

CITIZENS UNITED: STRENGTHENING THE FIRST AMENDMENT IN AMERICAN ELECTIONS

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“[I]t is our law and our tradition that more speech, not less, is the governing rule.”¹

I. INTRODUCTION

The 2010 election cycle seemed mostly normal: candidates battled at the local, state, and national levels for control of their governments; issues crowded ballots pertaining to everything from school tax levies to legalization of marijuana;² and citizens complained in typical fashion that they hated politics and could not wait for the election to be over.³ Nothing appeared too out of the ordinary except for the seemingly constant references to the recent United States Supreme Court decision, *Citizens United v. Federal Election Commission* (FEC).⁴ The decision, released in January 2010, struck down campaign finance laws that prohibited corporations from making expenditures independent of candidates in federal elections.⁵ The Supreme Court was immediately criticized for its opinion,⁶ and the debate over whether the Court got it right or wrong carried through the entire election cycle, eliciting strong praise from some and glaring admonition from others.⁷

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¹ *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

² Amanda Feilding, *Proposition 19*, THE HUFFINGTON POST (Nov. 1, 2010, 7:11 AM), http://www.huffingtonpost.com/amanda-feilding/proposition-19_b_776805.html.

³ See, e.g., Tom Fontaine, *Groups Slather \$478 Million on Races in Senate, House*, PITTSBURGH LIVE (Nov. 2, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/election/s_707222.html.

⁴ 130 S. Ct. 876 (2010).

⁵ *Id.* at 913.

⁶ See *infra* notes 284–86 and accompanying text.

⁷ See, e.g., Rosemary Harris Lytle & Judd Golden, *Guest Opinion: ACLU's Support for Citizen's United*, DAILY CAMERA (Jan. 29, 2011, 1:00 AM), <http://www.dailycamera.com/>
(continued)

The Court was correct in ruling as it did. The decision was necessary to overturn statutory provisions that were inconsistent with established campaign finance laws and the First Amendment. Furthermore, the panic that flowed from the decision regarding improper influence in elections is unnecessary and unfounded because the decision maintained safeguards put in place to preserve the integrity of American elections.

II. BACKGROUND

Citizens United, a nonprofit, tax-exempt organization,⁸ produced a film titled “Hillary: the Movie,” which discussed Senator Hillary Clinton’s senate record, her White House record during Bill Clinton’s presidency, and her own presidential bid.⁹ The film included “express opinions on whether she would make a good president.”¹⁰ Citizens United intended to release the movie in early 2008 along with promotional television advertisements for the movie.¹¹ However, then-current campaign finance regulations prohibited the desired release date because it overlapped with the primary season for the 2008 presidential election.¹² If Clinton were to become the democratic presidential nominee, Citizens United further wanted to run the television ads within sixty days of the general election, which the campaign finance restrictions also prohibited.¹³

Citizens United filed a complaint in the Federal District Court for the District of Columbia on December 13, 2007,¹⁴ seeking a preliminary injunction against any action taken by the FEC against the organization and arguing that then-current campaign finance law was unconstitutional.¹⁵

ci_17229907 (reiterating the American Civil Liberty Union’s opposition to the “broad and ill-defined prohibition” on electioneering communications in the Bipartisan Campaign Reform Act § 203 that *Citizens United* struck down). The authors quoted a recent letter in the *New York Times* decrying the overturn of “the century-old ban on corporate contributions to political campaigns.” *Id.* The authors replied that *Citizens United* “did no such thing” and that freedom of political advocacy speech was at stake. *Id.* “Granting government the power to decide who should speak, when, and how much is enough is not the answer. Nothing but disaster for the First Amendment flows from that approach.” *Id.*

⁸ *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 275–76.

¹² *Id.* at 276–77.

¹³ *Id.* at 276.

¹⁴ *Id.* at 277.

¹⁵ *Id.* at 277–78.

The district court disagreed with Citizens United's arguments, holding that the movie was subject to regulation by laws that were upheld by the Supreme Court in a prior challenge¹⁶ and that campaign finance laws could regulate the advertisements as well.¹⁷ The court refused to grant Citizens United's request for an injunction against the FEC.¹⁸

Citizens United appealed to the Supreme Court, arguing that the Supreme Court should overturn the decision of the district court.¹⁹ The organization claimed there was no sufficient governmental interest that would be served by regulating "Hillary: the Movie" or any other video-on-demand.²⁰ Citizens United also challenged two previous Supreme Court decisions: *Austin v. Michigan Chamber of Commerce*,²¹ which expanded the government's ability to regulate corporate campaign speech;²² and a portion of *McConnell v. FEC*,²³ which upheld as constitutional § 203 of the Bipartisan Campaign Reform Act (BCRA),²⁴ permitting regulation of any broadcast, satellite, or cable communication that refers to a clearly identified federal candidate and that is made within sixty days of a general election or thirty days of a primary election.²⁵

The Supreme Court granted certiorari and heard oral arguments on March 24, 2009.²⁶ During a particularly noteworthy exchange, Justice Alito asked Deputy Solicitor General Malcolm Stewart, who was arguing in favor of upholding prohibitions on corporate campaign speech, if Congress had to draw the line at regulating only broadcast and cable ads or if Congress could extend regulations to cover the internet, DVDs, or even

¹⁶ *Id.* at 279–80.

¹⁷ *Id.* at 280–81.

¹⁸ *Id.*

¹⁹ Brief for Appellant at 12, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellant.pdf.

²⁰ *Id.* at 13.

²¹ 494 U.S. 652 (1990).

²² *Id.* at 668–69.

²³ 540 U.S. 93 (2003).

²⁴ *Id.* at 209.

²⁵ See *id.* at 104–05 (describing issue ads as "the functional equivalent of express advocacy" so as to allow regulation of their broadcast in the respective thirty-day and sixty-day periods leading up to federal primary and general elections).

²⁶ Transcript of Oral Argument at 1, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205).

books.²⁷ Stewart responded that Congress could extend the campaign restrictions to other media as well, to which Justice Alito replied: “That’s pretty incredible.”²⁸ Stewart confirmed that he believed Congress could prohibit the use of general treasury funds to publish books, requiring corporations instead to publish books using Political Action Committee (PAC) funds.²⁹ Pointing out that most publishing companies are corporations, Justice Alito asked Stewart to clarify whether he thought a publisher that is a corporation could be prohibited from selling a book.³⁰ Stewart noted that certain media corporations could possibly be exempt from regulation but conceded that an advocacy corporation could be banned from selling a book, or even advertising the book, if the book contained communications that referenced a candidate for election.³¹ The idea that Congress could use campaign finance law to ban the publishing of books did not seem to sit well with the Court.³²

The Court was expected to hand down its ruling on the matter sometime in the early summer of 2009;³³ however, it surprisingly ordered a rehearing of oral arguments set for September 9, 2009—two months before the Court’s next term was to open.³⁴ The Court specifically requested that the parties file supplemental briefs addressing the following question: Should the Court overrule either or both *Austin* and the section of *McConnell* that addresses the facial validity of § 203 of the BCRA?³⁵

²⁷ *Id.* at 26–27.

²⁸ *Id.* at 27.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 28. Justice Roberts subsequently asked, “If it has one name, one use of the candidate’s name, it would be covered, correct?” *Id.* at 29. Stewart replied, “That’s correct.” *Id.*

³² *See id.* at 28. Justice Kennedy extended the discussion to the Kindle and its electronic books, expressing concern that transmittal via satellite would permit a total ban under the statute of a work by a corporate author of campaign advocacy. *Id.* at 29. Justice Breyer also raised the specter of a constitutional question in the event that a corporation “had to pay for” campaign advocacy in book form and “couldn’t pay for it through the PAC.” *Id.* at 31.

