Id.* (quoting 2 U.S.C. §§ 441b(a) & 441b(b)(2)).

extend to “the establishment . . . [or operation of] a separate segregated fund to be utilized for political purposes”(i.e., a PAC.)¹⁷¹

The respondents in *Beaumont*, who had been the plaintiffs below, were North Carolina Right to Life, Inc. (NCRL), three of its officers, and a North Carolina voter.¹⁷² They challenged the constitutionality of § 441b and the FEC’s regulations implementing it.¹⁷³ NCRL was organized under the laws of North Carolina to counsel pregnant women and urge them to seek alternatives to abortion.¹⁷⁴ A nonprofit, 501(c)(4) organization,¹⁷⁵ NCRL established a PAC that contributed to candidates for federal office in the past.¹⁷⁶ Nonetheless, NCRL now sought to invalidate, as applied to nonprofit advocacy corporations, the requirement that corporate entities establish PACs as the means of contributing campaign funds to candidates for federal office.¹⁷⁷

Writing for a majority that also included Chief Justice Rehnquist and Justices Stevens, O’Connor, Ginsburg, Breyer, and Kennedy (who concurred in the judgment), Justice Souter reiterated the Court’s observation in *Austin v. Michigan Chamber of Commerce* that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.”¹⁷⁸ “These state-created advantages,” he observed, “not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.”¹⁷⁹

Therefore, Justice Souter emphasized, “In barring corporate earnings from conversion into political ‘war chests,’ the ban [on using corporate treasury funds for political purposes] was and is intended to ‘preven[t] corruption or the appearance of corruption.’”¹⁸⁰ Beyond that, the prohibition was designed to “protect[] the individuals who have paid money into a corporation or union for purposes other than the support of [political] candidates” against the use of those funds “to support political candidates to

171. *Id.* (quoting 2 U.S.C. § 441b(b)(2)(C)) (internal quotation marks omitted).

172. *Id.*

173. *Id.* at 150.

174. *Id.*

175. This designation refers to I.R.C. § 501(c)(4), the provision of the Internal Revenue Code designating NCRL and other such organizations as exempt from federal taxation.

176. *Beaumont*, 539 U.S. at 150.

177. *Id.*

178. *Id.* at 148, 154 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–59 (1990)).

179. *Id.* at 154 (quoting *Austin*, 494 U.S. at 659) (internal quotation marks omitted).

180. *Id.* (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985)).

whom [the payors] may be opposed.”¹⁸¹ Moreover, if corporations could contribute to candidates directly, the persons who controlled or worked for a corporation could circumvent the limits on their individual contributions by routing additional funds, through the corporation, to candidates they favored.¹⁸²

Narrowing his focus to corporations such as NCRL, Justice Souter recalled the Court’s observation in *Austin* that “[a]lthough some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure,” so they have “the potential for distorting the political process.”¹⁸³ Under the rule of *Austin*, he noted, this “potential for distortion” warrants applying the ban on the use of treasury funds for political purposes to all corporations.¹⁸⁴ Besides, nonprofit advocacy groups can amass considerable resources and, like the American Association of Retired Persons, the National Rifle Association, or the Sierra Club, become politically powerful and, potentially, “conduits for circumventing the contribution limits imposed on individuals.”¹⁸⁵

Souter rejected the respondents’ claim that the § 441b prohibition should be subject to strict scrutiny, reasoning that contribution limits have been subject to a reduced level of scrutiny because “contributions lie closer to the edges than to the core of political expression.”¹⁸⁶ The transformation of campaign contributions into political debate, he reasoned, involves speech by someone other than the contributor, so even a contribution limit that significantly interferes with associational rights will be constitutional if it is “‘closely drawn’ to match a ‘sufficiently important interest.’”¹⁸⁷ And, he added, the respondents were wrong in characterizing § 441b as a complete ban on political contributions by advocacy groups, because the statute permitted corporations and unions to contribute funds to campaigns for federal office provided they established PACs for that purpose.¹⁸⁸

Thus, the *Beaumont* Court held that the § 441b prohibition on direct corporate contributions to federal candidates applied not only to business corporations, but also to nonprofit advocacy corporations.¹⁸⁹ In so doing, the Court struck yet another blow for political equality while using anti-

181. *Id.* (quoting *FEC v. Nat’l Right to Work Commn.*, 459 U.S. 197, 208 (1982)).

182. *Id.* at 155 (quoting *Colorado II*, 533 U.S. 431, 456 (2001)).

183. *Id.* at 158 (quoting *Austin*, 494 U.S. at 661).

184. *Id.*

185. *Id.* at 160.

186. *Id.* at 161 (citing *Colorado II*, 533 U.S. at 440).

187. *Id.* at 161–62 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387–88 (2000)).

188. *Id.* at 162–63.