³³ *Court Calls for Rehearing in Citizens United Case*, 33 NEWS MEDIA & THE L. 13 (2009), available at http://www.rcfp.org/news/mag/33-3/court_calls_for_rehearing_in_citizens_united_case_13.html.

³⁴ Associated Press, *Anti-Hillary Dispute to Be Re-heard*, FIRST AMENDMENT CENTER (June 29, 2009), <http://www.firstamendmentcenter.org/news.aspx?id=21767>.

³⁵ *Id.*

Prior to addressing the final ruling of the Court, a brief history of campaign finance law is necessary to fully understand the implications of the *Citizens United* decision.

A. *Early Attempts at Campaign Finance Reform*

The ideals of campaign finance reform originated in the post-Civil War era³⁶ when great concentrations of wealth led to congressional concern over increasing economic disparity between “the many and the few.”³⁷ Many believed that this wealth improperly influenced politics and led to corruption.³⁸ In 1894, Elihu Root, a delegate to the State Constitutional Convention of New York, began advocating legislation that would prohibit corporations from making campaign contributions.³⁹ He believed that corporations’ “great aggregations of wealth” were being used to further interests that were at odds with the interests of the public.⁴⁰

In 1905, President Theodore Roosevelt stated in a message to Congress that “[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law”⁴¹ and that such a prohibition would be “an effective method of stopping the evils aimed at in corrupt practices acts.”⁴² Congress responded by passing the Tillman Act in 1907, which forbade national banks and corporations from “mak[ing] a money contribution in connection with any election to any political office.”⁴³

Congress extended the restrictions on campaign financing over the next few decades.⁴⁴ In 1972, Congress passed the Federal Election Campaign Act,⁴⁵ requiring disclosure of contributions over \$100 and expenditures made by candidates and political committees exceeding

³⁶ *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 571. Root was a Senator from New York from 1909 to 1915 and a recipient of the Nobel Peace Prize in 1912. *Biographical Directory of the United States Congress: Root, Elihu*, LIBRARY OF CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=r000430> (last visited Mar. 29, 2011).

⁴⁰ *UAW-CIO*, 352 U.S. at 571.

⁴¹ *Id.* at 572.

⁴² *Id.*

⁴³ Tillman Act, ch. 420, 34 Stat. 864 (1907).

⁴⁴ *UAW-CIO*, 352 U.S. at 575–84.

⁴⁵ Pub. L. No. 92-225, 86 Stat. 3 (1972).

\$1,000 per year,⁴⁶ ratifying the ban on the use of corporate and union general treasury funds for contributions and expenditures,⁴⁷ and allowing for corporations and unions to create segregated funds (now known as PACs) for use in contributions and expenditures.⁴⁸

Corruption stemming from the 1972 presidential election demonstrated that the Act was not useful in deterring the corruption that Congress intended to prevent;⁴⁹ so in 1974, Congress passed the Federal Election Campaign Act Amendments of 1974 (FECA).⁵⁰ FECA closed the loophole in the 1972 Act that allowed candidates to circumvent expenditure and contribution limits.⁵¹ Additionally, the amendments imposed a \$1,000 limit on yearly contributions by individuals to any single candidate, limited an individual's total yearly contributions to \$25,000, limited independent expenditures by individuals to \$1,000, imposed expenditure limits on candidates and political parties, required more comprehensive disclosure of contributions and expenditures, and created the FEC.⁵²

B. *Buckley v. Valeo*

In 1976, *Buckley v. Valeo*⁵³ became the first major challenge to FECA to reach the Supreme Court.⁵⁴ The plaintiffs sought a declaratory judgment that the major provisions of FECA were unconstitutional as well as an injunction against the enforcement of those provisions.⁵⁵ The lower court of appeals sustained FECA, citing “‘a clear and compelling interest’ in preserving the integrity of the electoral process.”⁵⁶ On appeal to the Supreme Court, the plaintiffs claimed that FECA violated First

⁴⁶ *McConnell v. FEC*, 540 U.S. 93, 117–18 (2003).

⁴⁷ *Id.* at 118.

⁴⁸ *Id.*

⁴⁹ See *Buckley v. Valeo*, 519 F.2d 821, 839–40 (D.C. Cir. 1975). Dairy organizations gave very large contributions to Nixon fundraisers in order to gain access to White House officials in order to discuss price supports. *Id.* at 839 n.36.

⁵⁰ Pub. L. 93-443, 88 Stat. 1263 (1974).

⁵¹ *McConnell*, 540 U.S. at 118.

⁵² *Id.* at 118–19.

⁵³ 424 U.S. 1 (1976).

⁵⁴ See Willys Schneider, Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852, 853 (1976) (claiming that before *Buckley* there had never been a major test of the constitutionality of campaign reform and that the case raised novel issues).

⁵⁵ *Buckley*, 424 U.S. at 8–9.

⁵⁶ *Id.* at 9–10 (quoting *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975)).

2. *Contributions Versus Expenditures*

One of the most significant elements of the *Buckley* decision is the distinction that the Court drew between contributions given directly to candidates and expenditures made independently of, but relative to, candidates. Regarding expenditures, the Court held that limits on the amount of money that a person or group could spend constituted “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”⁶⁸ “Being free to engage in unlimited political expression subject to a ceiling on expenditures,” the Court concluded, “is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”⁶⁹ In contrast, the Court held that contribution limits operated as only a “marginal” restraint on one’s ability to exercise their right to free speech.⁷⁰ In the Court’s opinion, a contributor’s expression rested solely on the symbolic act of making a contribution and was not measurable by the amount that a contributor chose to give.⁷¹ Thus, the *Buckley* Court concluded that although limits on both contributions and expenditures restrict First Amendment freedoms, expenditure limits impose a significantly more severe restraint on those freedoms than contribution limits.⁷² The Court analyzed contributions and expenditures separately based upon this distinction.

a. *Contributions*

The Government argued that there were three sufficient interests justifying FECA’s limits on contributions. First, it argued that the limits served to prevent corruption and the appearance of corruption that arose from real or imagined influence of large contributions on candidates’ positions and actions once elected to office (the corruption interest).⁷³ Second, the Government argued that the limits served to “mute” the voices of the affluent, equalizing the ability of all citizens to affect the outcome of elections (the equalization interest).⁷⁴ Third, the Government argued that the limits would slow or stop the rising costs involved in running for

⁶⁸ *Id.* at 19.

⁶⁹ *Id.* at 19 n.18.

⁷⁰ *Id.* at 20–21.

⁷¹ *Id.* at 21.

⁷² *Id.* at 23.

⁷³ *Id.* at 25.

⁷⁴ *Id.* at 25–26.

office, allowing those with fewer resources to participate in the political process (the cost interest).⁷⁵

The *Buckley* Court found that the corruption interest was sufficient to justify the \$1,000 limit on contributions made by individuals to any particular candidate, stating, “To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”⁷⁶ The problems associated with the 1972 elections were enough for the Court to conclude that the corruption problem was “not an illusory one.”⁷⁷ Because the Court deemed the corruption interest was sufficient to uphold the contribution limits, it did not discuss the equalization interest or the cost interest in relation to contributions.⁷⁸

b. Expenditures

FECA prohibited individuals from making independent expenditures in excess of \$1,000 “relative to a clearly identified candidate.”⁷⁹ “Relative to” was not expressly defined by FECA, so the Court determined that “relative to” should be interpreted to mean “advocating the election or defeat of a candidate.”⁸⁰ In a footnote, the Court specified that FECA’s expenditure limits would only apply to communications containing “*express* words of advocacy . . . such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ or ‘reject.’”⁸¹

Because the Court viewed the expenditure limits as imposing a substantial restriction on free speech, it determined that the limits could only be upheld if they passed the “exacting scrutiny” required in First Amendment challenges.⁸² Although the corruption interest was sufficient to uphold FECA’s contribution limits, it was not adequate to justify FECA’s expenditure limits.⁸³ The Court opined that independent expenditures did not produce the risk of corruption that contributions did;

⁷⁵ *Id.* at 26.

⁷⁶ *Id.* at 26–27.

⁷⁷ *Id.* at 27.

⁷⁸ *Id.* at 26.

⁷⁹ *Id.* at 39–40.

⁸⁰ *Id.* at 42.

⁸¹ *Id.* at 44 n.52 (emphasis added).

⁸² *Id.* at 44–45.

⁸³ *Id.* at 45.

and thus, the limits on independent expenditures operated only to impermissibly limit independent expression.⁸⁴

The Court briefly considered whether the equality interest could justify the expenditure limits but determined that it too was insufficient to uphold expenditure limits, stating, “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.”⁸⁵ Because the expenditure limits imposed such a heavy burden on First Amendment expression without promoting a sufficient governmental interest, the Court struck down the limits.⁸⁶

C. *The Path to Austin and McConnell*

Since *Buckley*, there has been a multitude of campaign finance litigation, and the Court has struggled to maintain a uniform stance on the varying issues presented.

1. *The Austin Anomaly*

The Supreme Court specifically requested that the litigants in *Citizens United* present arguments about whether *Austin* should be overturned.⁸⁷ A brief history of the path to *Austin* follows below.

a. *Corporations’ Political Speech Rights*

In *First National Bank of Boston v. Bellotti*,⁸⁸ the Supreme Court considered the extent of corporations’ constitutional rights.⁸⁹ The Court decided that while corporations could be denied “purely personal” protections, such as the right to privacy and the privilege against compulsory self-incrimination,⁹⁰ corporations were entitled to First Amendment rights.⁹¹

At issue in *Bellotti* was the constitutionality of a Massachusetts criminal statute that forbade banks and other corporations from making expenditures for the purpose of influencing the outcome of a referendum

⁸⁴ *Id.* at 47.

⁸⁵ *Id.* at 48–49.

⁸⁶ *Id.* at 51.

⁸⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010).

⁸⁸ 435 U.S. 765 (1978).

⁸⁹ *Id.* at 775–84.

⁹⁰ *Id.* at 779 n.14 (citing *United States v. White*, 322 U.S. 694, 698–701 (1944)).

⁹¹ *Id.* at 784.

election.⁹² The Massachusetts Supreme Judicial Court upheld the statute, holding that a corporation's First Amendment rights were "limited to issues that materially affect its business, property, or assets."⁹³ The Supreme Court disagreed with the decision of the lower court, stating that the First Amendment's main purpose was to protect "the free discussion of government affairs"⁹⁴ and that "this is no less true because the speech comes from a corporation rather than an individual."⁹⁵ The Court further stated that "[t]he inherent worth of the speech in terms of its capacity for informing the public *does not depend upon the identity of the source*, whether corporation, association, union, or individual."⁹⁶

Analyzing the Massachusetts statute under the "critical scrutiny" required by the First Amendment,⁹⁷ the Court found the statute to be unconstitutional,⁹⁸ holding that the corruption interest approved by the *Buckley* Court was not compelling in the situation presented by *Bellotti*.⁹⁹ The Court stated, "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."¹⁰⁰ In the Court's opinion, there was no compelling government interest that could justify the imposition on the corporation's right to speak in a referenda election.¹⁰¹ Thus, the Court held that corporations could make independent expenditures in referenda elections.¹⁰²

The Supreme Court considered corporations' right to speak in candidate elections in *FEC v. National Conservative Political Action Committee* (NCPAC).¹⁰³ NCPAC involved a challenge to the Presidential Election Campaign Fund Act.¹⁰⁴ Section 9012(f) of the Act made it illegal for independent political committees to make expenditures in support of

⁹² *Id.* at 767.

⁹³ *Id.*

⁹⁴ *Id.* at 776–77.

⁹⁵ *Id.* at 777.

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Id.* at 786 (quoting *Buckley v. Valeo*, 424 U.S. 1, 11 (1976)).

⁹⁸ *Id.* at 795.

⁹⁹ *See id.* at 787–95.

¹⁰⁰ *Id.* at 790.

¹⁰¹ *Id.*

¹⁰² *Id.* at 792.

¹⁰³ 470 U.S. 480 (1985).

¹⁰⁴ 26 U.S.C. §§ 9001–9013 (2006).

candidates who chose to accept public funding for their campaign.¹⁰⁵ NCPAC and Fund for a Conservative Majority (FCM) were both nonprofit ideological corporations¹⁰⁶ that wished to make large expenditures in support of President Reagan's reelection in 1984.¹⁰⁷

The Court held that, under *Buckley*, prevention of corruption and the appearance of corruption were "the *only* legitimate and compelling government interests" that would justify restrictions on campaign speech,¹⁰⁸ and that the risk of corruption was not sufficiently present when independent expenditures were concerned,¹⁰⁹ even though corporations could potentially spend more money than the individuals considered in *Buckley*.¹¹⁰

The next major corporate campaign finance challenge came in 1986 when the Court decided *FEC v. Massachusetts Citizens for Life, Inc.* (MCFL).¹¹¹ MCFL was a nonprofit corporation with no shareholders that used its general treasury funds to finance campaign materials.¹¹² The organization published newsletters on an irregular basis from 1973 to 1978¹¹³ and published a "special edition" newsletter in time for the 1978 primary elections.¹¹⁴ The front page of the newsletter read, "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and "VOTE PRO-LIFE" was written on the back page.¹¹⁵ The newsletter listed each candidate and rated them based upon their commitment to promoting a pro-life agenda.¹¹⁶ The Government argued that the newsletter violated FECA § 441b—the provision that prohibited corporations from using their general treasury funds to make expenditures in connection with federal candidate elections.¹¹⁷ MCFL argued that its newsletter did not fall under this section nor was it covered by the "express advocacy" category created

¹⁰⁵ *Id.* § 9012(f).

¹⁰⁶ *NCPAC*, 470 U.S. at 490.

¹⁰⁷ *Id.* at 483.

¹⁰⁸ *Id.* at 496–97 (emphasis added).

¹⁰⁹ *Id.* at 498.

¹¹⁰ *Id.*

¹¹¹ 479 U.S. 238 (1986).

¹¹² *Id.* at 241.

¹¹³ *Id.* at 242.