189. *Id.* at 163.

corruption language. The Court prevented advocacy groups from using the advantages of the corporate form to flood a campaign with their treasury funds or to circumvent the limits on individual contributions by serving as conduits for donations exceeding the individual limit. Both results reflect not only deference to congressional judgments about campaign finance, but also a support for political equality consistent with Justice Souter's earliest lessons in grassroots democracy.¹⁹⁰

4. *McConnell v. FEC*

The last in the quartet of post-2000 cases reflecting Supreme Court deference to legislative judgments about campaign finance was *McConnell v. FEC*,¹⁹¹ which concerned the constitutionality of the Bipartisan Campaign Reform Act of 2002, better known as BCRA.¹⁹² In *McConnell* the Court upheld BCRA's ban on the solicitation, receipt, direction, transfer, or expenditure by political parties of unregulated "soft money"; that is, unlimited contributions to the parties from corporations, labor unions, and individuals.¹⁹³ The *McConnell* Court also upheld a BCRA provision extending an existing FECA requirement—that corporations and unions use only PAC funds for campaign spending advocating the election of a particular candidate—to "issue ads" that referred to a particular candidate, even if they did not advocate that candidate's election or defeat, (e.g., "Call Senator Smith and tell him to support family values") and that aired within sixty days of a general election or thirty days of a primary and

190. In the wake of *Citizens United*, parties challenging campaign-finance regulations have argued that *Citizens United* implicitly overruled *Beaumont*, but thus far these claims have failed. In *United States v. Danielczyk*, 683 F.3d 611, 616 (4th Cir. 2012), the court held that *Citizens United* prohibited suppressing corporate political speech regarding independent expenditures, but that *Beaumont* was still good law because *Citizens United* did not address direct corporate contributions to candidates, which were at issue in *Beaumont*. Other federal appellate courts have reached similar decisions. See, e.g., *Ognibene v. Parkes*, 671 F.3d 174, 178, 195 n.21 (2d Cir. 2011) (upholding provisions of New York City's campaign-finance law and reasoning that it would not overrule *Beaumont* because the Supreme Court had not done so in *Citizens United*); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124–25 (9th Cir. 2011) (refusing to overrule *Beaumont*, which remains good law because it addressed only contributions, not independent expenditures, by corporations); and *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) (noting that the *Citizens United* Court "explicitly declined to reconsider its precedents involving campaign contributions by corporations to candidates for elected office" (citing *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010))).

191. *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by*, *Citizens United*, 130 S. Ct. at 913.

192. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

193. *McConnell*, 540 U.S. at 183–184.

targeted the state or district where the named candidate was running for office.¹⁹⁴

McConnell was the only member of the quartet in which Justice Souter did not write the majority opinion; indeed, he did not write at all, instead joining an opinion coauthored by Justices Stevens and O'Connor concerning Titles I and II of BCRA, a separate opinion authored by Chief Justice Rehnquist regarding Titles III and IV of BCRA, and still another opinion, authored by Justice Breyer, about Title V of BCRA.¹⁹⁵ Accordingly, *McConnell* will not be the subject of a detailed discussion here because it does not offer a window on Justice Souter's campaign-finance jurisprudence.¹⁹⁶

C. Skepticism Returns, and Justice Souter Dissents

McConnell was the last campaign-finance decision during Justice Souter's tenure on the Supreme Court in which he was in the majority; after *McConnell*, Justice Souter's political egalitarianism was evident only in dissent. The reason for this change was the replacement on the Court of Sandra Day O'Connor by Samuel Alito in 2006 and, to a lesser extent, the replacement of William Rehnquist by John Roberts in 2005.¹⁹⁷ In campaign-finance cases, those "personnel changes" spurred a swing of the pendulum back to skepticism regarding legislative regulation.

1. *Randall v. Sorrell*

The first of Justice Souter's dissents in a campaign-finance case occurred in *Randall v. Sorrell*, where the Court invalidated a Vermont law that limited not only contributions to political campaigns, which *Buckley* permitted, but also expenditures by political campaigns, which *Buckley*

194. Hasen, *supra* note 89, at 48.

195. *McConnell*, 540 U.S. at 110.

196. Still, *McConnell* was a noteworthy decision. According to several veteran commentators on election law, *McConnell's* greatest doctrinal significance was its further relaxation of the definition of corruption. DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, & DANIEL P. TOKAJI, ELECTION LAW: CASES AND MATERIALS, 794–95 (4th ed. 2008). The *McConnell* Court modified the analysis of "corruption" in campaign finance cases from a consideration of the effect of contributions on particular decisions (i.e., the *quid pro quo*) to their effect on creating opportunities for large contributors to influence elections. *Id.* at 794. In other words, *McConnell* broadened the definition of corruption to include the exchange of soft-money contributions for access to officeholders. *Id.* at 795.

197. See Richard L. Hasen, *What the Court Did—and Why*, 5 AM. INT. 49, 49–53 (2010) (discussing the pendulum swing in Supreme Court jurisprudence surrounding campaign finance legislation).

expressly prohibited.¹⁹⁸ The *Randall* majority, speaking through Justice Breyer, rejected Vermont's arguments that the Court should either: (1) reverse *Buckley* and uphold expenditure limits because contribution limits and disclosure requirements were insufficient to deter corruption or its appearance, or (2) limit the scope of *Buckley* by distinguishing it from the present case.¹⁹⁹ The Court declined the invitation to reverse *Buckley* because Vermont had failed to show any dramatic increase in corruption or its appearance in Vermont politics or, even assuming such an increase, that limiting campaign spending was the only means of combating political corruption.²⁰⁰ The Court also refused to distinguish *Randall* from *Buckley* based on Vermont's "time protection rationale," namely, that expenditure limits would reduce officeholders' need to raise campaign funds, thereby giving them more time to serve the public.²⁰¹ In the Court's view, Vermont's "invitation so to limit *Buckley*'s holding [wa]s effectively [an invitation] to overrule it."²⁰²