¹¹⁴ *Id.* at 243.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 244.

in *Buckley*.¹¹⁸ The Court rejected the argument that the newsletter was not express advocacy because the newsletter contained the language “vote for” and identified specific candidates.¹¹⁹

Although the Court found that MCFL’s newsletter violated § 441b’s prohibition on corporations using general treasury funds to make expenditures in federal elections, it held that the Act was unconstitutional as it applied to MCFL.¹²⁰ A plurality of the Court found that FECA’s requirements that corporations create a segregated fund for political activities, solicit funds only from its own members, and comply with complicated disclosure requirements were too much of a burden on corporations like MCFL.¹²¹ The plurality stated that such stringent requirements could possibly discourage small groups that would have difficulties bearing the heavy administrative costs of fulfilling such requirements¹²² and held that “[t]he fact that the statute’s practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities.”¹²³ The Court held that the corruption interest was not compelling in this case because “groups such as MCFL . . . do not pose that danger of corruption.”¹²⁴

The Court did not strike down § 441b; instead, it created an exception to the law for certain corporations.¹²⁵ For a corporation to be exempt from § 441b’s restrictions on independent spending, the Court held that the corporation must (1) be formed for the purpose of promoting political ideas and not engage in business activities, (2) have no shareholders or other members who have a claim to its assets, and (3) not be established by a business or labor union, or accept funding from businesses or labor unions.¹²⁶

¹¹⁸ *Id.* at 248.

¹¹⁹ *Id.* at 249–50.

¹²⁰ *Id.* at 263.

¹²¹ *Id.* at 253–55.

¹²² *Id.* at 254–55.

¹²³ *Id.* at 255.

¹²⁴ *Id.* at 259.

¹²⁵ *Id.* at 263–64.

¹²⁶ *Id.*

b. Austin's "New Corruption"

As in *MCFL* and *NCPAC*, a nonprofit corporation was again at issue in *Austin v. Michigan Chamber of Commerce*.¹²⁷ However, unlike *Bellotti*, the corporation challenging the campaign finance regulation—the Michigan Chamber of Commerce—wished to make expenditures in connection with a candidate election.¹²⁸ Although the law the Chamber challenged was a state, not a federal law,¹²⁹ the Court applied the same analysis as it had for challenges to federal campaign finance laws.¹³⁰

The *Austin* Court held that the Chamber did not fall under the *MCFL* exception because it was not created for political purposes and was free to solicit funding from corporations.¹³¹ The Court then held that the regulation against corporate spending in question was intended to prevent “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,”¹³² and that this was a sufficiently compelling interest that justified upholding the statute.¹³³ In this holding, the Court introduced a new interest that was sufficient to justify restrictions on political speech (the antidistortion interest).¹³⁴ This was a sharp break from past decisions, such as *NCPAC*, which held that *Buckley’s* corruption interest was “the *only* legitimate and compelling government interest[.]” that could justify limits on campaign speech.¹³⁵

Justice Scalia dissented from the Court’s opinion,¹³⁶ calling it “Orwellian”¹³⁷ and contrary to First Amendment principles.¹³⁸ Scalia was especially critical of the Court’s creation of the antidistortion interest.¹³⁹

¹²⁷ 494 U.S. 652 (1990).

¹²⁸ *Id.* at 656.

¹²⁹ *Id.* at 654.

¹³⁰ *Id.* at 657 (citing *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976)).

¹³¹ *Id.* at 661–62, 664.

¹³² *Id.* at 660.

¹³³ *Id.*

¹³⁴ *See id.* at 660–61 (referring to the “potential for distortion” that corporate spending causes to justify the statute).

¹³⁵ *FEC v. NCPAC*, 470 U.S. 480, 496–97 (1985) (emphasis added).

¹³⁶ *Austin*, 494 U.S. at 679.

¹³⁷ *Id.*

¹³⁸ *Id.* at 679–80.

¹³⁹ *Id.* at 683–85.

Scalia felt that this “New Corruption”¹⁴⁰ was irrational because wealthy individuals could spend as much as they pleased regardless of public support and would face no government sanction.¹⁴¹ Scalia also criticized the majority’s opinion that the special benefits that corporations received from the state could have the potential for corruption.¹⁴² He wrote, “The Court thus holds, for the first time since Justice Holmes left the bench, that a direct restriction upon speech is narrowly tailored if it extends to speech that has the mere *potential* for producing social harm.”¹⁴³ It was *Austin*’s break from precedent and creation of a new government interest that the Court addressed in *Citizens United*.¹⁴⁴

2. *The BCRA and McConnell*

The *Citizens United* Court also questioned the portion of *McConnell* that upheld § 203 of the BCRA.¹⁴⁵ The BCRA, also known as the McCain-Feingold Act,¹⁴⁶ amended prior campaign finance law in a number of ways by making new regulations relating to soft money, contribution limits, and independent and coordinated expenditures.¹⁴⁷ BCRA § 203 maintained FECA’s rule prohibiting corporations from using their general treasury funds in federal elections but replaced *Buckley*’s determination that only express advocacy could be regulated with a provision concerning all “electioneering communications.” Section 203 called for regulation of *any* broadcast, satellite, or cable communication that refers to a clearly

¹⁴⁰ *Id.* at 684.

¹⁴¹ *Id.* at 685.

¹⁴² *Id.* at 689.

¹⁴³ *Id.*

¹⁴⁴ *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

¹⁴⁵ *Id.* at 886–87.

¹⁴⁶ See *McConnell v. FEC*, 540 U.S. 93, 249 (2003) (citing U.S. PUB. INT. RES. GROUP, THE LOBBYIST’S LAST LAUGH: HOW K STREET LOBBYISTS WOULD BENEFIT FROM THE MCCAIN-FEINGOLD CAMPAIGN FINANCE BILL 2 (2001), available at http://cdn.publicinterestnetwork.org/assets/w3RoLM1NUekpEqhbnrydNg/lastlaugh7_5_01.pdf). The dissent’s discussion in *McConnell* regarding the BCRA as the “McCain-Feingold Bill” is one example of the popular name for the BCRA as passed. See *id.*

¹⁴⁷ *Id.* at 133–34.

identified candidate for federal office and that is made within sixty days of a general election or thirty days before a primary election.¹⁴⁸

Senator Mitch McConnell challenged the constitutionality of the BCRA, especially its “electioneering communications” provision, arguing that *Buckley* drew a line between express and issue advocacy (advocacy that does not directly call for the election or defeat of a candidate)¹⁴⁹ and that any regulation of issue advocacy was a violation of a speaker’s First Amendment right to participate in issue advocacy.¹⁵⁰

Senators John McCain and Russ Feingold intervened in the action, opposing Senator McConnell’s position and arguing that the “electioneering communications” provision of the BCRA was necessary because the express-issue distinction was easy to circumvent¹⁵¹ and that the new standard set forth by the BCRA would be “effective” and “objective.”¹⁵²

The *McConnell* Court agreed with the Government and Senators McCain and Feingold. *Buckley*’s distinction between express and issue advocacy was, according to the Court, merely statutory interpretation and not a principle of constitutional law.¹⁵³ The Court even called the distinction “functionally meaningless” because the express-advocacy rule could be easily circumvented by groups wishing to influence an election by stopping short of using the express language that *Buckley* forbade,¹⁵⁴ noting that advertisers rarely chose to use those words anyway.¹⁵⁵ McConnell also argued that the justifications that supported the regulation of express advocacy did not apply to a significant amount of speech that § 203 covered, but the Court disagreed with this argument, stating that “[t]he justifications for the regulation of express advocacy apply equally to

¹⁴⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (2002); *see also id.* § 201(a), 116 Stat. at 89 (defining “electioneering communication” and adding this definition to 2 U.S.C. § 434).

¹⁴⁹ *See supra* note 81 and accompanying text.