Turning to Vermont's contribution limits, the majority opinion noted that although, under *Buckley*, such limits are permissible, excessively low limits "can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."²⁰³ Vermont's contribution limits,²⁰⁴ the opinion observed, were "substantially lower than both the limits [the Court had] previously upheld and comparable limits in other States."²⁰⁵ Beyond that, they were not closely drawn to match sufficiently important interests because the evidence presented at trial "raise[d] a reasonable inference that the contribution limits [were] so low that they may pose a significant obstacle to candidates [especially challengers] in competitive elections."²⁰⁶ And Vermont failed to show that corruption or its appearance was a greater problem in the Green Mountain State than elsewhere, so no special justification existed for such low contribution limits.²⁰⁷ Thus, the

198. *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (citing *Buckley v. Valeo*, 424 U.S. 1, 54–58 (1976) (per curiam)).

199. *Id.* at 243.

200. *Id.* at 244.

201. *Id.* at 245.

202. *Id.* at 246.

203. *Id.* at 249.

204. See note 64, *supra*, for a list of those limits.

205. *Randall*, 548 U.S. at 253.

206. *Id.* at 256.

207. *Id.* at 261.

Vermont law's expenditure and contribution limits violated the First Amendment.²⁰⁸

Justice Souter wrote a dissent in *Randall* in which Justices Ginsburg and Stevens (in part) joined. Souter disagreed with both of the majority's conclusions, preferring instead "to remand for further enquiry bearing on the limitations on candidates' expenditures" and to uphold the Vermont law's contribution limits.²⁰⁹ He reasoned that it was premature to invalidate the expenditure limits because: (1) *Buckley* did not foreclose the possibility that some such limit would satisfy the First Amendment, and (2) the majority did not properly consider the Vermont law's time-protection rationale.²¹⁰

In Souter's view, Vermont was not asking the Court to reverse *Buckley*; rather, it was asking the Court to apply the *Buckley* framework to determine whether the evidence presented at trial supported the disputed expenditure limits.²¹¹ That evidence, which highlighted the amounts of time officeholders spent on fundraising and Vermonters' lack of confidence in the electoral process, was sufficient, according to Justice Souter, to justify a remand so that the district court could decide whether the expenditure limits were the least restrictive means of accomplishing the Vermont law's aims.²¹² The nature of such evidence plainly concerned him, as reflected in the references to "endless fundraising," "ever more expensive campaigning," "the fundraising treadmill," and "the pernicious effect of the nonstop pursuit of money" sprinkled throughout his opinion.²¹³ Thus, he concluded that by invalidating Vermont's expenditure limits, the *Randall* majority had erred in "foreclos[ing] the ability of a State to remedy the impact of the money chase on the democratic process."²¹⁴

Justice Souter would also have upheld the contribution limits, reasoning that they were consistent with limits set by other states, all with populations larger than Vermont's.²¹⁵ Therefore, he wrote, "Vermont is not an eccentric party of one, and . . . this is a case for the judicial deference

208. *Id.* at 262. Also working against the Vermont law, in the Supreme Court's view, was that it: (1) imposed the same contribution limits on political parties that applied to individuals, thereby limiting the role parties could play in elections; (2) failed to adjust those limits for inflation; and (3) neglected to exclude expenses incurred by campaign volunteers, such as travel costs, from the law's definition of a campaign contribution, which could cause a campaign volunteer to exceed the contribution limit without ever contributing any money to the candidate. *Id.* at 257, 259, 261.

209. *Id.* at 281 (Souter, J., dissenting).

210. *Id.* at 281–82.

211. *Id.* at 283.

212. *Id.*

213. *Id.* at 282–283.

214. *Id.* at 284.

215. *Id.*

that our own precedents say we owe here.”²¹⁶ Souter maintained that deference was appropriate in this case because Vermont legislators had testified at trial that campaign contributors received special attention (e.g., returned phone calls) from officeholders, but that small donations were still important in Vermont, as part of low-cost, door-to-door, “retail” political campaigns.²¹⁷ “The Legislature of Vermont,” he emphasized, “evidently tried to account for the realities of campaigning in Vermont, and I see no evidence of constitutional miscalculation sufficient to dispense with respect for its judgments.”²¹⁸ Indeed, he pointed out, a competitive mayoral race had occurred in Burlington, Vermont’s largest city, when the challenged limits were in effect, so no evidence showed that the limits would necessarily protect incumbents by crippling challengers’ ability to raise money.²¹⁹

Thus, in *Randall v. Sorrell*, Justice Souter continued to champion the cause of political equality. He would have offered Vermont an opportunity to show the district court that its expenditure limits satisfied *Buckley* by being narrowly drawn to match an important interest in combating political corruption; namely, the distorting electoral and policy effects of large campaign contributions. He would also have validated contribution limits reflecting a low-budget, retail style of political campaigning with which he was quite familiar from having lived in New Hampshire. Because Justice Souter was more deferential than Justice Breyer to legislative judgments and less concerned about low contribution limits preventing challengers from raising enough money to compete against incumbents, he and Breyer parted company in *Randall* even though they both customarily supported political equality.²²⁰

2. *FEC v. Wisconsin Right to Life, Inc.*

The other campaign-finance case in which Justice Souter championed political equality in dissent was *FEC v. Wisconsin Right to Life, Inc.*²²¹ The respondent challenged BCRA’s prohibition on the use of corporate treasury

216. *Id.* at 285.

217. *Id.* at 285–86.

218. *Id.* at 288.

219. *Id.* at 287. Souter also dismissed Justice Breyer’s concerns about the Vermont law’s limits on party contributions, lack of an inflation index, and lack of an exception for expenses incurred by volunteers. *Id.* at 288. He observed that: (1) parties could still spend as much money as they wished independently to help their candidates; (2) the lack of an inflation allowance was irrelevant because the challenge at hand was only to the law in its present form; and (3) volunteers whose expenses reached the contribution limit could bill the campaigns for which they worked for the excess amounts. *Id.* at 288–89.

220. Hasen, *supra* note 78, at 187–188.

221. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 522 (2007) (Souter, J., dissenting).

funds for “electioneering communication,” defined as “any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office.”²²² Wisconsin Right to Life (WRTL) was a nonprofit, ideological group that was tax-exempt under § 501(c)(4) of the IRS Code.²²³ In 2004 it ran advertisements urging Wisconsin’s two senators, Russ Feingold and Herb Kohl, to oppose a filibuster by Senate Democrats against President George W. Bush’s judicial nominees.²²⁴ The “issue ads,” which mentioned the two Wisconsin senators by name, but did not advocate their election or defeat, merely said: “Contact Senators Feingold and Kohl and tell them to oppose the filibuster.”²²⁵

WRTL planned to use its general treasury funds to pay for the ads, but it realized that, under BCRA, as of thirty days before Wisconsin’s primary election, the ads would be illegal if so financed.²²⁶ Therefore, it sued the FEC, seeking declaratory and injunctive relief from a three-judge federal district court, and argued that the prohibition on the use of corporate treasury funds was unconstitutional as applied to issue ads.²²⁷ Although the Supreme Court in *McConnell* had upheld the prohibition that WRTL now challenged, it had left open the question whether a corporation or a union could challenge the prohibition (§ 203 of BCRA) on an as-applied basis by showing that an ad it wished to pay for using general treasury funds was a “genuine issue advertisement” and therefore not subject to BCRA’s restrictions.²²⁸ This was the question at hand in *FEC v. Wisconsin Right to Life*.

Chief Justice Roberts, in a plurality opinion joined by Justice Alito, noted that § 203 of BCRA burdened political speech; hence, it was subject to strict scrutiny.²²⁹ “Under strict scrutiny,” the Chief Justice wrote, “the *Government* must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest.”²³⁰ In *McConnell*, he continued, the Court held that BCRA survives strict scrutiny

222. *Id.* at 457–58 (majority opinion) (quoting 2 U.S.C. § 434b(f)(3)(A) (2000 ed., Supp. IV)).

223. *Id.* at 458.

224. *Id.* at 458–59.

225. Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1076 (2008) (quoting *Wis. Right to Life, Inc.*, 551 U.S. at 459).

226. *Wis. Right to Life*, 551 U.S. at 460.

227. *Id.* at 458–59.

228. Hasen, *supra* note 225, at 1076.

229. *Wis. Right to Life*, 551 U.S. at 460.

230. *Id.* at 464.

to the extent that it regulates express advocacy (e.g., “Vote for Smith,” “Jones for Congress,” etc.) or the functional equivalent thereof.²³¹ But he rejected the test of express advocacy or its equivalent that the FEC argued the *McConnell* Court had adopted for as-applied challenges; namely, whether the speaker intended to affect an election.²³² Asserting that the speaker’s motivation was irrelevant to the question of constitutional protection, Roberts identified the proper standard as whether “the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”²³³

Based on that standard, the Chief Justice concluded that WRTL’s ads were not the functional equivalent of express advocacy because they focused on a legislative issue, took a position on it, and exhorted the public to adopt that position and to contact public officials about it.²³⁴ Besides, the ads lacked any of the hallmarks of express advocacy; they did not mention an election, a candidacy, or a political party, and they took no position on a candidate’s qualifications for office.²³⁵ Thus, no compelling interest justified extending BCRA § 203 to WRTL’s ads, so § 203 was unconstitutional as applied to those ads.²³⁶

Justice Souter wrote a dissent in which Justices Stevens, Ginsburg, and Breyer joined, which argued that WRTL’s ads, viewed in context, were “indistinguishable” from the kinds of ads that the *McConnell* Court had held corporations could fund only through a PAC.²³⁷ He began the dissent by recalling that in 1986 the Court held that the prohibition on the use of corporate and union treasury funds in federal elections applied only to “express advocacy”; namely, advocacy for the election or defeat of a clearly identified candidate for federal office.²³⁸ “As was expectable,” he observed, “narrowing the corporate-union electioneering limitation to magic words soon reduced it to futility.”²³⁹ And “the massive regulatory gap left by the ‘magic words’ test . . . proved to be the door through which so-called ‘issue ads’ of current practice entered American politics.”²⁴⁰ Lacking magic words advocating the election or the defeat of a particular candidate, these issue

231. *Id.* at 465 (citing *McConnell v. FEC*, 540 U.S. 93, 206 (2003)).