¹⁵⁰ *McConnell*, 540 U.S. at 190.

¹⁵¹ Brief for Intervenor-Defendants Senator John McCain et al. at 10, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf.

¹⁵² *Id.* at 42.

¹⁵³ *McConnell*, 540 U.S. at 190.

¹⁵⁴ *Id.* at 193.

¹⁵⁵ *Id.* at n.77 (“All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat.”).

ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect."¹⁵⁶ The *McConnell* Court did note, however, that the justifications for upholding the new campaign regulations might not apply to genuine issue ads.¹⁵⁷

In 2007, BCRA § 203 was challenged by Wisconsin Right to Life, Inc. (WRTL), a nonprofit agency that wanted to run ads encouraging voters to contact Senators Russ Feingold and Herb Kohl to urge them to oppose a filibuster.¹⁵⁸ WRTL conceded that the ads were prohibited by § 203¹⁵⁹ but argued that it had a First Amendment right to broadcast the ads.¹⁶⁰

The *WRTL* Court first addressed the issue of whether the ads in question were the type of genuine issue ads that *McConnell* suggested could fall outside of justified regulation or were the "functional equivalent" of speech expressly advocating the election or defeat of a candidate falling within the regulations of the BCRA.¹⁶¹ The Government argued that, under *McConnell*, ads were the functional equivalent of express advocacy if they were intended to influence elections and had that effect.¹⁶² The *WRTL* Court rejected this argument, finding that the *McConnell* Court never intended to adopt a test to determine whether something was the equivalent of express advocacy,¹⁶³ and even if it had, the test suggested by the Government did not comport with *Buckley*'s standards.¹⁶⁴ A test that turned on intent, wrote Chief Justice Roberts, could have the result of criminally punishing one speaker while protecting another, even if the ads were identical.¹⁶⁵ A test that turned on effect would also be problematic because the speaker would have to rely on the audience understanding the message in a certain way to avoid criminal charges.¹⁶⁶ The *WRTL* Court

¹⁵⁶ *Id.* at 205–06.

¹⁵⁷ *Id.* at 206 n.88.

¹⁵⁸ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 458–59 (2007).

¹⁵⁹ *Id.* at 464.

¹⁶⁰ *Id.* at 460.

¹⁶¹ *Id.* at 456.

¹⁶² *Id.* at 465.

¹⁶³ *Id.* at 466. Although only two Justices concurred in this portion of the opinion, three additional votes would have overruled altogether the portion of *McConnell* that had upheld the constitutionality of BCRA § 203. *See id.* at 452–53.

¹⁶⁴ *Id.* at 467 (“[T]he *Buckley* Court explained that analyzing the question in terms ‘of intent and of effect’ would afford ‘no security for free discussion.’”).

¹⁶⁵ *Id.* at 468.

¹⁶⁶ *Id.* at 469.

then held that “an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁶⁷

Using this test, the Chief Justice found that the ads in question were not the functional equivalent of express advocacy,¹⁶⁸ and the Supreme Court ultimately upheld the district court finding that “BCRA § 203 [was] unconstitutional as applied to the advertisements at issue in these cases.”¹⁶⁹

Justice Alito, in a concurring opinion, seemed to pave the way for the challenge raised by Citizens United. “If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech,” he wrote, “we will presumably be asked in a future case to reconsider the holding in *McConnell* . . . that § 203 is facially constitutional.”¹⁷⁰

III. DISCUSSION

A. *The Opinion of the Court*

On January 21, 2010, after months of anticipation, the *Citizens United* Court announced its decision.¹⁷¹ Justice Kennedy wrote the majority opinion declaring that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”¹⁷² In so holding, the Court overruled *Austin* and the portion of *McConnell* in question, invalidated BCRA § 203 and FECA § 441b,¹⁷³ and signaled a return “to the principle established by *Buckley* and *Bellotti*, that the Government may not suppress political speech on the basis of the speaker’s corporate identity.”¹⁷⁴

In arriving at its conclusion, the majority opinion first addressed whether the Court could find for Citizens United on more narrow grounds but determined that it could not.¹⁷⁵ The opinion then turned to the facial

¹⁶⁷ *Id.* at 469–70.

¹⁶⁸ *Id.* at 481.

¹⁶⁹ *Id.* at 470, 482.

¹⁷⁰ *Id.* at 482–83.

¹⁷¹ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

¹⁷² *Id.* at 886.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 913.

¹⁷⁵ *Id.* at 892. Citizens United presented four ways that the Court could find in its favor without overturning other campaign finance laws: (1) it argued that FECA § 441b did not cover “Hillary: the Movie” because the movie did not qualify as an “electioneering communication” due to the fact that it would reach one household at a time and not 50,000

(continued)

PACs.¹⁸⁵ The majority opinion interpreted § 441b as nothing more than an attempt “to silence entities whose voices the Government deems to be suspect.”¹⁸⁶ The First Amendment, the Court stated, “stands against attempts to disfavor certain subjects or viewpoints” and prohibits restrictions that make distinctions among speakers.¹⁸⁷ The majority relied on *Bellotti* to support its position regarding corporate speech, reiterating that “First Amendment protection extends to corporations,”¹⁸⁸ that “political speech does not lose First Amendment protection ‘simply because its source is a corporation,’”¹⁸⁹ and that the legislature “is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”¹⁹⁰ The First Amendment, thus, protects corporations as well as “natural” persons.¹⁹¹

The *Citizens United* decision fits with *Buckley*’s understanding of campaign finance law.¹⁹² The majority opined that if the *Buckley* Court had considered the constitutionality of a ban on corporate expenditures, it would have also found the ban to be impermissible because the ban “could not have been squared with the reasoning and analysis of that precedent.”¹⁹³

Thus, in the Court’s opinion, *Austin* was a break from established campaign finance precedent¹⁹⁴ because *Austin*’s antidistortion interest did not conform to the principles set forth in either *Buckley* or *Bellotti*.¹⁹⁵ Notably, even the Government, in defending the ban on corporate expenditures, abandoned its reliance on *Austin*’s antidistortion interest, and instead, argued that *Austin* should be upheld based on the corruption interest and a shareholder-protection interest,¹⁹⁶ which is concerned with protecting dissenting shareholders from being forced to fund corporate

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 898.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 899 (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)).

¹⁸⁹ *Id.* at 900 (quoting *Bellotti*, 435 U.S. at 784).

¹⁹⁰ *Id.* at 902 (quoting *Bellotti*, 435 U.S. at 784–85).

¹⁹¹ *Id.* at 900.

¹⁹² *Id.* at 902.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 903.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

millions of Americans' speech;²⁰⁵ and as a result, the Government was impermissibly limiting the amount of speech that could reach the public.²⁰⁶

The opinion next addressed the corruption interest and reiterated *Buckley's* holding that *only* the prevention of corruption or the appearance of corruption was adequate to limit political speech.²⁰⁷ The Court stated that, unlike contributions, "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."²⁰⁸ Especially damaging to the Government's corruption argument was the fact that the record in *McConnell* was over 100,000 pages long and did "not have any direct examples of votes being exchanged for . . . expenditures" and only contained slight evidence of ingratiation.²⁰⁹ Even so, "[i]ngratiation and access," the Court stated, "are not corruption."²¹⁰

The majority quickly dismissed the shareholder-protection interest as both underinclusive and overinclusive.²¹¹ The Court determined that if Congress was really concerned with protecting dissenting shareholders, it would not have created such an underinclusive law that banned corporate speech within certain media only within the thirty or sixty day time frame.²¹² The Court also viewed the restrictions as overinclusive because they covered all corporations, including those with single shareholders, nonprofit corporations, and ones in which all shareholders agreed with the corporation's political position.²¹³ Furthermore, general protections afforded by corporate and agency law would operate to curb any abuse by corporate directors.²¹⁴ Thus, because there was no governmental interest sufficient to justify the restrictions on corporate expenditures, the Court overruled *Austin*,²¹⁵ and as a result, also overruled the portion of

²⁰⁵ *Id.* at 906–07.