232. *Id.* at 467.

233. *Id.* at 470.

234. *Id.*

235. *Id.*

236. *Id.* at 481.

237. Hasen, *supra* note 225, at 1079.

238. *Wis. Right to Life*, 551 U.S. at 513 (Souter, J., dissenting) (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986)).

239. *Id.* at 515.

240. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam)).

ads, in Justice Souter's words, "failed to trigger the limitation on union or corporate expenditures for electioneering."²⁴¹

Souter then reminded the majority that in *McConnell* the Court had stated: "Because corporations can still fund electioneering communications with PAC money, it is simply wrong to view [BCRA § 203] as a complete ban on expression rather than a regulation."²⁴² Besides, a nonprofit corporation such as WRTL was free to bless or blame a particular candidate by name, even shortly before an election, by means of a newspaper ad or a website instead of through a "broadcast, cable, or satellite communication."²⁴³ It could even take advantage of an exception for nonprofits created by the Court in *Massachusetts Citizens for Life*, which allowed them to use general treasury funds for electioneering communications so long as they did not serve as conduits for corporate and union political contributions.²⁴⁴

Broadening the discussion, Justice Souter explained that restrictions on corporate and union participation in federal elections reflected Congress's recognition that "the corrupting influence of money in politics" is not limited to "outright bribery" or *quid pro quo* exchanges; but rather, it includes "the more pervasive distortion of electoral institutions by concentrated wealth, . . . the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions."²⁴⁵ Consistent with that view, the *McConnell* Court extended § 203 to the functional equivalents of "express advocacy," noting "[I]ittle difference existed . . . between an ad that urged voters to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'"²⁴⁶

McConnell should govern the present case, Souter concluded, because "[a]ny alert voters who heard or saw WRTL's ads would have understood that WRTL was telling them that the Senator's [Feingold's] position on the filibusters should be grounds to vote against him."²⁴⁷ Instead, the majority "st[ood] *McConnell* on its head"; *McConnell* held that if an ad is reasonably understood as having exceeded pure issue advocacy, it cannot be paid for with corporate or union treasury funds, but the majority in *WRTL* held that if an ad is subject to any reasonable interpretation other than as express

241. *Id.*

242. *Id.* at 520 (quoting *McConnell v. FEC*, 540 U.S. 93, 204 (2003)) (internal quotations omitted).

243. *Id.* at 521 (quoting 2 U.S.C. § 434(f)(3)(A)(i) (2000 ed., Supp. IV)).

244. *Id.*

245. *Id.* at 522.

246. *Id.* at 525 (quoting *McConnell*, 504 U.S. at 126–27).

247. *Id.*

advocacy, it may be paid for with such funds.²⁴⁸ As a result, Justice Souter observed, as if shaking his head in befuddlement, “[I]t is possible that even some ads with magic words could not be regulated.”²⁴⁹ Whether or not that is true, Professor Hasen’s assessment of *WRTL*, namely, that it “provides a broad safe harbor for corporations and unions” by “allow[ing] them to spend large sums seeking to influence the outcome of elections,” is certainly accurate.²⁵⁰

Justice Souter again stood up for political equality in *WRTL* by seeking to limit the influence of corporate and union money in federal elections. He would have extended the prohibition on the use of corporate and union treasury funds to nonprofit entities that wish to spend those funds on issue ads that are thinly veiled advocacy aimed at defeating a particular candidate. Had Justice Souter’s view prevailed, the influence of corporate and union money would have been reduced because nonprofits would have been restricted to using their own (more limited) treasury funds or segregated PAC funds, or to using less pervasive media, such as newspapers or websites, to air issue ads close to federal elections.

D. Justice Souter and Political Equality

Justice Souter was a consistent voice for political equality during his nineteen years on the Supreme Court even though political equality was more an implication than a theme of his opinions, which stressed instead preventing corruption and promoting public confidence in the American political system.²⁵¹ By his own admission, his attitudes toward government and democracy reflect the small New Hampshire town in which he lived from age eleven until his appointment to the Court in 1990; particularly, its annual exercise in direct democracy known as town meeting.²⁵² They also

248. *Id.* at 527.

249. *Id.*

250. Hasen, *supra* note 225, at 1103.

251. The final campaign-finance decision in which Justice Souter participated as a member of the Supreme Court, *Davis v. FEC*, 554 U.S. 724 (2008), warrants only a brief discussion because Justice Souter did not commit his views to writing in *Davis*, instead joining Justice Stevens’s dissent on the merits. Reflecting the Roberts Court’s skepticism toward campaign-finance regulations, *Davis* invalidated two provisions of BCRA. *Id.* at 744. One provision, part of a so-called Millionaire’s Amendment, permitted the opponent of a federal candidate who spends more than \$350,000 in personal funds on the campaign to receive contributions greater than the amounts ordinarily allowed by law until equaling the amount of personal funds spent by the self-financing candidate. *See* 2 U.S.C. § 441a-1(a) (2006). The other provision imposed disclosure requirements designed to implement the Millionaire’s Amendment. *Davis*, 554 U.S. at 744.