²⁰⁶ *Id.* at 907.

²⁰⁷ *Id.* at 908. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

²⁰⁸ *Id.* at 909.

²⁰⁹ *Id.* at 910 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 560 (D.D.C. 2003)).

²¹⁰ *Id.*

²¹¹ *Id.* at 911.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 913.

expenditures.²²⁵ Stevens also took issue with the majority's admonishment of "identity-based distinctions"²²⁶ because in his opinion "the authority of legislatures to enact viewpoint-neutral regulations based on content and identity is well settled."²²⁷ As examples, Stevens pointed to the ability of state-run broadcasters to exclude candidates from debates, the prohibition of displays of campaign material near polling places, and current restrictions on campaign spending by foreign nationals.²²⁸

Stevens additionally dismissed the theory of corporate personhood—the theory that corporations are entitled to the same rights as individuals under the Constitution²²⁹—stating that corporations "are not natural persons."²³⁰ In his view, the Framers were very skeptical of corporations, and they "took it as a given" that corporations could be regulated in ways that citizens could not.²³¹ Stevens used the fact that no prominent Framer ever mentioned the notion that corporate speech could be less protected than individual speech as an indication that "the very notion of 'corporate speech' . . . was inconceivable" to the Framers.²³²

Justice Scalia, in a separate concurring opinion, responded to Stevens' assertion.²³³ Scalia wrote that the Framers' personal feelings toward corporations were relevant only as to the "meaning of the text they enacted—not, as the dissent suggests, as a freestanding substitute for that text."²³⁴ Scalia believed that Stevens' conclusion was incorrect, because he believed that the Founders' disdain for corporations was more directed at the monopolies that corporations were able to form at the time and that if corporations as we know them today had existed during the Framers' time, the Framers probably would have looked upon corporations with favor.²³⁵ Scalia further argued that the lack of mention about corporate speech could not be explained by the idea that the Framers found the notion "inconceivable" because plenty of corporations that were organized during

²²⁵ *Id.*

²²⁶ *Id.* at 945–48.

²²⁷ *Id.* at 946.

²²⁸ *Id.* at 946–47.

²²⁹ Amanda D. Johnson, Comment, *Originalism and Citizens United: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187, 187 (2010).

²³⁰ *Citizens United*, 130 S. Ct. at 947 (Stevens, J., dissenting).

²³¹ *Id.* at 949–50.

²³² *Id.* at 951.

²³³ *Id.* at 925–29 (Scalia, J., concurring).

²³⁴ *Id.* at 925.

²³⁵ *Id.* at 926.

the Founders' time were actively participating in speech:²³⁶ “[C]olleges, towns and cities, religious institutions, and guilds had long been organized as corporations . . . [and] actively petitioned the Government and expressed their views in newspapers and pamphlets.”²³⁷

Scalia also disagreed with Stevens' dismissal of the corporate personhood theory, writing that the provisions in the Bill of Rights apply to individual men and women but that the “individual person's right to speak includes the right to speak *in association with other individual persons*.”²³⁸ Scalia urged the dissent to “celebrate rather than condemn the addition of speech to the public debate.”²³⁹

Stevens' dissent also focused on prior case law and *stare decisis*. In Stevens' view, it was the holding of *Citizens United*, and not *Austin* and *McConnell*, which was at odds with precedent.²⁴⁰ He cited *MCFL* as evidence that the theory that corporations could be restricted was settled law and pointed out that the Court had considered and upheld *Austin* “a number of times.”²⁴¹

Chief Justice Roberts responded to Stevens' assertions by writing a separate concurring opinion to discuss the principles of *stare decisis*.²⁴² Roberts pointed out that the Court never had an occasion prior to *Citizens United* to determine whether *Austin* should be overturned, and the fact that the Court was unwilling to overturn *Austin* in other campaign finance cases should not be construed as a reaffirmation of *Austin*.²⁴³ Roberts wrote that “*stare decisis* is not an end in itself. It is instead ‘the means by which we ensure that the law will not change erratically, but will develop in a principled and intelligent fashion.’”²⁴⁴ In Roberts' opinion, it was not *Citizens United* that was at odds with Court jurisprudence; rather, it was *Austin* that was in conflict with settled campaign finance law.²⁴⁵ “*Austin*,”

²³⁶ *Id.* at 927.

²³⁷ *Id.* at 926–27.

²³⁸ *Id.* at 928.

²³⁹ *Id.* at 929.

²⁴⁰ *Id.* at 956–57 (Stevens, J., dissenting).

²⁴¹ *Id.* (citing *FEC v. Beaumont*, 539 U.S. 146, 153–56 (2003) (holding that there was a public interest in “restricting the influence of political war chests funneled through the corporate form”)).

²⁴² *Id.* at 917–25 (Roberts, C.J., concurring).

²⁴³ *Id.* at 919–20.

²⁴⁴ *Id.* at 920–21 (quoting *Vasquez v. Hillary*, 474 U.S. 254, 265 (1986)).

²⁴⁵ *Id.*

he wrote, “undermined the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech.”²⁴⁶ Roberts also believed that *Austin* was inconsistent with *Bellotti*’s determination that speech could be protected, even if the speaker is a corporation.²⁴⁷ Roberts pointed out that two of the interests the dissent relied on in its belief that *Austin* should be upheld—the corruption interest and the shareholder-protection interest—were not even used by the *Austin* Court for support of its position.²⁴⁸ Roberts concluded: “There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.”²⁴⁹

Finally, Stevens’ dissent addressed the three interests offered in support of restricting corporations’ speech.²⁵⁰ Beginning with the corruption interest, Stevens wrote that the focus of the Court should not be only on quid pro quo corruption. In Stevens’ opinion, it was unrealistic to believe that this type of corruption could be separated from other “improper influence.”²⁵¹ Although *Buckley* found the corruption interest to be inadequate when considering the validity of limits on independent expenditures, Stevens asserted that the *Buckley* Court left open the possibility that the corruption interest could, in the future, justify a restriction on independent expenditures, because some large expenditures could in fact pose the same dangers as quid pro quo corruption.²⁵²

Turning next to the antidistortion interest, Stevens again presented the argument that corporations are state-created entities with certain benefits that should preclude them from being able to speak alongside citizens. Corporations, Stevens wrote, “have ‘limited liability’ for their owners and managers, ‘perpetual life,’ separation of ownership and control, ‘and favorable treatment of the accumulation and distribution of assets,’” and furthermore, “have no consciences, no beliefs, no feelings, no thoughts, [and] no desires.”²⁵³ He felt that corporate participation in political speech

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 921–22.

²⁴⁸ *Id.* at 923.

²⁴⁹ *Id.* at 924.

²⁵⁰ *Id.* at 961–79 (Stevens, J., dissenting).

²⁵¹ *Id.* at 961.

²⁵² *Id.* at 964–65.