252. *See Nomination Hearings*, *supra* note 13, at 50 (opening statement of Judge David H. Souter).

likely reflect the New Hampshire political culture in which Souter worked as a public official for more than two decades, especially its preference for low-cost, door-to-door, face-to-face political campaigns. Both town meeting and the New Hampshire political culture value civic participation as an opportunity and a responsibility, with the low price of admission encouraging such participation.²⁵³

These views are evident in the majority opinions Justice Souter authored in campaign-finance cases. In *Shrink Missouri* he upheld contribution limits, noting that democracy requires faith in government and a willingness to participate, both of which wane in the face of cynicism resulting from large donors that receive privileged access to officeholders.²⁵⁴ In *Colorado Republican II* he affirmed a legislative attempt to prevent circumvention of contribution limits by means of unlimited coordinated spending between political parties and their candidates.²⁵⁵ In *Beaumont* he validated a similar legislative effort to prevent circumvention by nonprofit advocacy corporations of a longstanding prohibition on the use of corporate treasury funds in political campaigns.²⁵⁶

The same attitudes are evident in the dissents Justice Souter wrote in campaign-finance cases during his last few years on the Court. In *Randall* he observed that *Buckley* had not precluded the possibility that campaign spending limits would satisfy the First Amendment, and that the majority erred in failing to consider the time-protection rationale Vermont had offered for its spending limits.²⁵⁷ He also would have upheld Vermont's stringent contribution limits because they fit that state's low-cost campaigns and because states should be able "to remedy the impact of the money chase on the democratic process."²⁵⁸ In *WRTL*, Souter would have extended the prohibition on the use of corporate and union treasury funds in elections to nonprofit corporations seeking to circumvent it by airing issue ads, paid for by treasury funds, close to an election.²⁵⁹ Had Souter's view prevailed, nonprofits would have been limited to using segregated PAC funds or alternative media for such purposes, thereby likely reducing the potentially distortive effects of their messages on political campaigns.

Thus, the man from Weare brought a bit of Weare and New Hampshire with him to Washington when he joined the Supreme Court in 1990. As a

253. See *supra* Part I.

254. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 290 (2000) (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

255. *Colorado II*, 533 U.S. 431, 437 (2001).

256. *FEC v. Beaumont*, 539 U.S. 146, 149 (2003).

257. *Randall v. Sorrell*, 548 U.S. 230, 281–82 (2006) (Souter, J., dissenting).

258. *Id.* at 284, 286.

259. *FEC v. Wis. Right to Life, Inc.*, 552 U.S. 449, 525 (2008) (Souter, J., dissenting).

result, the Court's campaign-finance decisions that he authored recognize that a healthy democracy, like a good town meeting, must foster not only the freedom of speech, but also political equality.

IV. THE SOUTER LEGACY IN CAMPAIGN-FINANCE LAW

When Justice Souter retired from the Supreme Court in 2009, he left an important legacy in campaign-finance law, even though the Roberts Court has embraced the freedom of speech and spurned political equality since his departure.²⁶⁰ The Souter legacy is the recognition that campaign-finance jurisprudence can and must balance freedom of speech and political equality if American democracy is to be vibrant and enduring. Justice Souter's advocacy of that position can inspire others who share his devotion to political equality to continue championing it until the judicial pendulum swings back toward deference to campaign-finance regulation.

Balancing competing constitutional values, such as free speech and political equality, is vintage Souter. In a 2010 commencement address at Harvard University, he remarked: "Remember that the tensions that are the stuff of judging in so many hard constitutional cases are, after all, the creatures of our aspirations: to value liberty, as well as order, and fairness and equality, as well as liberty."²⁶¹ A commentator has noted, "Throughout Justice Souter's opinions, whether for the majority or in dissent, a general theme emerges: courts must engage in contextual balancing whenever constitutional rights are implicated, whether by laws of general applicability or through purposeful discrimination."²⁶² The commentator added that "[a]

260. See *supra* note 10. One part of the Souter legacy in campaign-finance law may not be known for fifty years, when, pursuant to its agreement with the Justice, the New Hampshire Historical Society makes the Souter papers available for study. Richard L. Hasen, *Justice Souter Should Publish His Secret Citizens United Dissent*, SLATE (May 16, 2012, 2:29 PM ET), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/05/citizens_united_justice_david_souter_s_dissent_in_the_supreme_court_s_momentous_campaign_finance_case_.html. Reportedly, those papers include a blistering dissent to an opinion by a five-member majority that would have issued the *Citizens United* decision in 2009, while Souter was still on the Court. *Id.* Indeed, the Court first heard oral arguments in that case in March 2009. *Id.* It appears that the dissent blasted the majority for violating one of the Court's own rules, probably the rule against deciding issues the parties had not raised and the Court had not asked them to brief. *Id.* In April 2009, Justice Souter announced his decision to retire, whereupon Chief Justice Roberts reportedly sought, successfully, to have the case reargued during the following term so as to prevent publication of the Souter dissent. *Id.* As a result, unless Justice Souter opts to release the dissent sooner, which appears unlikely given his pronounced preference for privacy, its exact contents will presumably remain a matter of speculation among Supreme Court watchers for decades. *Id.*

261. Justice David H. Souter, *Text of Justice David Souter's Speech*, THE HARVARD GAZETTE (May 27, 2010), <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

262. Hanks, *supra* note 3, at 932–33.

judicial imperative to balance the constitutional rights at issue in each case and a judicial commitment to respecting precedent, rather than ideology, as his critics contend, appear to drive his jurisprudence.”²⁶³

The paramount example of those inclinations was the joint opinion that Souter wrote with Sandra Day O’Connor and Anthony Kennedy in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁶⁴ which preserved the right to an abortion guaranteed by the Court’s earlier decision in *Roe v. Wade*,²⁶⁵ while nevertheless upholding most of a Pennsylvania law that imposed several restrictions on abortion in that state.²⁶⁶ In essence, said Tom Rath, David Souter’s former colleague at the New Hampshire Attorney General’s Office and a close friend, *Casey* was about “how the judiciary can bind a society together.”²⁶⁷ The opinion reflected, in Rath’s view, Souter’s “‘vision of the [Supreme] Court as a moderating influence,’ as ‘a conciliator and legitimizer.’”²⁶⁸ That vision, said Rath, “represented ‘the essence of David Souter. That’s the David Souter I’ve heard many a night on porches.’”²⁶⁹

The competing constitutional values that Justice Souter sought to balance in campaign-finance cases were the dual goals of the freedom of speech; namely, to protect individuals from government coercion while simultaneously protecting their right to participate in government in a meaningful way.²⁷⁰ In Souter’s view, the largely unregulated campaign spending resulting from overemphasis on freedom from coercion violates the freedom of participation by equipping wealthy institutions and individuals with outsized megaphones to air their views, while ordinary citizens must cup their hands and shout. As a result, what Souter alternately called “political integrity,” “democratic integrity,” or “electoral integrity” is sacrificed because: (1) the large contributors obtain greater access to elected officials than their fellow citizens do, and (2) those who cannot contribute handsomely know about the privileged access enjoyed by the large contributors, which undermines their confidence in the electoral process.²⁷¹

Therefore, even independent spending, such as that contemplated by

263. *Id.* at 935.

264. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 866 (1992).

265. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

266. David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, <http://www.nytimes.com/1994/09/25/magazine/justice-souter-emerges.html>.

267. *Id.*

268. *Id.*

269. *Id.*

270. For a thorough discussion of this distinction between “negative liberty” (freedom from coercion) and “active liberty” (freedom of participation) see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 32–33 (2005).

271. Hasen, *supra* note 78, at 182–83.

Wisconsin Right to Life, is potentially problematic despite its separation from particular campaigns, which removes the taint of possible *quid pro quo* corruption. In Souter's view, although independent spending does not raise the red flag of corruption (i.e., the sale of special favors), it nonetheless violates the "democratic integrity" principle by giving large contributors privileged access to officeholders, resulting in public cynicism about electoral politics.²⁷² Accordingly, Souter would balance free speech and political equality by prohibiting nonprofit corporations from using their treasury funds to pay for issue ads close to elections, while permitting them to pay for the ads with PAC funds solicited from their political supporters.

Justice Souter's concern for balancing freedom from coercion and freedom of participation is also evident in his willingness, in *Randall v. Sorrell*, to allow the trial court to consider whether Vermont's spending limits were narrowly tailored to satisfy an important governmental interest and to uphold its rather stringent contribution limits.²⁷³ According to Professor Hasen, Souter's willingness, despite *Buckley*, to consider evidence that Vermont's spending limits were constitutional "suggests there is more going on here than simple concern about corruption"; namely, "an egalitarian impulse to make campaigns less about money and more about ideas."²⁷⁴ Similarly, Professor Hasen has noted that it is difficult to justify Vermont's contribution limits on anticorruption grounds because such low limits were unnecessary to stave off the sale of political favors.²⁷⁵ "[T]he better reading of the . . . [legislative] intent—and [of] Justice Souter's intent to uphold the limits" according to Hasen, "is a commitment to equality in campaign finance fundraising and spending."²⁷⁶

The Souter balancing approach is dramatically different from the current Supreme Court's exclusive concern for the freedom of speech at the expense of political equality. The current Court's focus was evident in Justice Kennedy's majority opinion in *Citizens United*, which noted that *quid pro quo* corruption, not the distorting effects of corporate wealth, was the governmental interest identified in *Buckley* as justifying campaign-finance regulation.²⁷⁷ And *quid pro quo* corruption, Kennedy continued, means "dollars for political favors," not the privileged access that large contributors may have to elected officials.²⁷⁸ On the contrary, he noted, "It

272. *Id.* at 185–86.

273. *Randall v. Sorrell*, 548 U.S. 230, 283 (2006) (Souter, J., dissenting).

274. Hasen, *supra* note 78, at 186.

275. *Id.* at 188.

276. *Id.*

277. *Citizens United v. FEC*, 130 S.Ct. 876, 909 (2010).

278. *Id.* at 910 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.”²⁷⁹ Therefore, in Kennedy’s view, to base the regulation of independent expenditures on the desire to deny corporations inordinate access to officeholders and excessive influence over public policy “is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”²⁸⁰

Finally, according to Justice Kennedy, “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy” because independent expenditures, by definition, are not coordinated with individual candidates, and because such expenditures aim to sway votes, which shows that “the people have the ultimate influence over elected officials.”²⁸¹ Thus, as *Citizens United* shows, the current Supreme Court rejects “Souterian” balancing of free speech and political equality in campaign-finance cases, preferring instead to zealously protect free speech by permitting corporations to use their treasury funds for independent campaign expenditures.