²⁵³ *Id.* at 971–72.

that the government is bound to respect.²⁶² Underlying this conclusion was the notion that “corporations are formed by real individuals and those individuals have constitutional rights against the state.”²⁶³

The Fourteenth Amendment to the Constitution was passed in 1868, giving due process and equal protection of the law to all persons.²⁶⁴ In 1886, the Supreme Court decided *Santa Clara County v. Southern Pacific Railroad Company*.²⁶⁵ Prior to oral argument, Chief Justice Waite informed the litigants that the Court would not consider whether corporations were persons under the Constitution, and thus, entitled to protection under the Fourteenth Amendment because the justices were all of the opinion that they were.²⁶⁶ This passage, inserted in the record by the court reporter, established the idea of corporate personhood without any argument, explanation, discussion, or dissent by the Court.²⁶⁷

The commercial speech doctrine, established in *Central Hudson Gas v. Public Service Commission*,²⁶⁸ also gives credence to the notion that corporations have constitutional rights. The plaintiff in *Central Hudson*, an electric corporation, challenged a ban by the government on any advertising that promoted the use of electricity.²⁶⁹ The Supreme Court held the ban to be unconstitutional, finding that so long as commercial speech is not unlawful or misleading, the government *may not prohibit* such speech without a substantial interest.²⁷⁰ Further, the Court held that any restriction imposed by the state on commercial speech must not be any more restrictive than necessary.²⁷¹

²⁶² Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 864 (2007).

²⁶³ *Id.*

²⁶⁴ U.S. CONST. amend. XIV, § 1; *see also* Winkler, *supra* note 262, at 864–65.

²⁶⁵ 118 U.S. 394 (1886).

²⁶⁶ *Id.* at 396.

²⁶⁷ Winkler, *supra* note 262, at 865. The Court reporter, J. C. Bankroft Davis, asked Justice Waite if he could include this statement in the headnotes of the case. Waite gave Davis an ambivalent answer, which Davis took as a yes, and the statement was included. Cecil Adams, *How Can a Corporation Be Legally Considered a Person?*, THE STRAIGHT DOPE (Sept. 9, 2003), <http://www.straightdope.com/columns/read/2469/how-can-a-corporation-be-legally-considered-a-person>.

²⁶⁸ 447 U.S. 557 (1980).

²⁶⁹ *Id.* at 559.

²⁷⁰ *Id.* at 564.

²⁷¹ *Id.*

These decisions, as well as *Bellotti* and *NCPAC*, demonstrate the Court's support of the corporate personhood theory. However, despite the holdings that give judicial validity to corporate personhood, many continue to question the theory.

The majority and dissenting opinions in *Citizens United* highlight the ongoing debate. In declaring that "First Amendment protection extends to corporations," the majority was able to cite twenty-three other Supreme Court decisions that supported its assertion²⁷²—certainly a strong argument in favor of recognizing corporate personhood.

Conversely, Stevens' dissent focused on the distinctions between individuals and corporations as support for his proposition that corporations should not be entitled to the same protections as individuals under the Constitution.²⁷³ He wrote that the concept "that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case."²⁷⁴ Regarding political activity, Stevens said, "Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office"²⁷⁵ and "the 'speakers' are not natural persons, much less members of our political community."²⁷⁶

²⁷² *Citizens United v. FEC*, 130 S. Ct. 876, 890–99 (2010) (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778 (1978); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Greenbelt Coop. Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)).

²⁷³ *Id.* at 930 (Stevens, J., dissenting).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 947.

Although Stevens is correct in asserting that corporations cannot literally participate in the electoral process as a candidate or voter, his distinction between individuals and corporations is illogical in this context. One only needs to turn to a later page in his dissent to find the fault in his distinction. Stevens wrote that Citizens United could prevail on other grounds, possibly by extending the *MCFL* exception to cover nonprofit organizations that only accept a *de minimis* amount of contributions from for-profit corporations.²⁷⁷ Certainly, these types of corporations cannot run or vote for political office either but that was not deemed fatal to their participation in political speech. Additionally, Stevens would have upheld laws that required corporations to form PACs to participate in political speech,²⁷⁸ but PACs also cannot vote or run for political office. Stevens never explains why he feels that the ability to vote or run for office should be determinative for some corporations but not others. If the ability to physically participate in the election process were a requisite to protection of political speech under the First Amendment, surely no corporation, union, or PAC would ever be entitled to such protection. The Court has never supported such an extreme proposition.²⁷⁹

Stevens also relied on the notion that corporations are merely creations of the state, which historically could determine the scope and content of the corporation, to distinguish why corporations' speech rights should not be equal to those of individuals.²⁸⁰ One response to this proposition is that "[c]orporations are created by people—they are merely recognized by the state."²⁸¹ Further, as the majority points out, it is well established that the government cannot condition the special advantages conferred upon corporations on the forfeiture of their First Amendment rights.²⁸² Though the corporation is an entity acknowledged by the state and enjoys state benefits such as prolonged life and special taxation,²⁸³ it is an association of people who did not choose to (nor must they choose to) limit their ability to participate in political speech as a condition of their association.

²⁷⁷ *Id.* at 937.

²⁷⁸ *Id.* at 942–43.

²⁷⁹ *See id.* at 900 (majority opinion).

²⁸⁰ *Id.* at 949 (Stevens, J., dissenting).

²⁸¹ Bradley A. Smith, *Corporations Are People, Too*, NAT'L PUBLIC RADIO (Sep. 10, 2009), <http://www.npr.org/templates/story/story.php?storyId=112711410>.

²⁸² *Citizens United*, 130 S. Ct. at 905 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 680 (1990)).

²⁸³ *Id.* (quoting *Austin*, 494 U.S. at 658–59).

Therefore, both case law and common sense lead to the conclusion that corporations should have First Amendment rights. *Citizens United* was necessary for the Court to overturn bad law that infringed on important speech rights and to strengthen the Court's commitment to the First Amendment.

B. This Decision Will Not Have Catastrophic Political Results

Many harshly criticized the Court's decision immediately upon its announcement. President Obama referenced the decision in his 2010 State of the Union Address, indicating that he was disappointed with the outcome;²⁸⁴ politicians and pundits blasted the Court for making such a careless decision;²⁸⁵ and polls indicated that Americans overwhelmingly opposed the decision.²⁸⁶ Unfortunately, much of the fear that many have regarding the ramifications of the Court's decisions is unfounded and unnecessary and is only fueled by inaccurate accusations.

1. There Is No Evidence That Independent Expenditures Have Devastating Political Consequences

Stevens' dissent argues that *Buckley* contemplated a limitation on expenditures if it is shown that large expenditures posed the same dangers of corruption as contributions.²⁸⁷ Stevens cited *McConnell's* record as

²⁸⁴ President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

²⁸⁵ Glenn Spencer, *Citizens United, Election Spending, and the DISCLOSE Act*, THE CHAMBER POST (Jul. 8, 2010), <http://www.chamberpost.com/2010/07/citizens-united-election-spending-and-the-disclose-act.html>. Senator Charles Schumer said, "The Supreme Court has just pre-determined the winners of next November's elections It won't be Republicans, it won't be Democrats, it will be corporate America." *Id.* Keith Olbermann, in a special comment on his nightly television program, claimed: "This is a Supreme Court-sanctioned murder of what little actual Democracy is left in this Democracy. It is government of the people by the corporations for the corporations. It is the Dark Ages. It is our Dred Scott." *Countdown with Keith Olbermann* (MSNBC television broadcast Jan. 21, 2010), available at <http://www.msnbc.msn.com/id/34981476/>.

²⁸⁶ Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>. The poll, conducted February 4-8, 2010, indicated that eight out of ten poll respondents disagreed with the decision, and 65% were "strongly" opposed. *Id.*

²⁸⁷ *Citizens United*, 130 S. Ct. at 964-65 (Stevens, J., dissenting).

proof that such corruption was present in corporate electioneering: the “BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at creating ‘issue ads’ to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense.”²⁸⁸ Stevens did concede, however, that there were no specific examples of such corruption, writing that proving such corruption would be “next to impossible.”²⁸⁹ As the majority points out, the *McConnell* record was over 100,000 pages long and contained no direct evidence of corruption;²⁹⁰ and further, there is only “scant evidence that independent expenditures even ingratiate,” which is not itself corruption.²⁹¹ The only evidence of impropriety in the record concerned donations of soft money to political parties.²⁹²

The *Citizens United* Court did leave open a safety valve should such corruption become apparent. The majority held that “[w]hen Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy.”²⁹³ Should events occur that cause Congress to become concerned with elected officials’ actions in response to independent expenditures, the Court decided that it would give weight to attempts by Congress to eliminate those actions²⁹⁴ so long as Congress’ remedy passes constitutional muster.

One must note, however, that the effect this ruling will have may be very limited and such corruption may not occur. Prior to the *Citizens United* decision, more than half of the states permitted corporate expenditures in elections.²⁹⁵ Those states did not find it necessary to change their laws to protect their citizens from the problems associated

²⁸⁸ *Id.* at 965.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 910 (majority opinion) (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 560 (D.D.C. 2003)).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 911.

²⁹⁴ *Id.*

²⁹⁵ *Corporate America vs. the Voter: Examining the Supreme Court’s Decision to Allow Unlimited Corporate Spending in Elections: Hearing Before the S. Comm. on Rules and Administration*, 111th Cong. 3 (2010) (statement of Allison R. Hayward, Professor, George Mason University School of Law), available at http://rules.senate.gov/public/index.cfm?a=Files.Serve&File_id=fd7f6a65-8b7c-43ea-a30e-4e4469297c0e.

with corporate political spending.²⁹⁶ Thus, allowing corporations to make expenditures in federal campaigns will also be unlikely to cause corruption.

Those concerned that the *Citizens United* ruling will lead to one-sided politics should remember that Americans are capable of making informed decisions. The “marketplace of ideas” concept, first advanced by Justice Oliver Wendall Holmes, supports the notion that if given information and alternatives, Americans can distinguish the good from the bad.²⁹⁷ Holmes wrote: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁹⁸ The Court has made this argument in numerous cases,²⁹⁹ and it still stands as a solid principle of the First Amendment.

Additionally, critics of the decision must remember that *Citizens United* did not change the law as it relates to corporate contributions. Prior to *Citizens United*, corporations were forbidden from directly contributing to candidates, and no part of the *Citizens United* decision changed that rule.³⁰⁰ If a corporation wishes to make a direct contribution to a candidate it must form a PAC and can only use money donated to the PAC—not the corporation’s general treasury funds—to make the contribution.³⁰¹ PAC contributions are still limited to \$5,000 per candidate, per election cycle.³⁰² Any suggestion that the *Citizens United* decision will lead to corporations

²⁹⁶ *Id.*; see also Bradley Smith, *The Case for Corporate Political Spending*, WALL ST. J. (Feb. 27, 2010), <http://online.wsj.com/article/SB10001424052748704479404575087753711035326.html> (“The 28 states that already allow corporate campaign expenditures for state races (including governor, state legislature and attorney general) are not awash in corporate political spending.”).

²⁹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁹⁸ *Id.*

²⁹⁹ See, e.g., *Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”).

³⁰⁰ 11 C.F.R. § 114.2 (2010).

³⁰¹ *Id.* § 114.5.

³⁰² *Contribution Limits for 2009-10*, FED. ELECTION COMM’N, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Feb. 25, 2011).

being able to directly contribute huge sums of money to candidates is completely unfounded and inconsistent with settled campaign finance law.

2. *American Elections Are Still Safe from Foreign Influence*

Since the release of the *Citizens United* decision, there has been speculation that the ruling will lead to foreign influence in American politics.³⁰³ Sensationalist headlines (“Supreme Court’s Ruling Would Allow Bin Laden to Donate to Sarah Palin’s Presidential Campaign”³⁰⁴) and President Barack Obama’s claim during his State of the Union address that the ruling would “open the floodgates for special interests—including foreign corporations—to spend without limits in our elections”³⁰⁵ have promoted this notion of improper foreign influence. Justice Alito made headlines when he mouthed “not true” in response to President Obama’s assertion,³⁰⁶ but Alito was correct. The idea that foreign individuals will now suddenly be able to pump millions into the election process and influence outcomes is baseless. Because § 441b does not address corporations that are funded by foreigners or corporations that were established in foreign countries, the Court did not decide whether the government has a compelling interest in preventing foreign individuals from participating in the American electoral process,³⁰⁷ leaving the laws banning foreign involvement in elections in place.³⁰⁸

Title 2, § 441(e) of the United States Code governs foreign involvement in elections. The statute states: “It shall be unlawful for a foreign national, directly or indirectly, to make a contribution . . . in connection with a Federal, State, or local election . . . or . . . an expenditure, independent expenditure, or disbursement for an

³⁰³ See Elizabeth Lynch, *Citizens United: U.S. Politics with Chinese Characteristics*, HUFFINGTON POST (Jan. 29, 2010, 11:17 AM), http://www.huffingtonpost.com/elizabeth-lynch/citizens-united-us-politi_b_441936.html.

³⁰⁴ Greg Palast, *Supreme Court’s Ruling Would Allow Bin Laden to Donate to Sarah Palin’s Presidential Campaign*, ALTERNET (Dec. 11, 2009), <http://www.alternet.org/story/144502/>.

³⁰⁵ President Barack Obama, Remarks by the President in State of the Union Address, *supra* note 284.

³⁰⁶ *Justice Alito Shown Shaking His Head and Mouthing “Not True” in Response to State of the Union Address*, JONATHAN TURLEY (Jan. 28, 2010), <http://jonathanturley.org/2010/01/28/justice-alito-shown-shaking-his-head-and-mouthing-not-true-in-response-to-state-of-the-union-address/>.

³⁰⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

³⁰⁸ 2 U.S.C. § 441e (2006).

only if the officials making the corporate decision to spend were American citizens or permanent residents.³¹⁴

The *Citizens United* decision did not disturb these laws; and thus, there is no need for concern that it will pave the way for improper foreign influence.

V. CONCLUSION

In sum, the First Amendment protects the right of *all* speakers who wish to make independent expenditures in the political process, and restrictions cannot be placed on speech based upon the identity of the speaker. Decades of campaign finance precedent support the *Citizens United* ruling, and there is no reason to suspect that the decision will have harmful results that some have predicted and many fear. Once it becomes apparent that the ruling will not have these damaging consequences, Americans should be able to celebrate the decision as a victory for the protection of their First Amendment rights.

³¹⁴ See Greg Stohr, *Obama Foreign-Business Court Slam Hints at Next Clash*, BLOOMBERG (Jan. 29, 2010, 2:19 PM), <http://www.businessweek.com/news/2010-01-29/obama-foreign-business-court-slam-hints-at-next-clash-update1-.html>.