In any event, Justice Souter’s balancing of competing First Amendment values dovetails with Professor Meikeljohn’s observation that “[t]he First Amendment . . . is not the guardian of unregulated talkativeness.”²⁸² The town-meeting experience evidently shaped the views of both men: Justice Souter learned his first lessons about government there; Professor Meikeljohn used town meeting to highlight the importance of the freedom of participation. At town meeting, Meikeljohn wrote, the freedom of speech is honored, but the moderator nonetheless runs the meeting and may direct that “each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available.”²⁸³ This view coincides with Justice Souter’s willingness to limit the political contributions of individuals, political parties, and nonprofit corporations, because despite such limitations, existing law offered them ample opportunity (e.g., through PACs or independent spending not coordinated with campaigns) to support their preferred candidates financially.

Thus, Justice Souter, an avid hiker in New Hampshire’s White Mountains, has cut a new trail through the rocks, roots, and switchbacks of

279. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)).

280. *Id.* (quoting *McConnell*, 540 U.S. at 296).

281. *Id.*

282. MEIKELJOHN, *supra* note 24, at 26.

283. *Id.*

campaign-finance law. Perhaps one or more of his many former clerks who have become professors will widen the trail and make it accessible to more hikers in the future.²⁸⁴ The trailhead is the idea that campaign-finance law must protect not only freedom from governmental coercion, but also freedom to participate in government. At this point, the summit is not visible, being far in the distance in light of the current Court's penchant for protecting only freedom from coercion.²⁸⁵ Perhaps the summit will be the "one person, ten dollars" principle suggested by one commentator, an extension of the one person, one vote concept; alternatively, it may be "at least some 'floor' of public financing designed to make all serious candidates competitive."²⁸⁶

If the summit appears unreachable, consider Justice Souter's own testimony before the Senate Judiciary Committee during his confirmation hearings in 1990. When asked by then-Senator Joe Biden (D-DE) whether the correct interpretation of the Constitution changes over time, Souter answered, "Principles don't change, but our perceptions of the world around us and the need for those principles do."²⁸⁷ To illustrate his point, Souter used the example of the overruling of *Plessy v. Ferguson*²⁸⁸ by *Brown v. Board of Education*,²⁸⁹ saying, "I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses."²⁹⁰ Before our noses, as the *Brown* Court recognized, was "the evidence of non-tangible effects" of racial discrimination on the psyches and life prospects of African Americans.²⁹¹ "When you accept that evidence," Souter told the Senators, "then you see that you cannot have [both] separateness and equality."²⁹²

Similarly, the principle of political equality, as manifested through protection for political participation, has long been a part of the First Amendment, although the current Court majority seems unable to see it

284. Half of the Souter clerks whose current status could be determined as of May 2009 were teaching law, a higher percentage than among the former clerks of any other sitting justice. Tony Mauro, *Souter's Tribe: Justice's Legacy Tied to the 72 Lawyers Who Clerked for Him*, THE NATIONAL JOURNAL (May 12, 2009), <http://www.law.com/jsp/article.jsp?id=1202430614433>.

285. See *supra* note 10.

286. Pasquale, *supra* note 67, at 640.

287. *Nomination Hearings*, *supra* note 13, at 303 (opening statement of Judge David H. Souter).

288. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (holding that separate but equal public facilities for blacks and whites is constitutional), *abrogated by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

289. *Brown*, 347 U.S. at 494–95.

290. *Nomination Hearings*, *supra* note 13, at 303 (opening statement of Judge David H. Souter).

291. *Id.*

292. *Id.*

clearly. Although advocacy of political equality is beyond the scope of this Article, the principle of political equality surely merits examination, explanation, and advocacy, in a future article, as a core value underlying campaign-finance law. Perhaps a future Court will examine it in light of the consequences for the American political system of outsized political spending by corporations and wealthy individuals, and will conclude that a balance is necessary between the competing First Amendment values and that the present imbalance favoring free speech must be corrected. Assuming that day comes, and the summit is reached, supporters of political equality will have Justice Souter to thank for showing the way.

CONCLUSION

Justice David Souter left an important legacy in campaign-finance jurisprudence; namely, recognition of the value of political equality to the vitality of American democracy. Several factors account for this legacy: Souter's early exposure to town meetings and his long residency in New Hampshire—with its passion for grassroots democracy, fairly moralistic political culture, and relatively low-cost, retail style of political campaigning—have likely contributed to his appreciation for political equality. So has his belief in balancing conflicting constitutional rights to promote social harmony. And his respect for precedent enabled him to champion political equality within the framework of *Buckley v. Valeo*, which is generally viewed as more protective of free speech than political equality.²⁹³

Thus, advocates of political equality should carefully study Justice Souter's campaign-finance opinions in preparation for the day when the Supreme Court recognizes that democracy requires (and the First Amendment protects) freedom to participate in government as well as freedom from government coercion. When that day arrives, the advocates of political equality will owe a great debt to Justice Souter.

293. Hasen, *supra* note 89, at 38.