

## REMOVING CORPORATE CAMPAIGN FINANCE RESTRICTIONS IN *Citizens United v. Federal Election Commission*, 130 S. CT. 876 (2010)

Since the Supreme Court's seminal campaign finance ruling in *Buckley v. Valeo*,<sup>1</sup> the Court continues to disagree over the best way to balance First Amendment free speech rights against the state's interest in fighting the reality or appearance of corruption caused by sizeable campaign expenditures.<sup>2</sup> The debate over corporate campaign expenditures has been a source of particularly sharp disagreement, generating at least six major decisions since the Court's ruling in *Buckley*.<sup>3</sup> In two recent decisions, the Court held that although corporations could use money in separate political funds for campaign spending, general treasury funds were off limits.<sup>4</sup> In *Citizens United v. FEC*,<sup>5</sup> however, the Supreme Court expanded corporate campaign spending power by holding that, although "[t]he government can regulate corporate political speech through disclaimer and disclosure requirements," it is unconstitutional for the government to suppress corporate political speech entirely.<sup>6</sup> In doing so, the Court struck down parts of two previous decisions<sup>7</sup> that limited the ability of corporations to spend money on electioneering communications in federal elections. Although it is too soon to know what effect the Court's decision will have on the electoral process, *Citizens United* likely will be most significant not for what it means for corporate campaign

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1. 424 U.S. 1 (1976) (per curiam).

2. For example, in *Buckley*, five of the Justices who joined the 138-page majority opinion wrote separate opinions. *Id.* at 5.

3. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

4. *McConnell*, 540 U.S. at 204; *Austin*, 494 U.S. at 670.

5. 130 S. Ct. 876 (2010).

6. *Id.* at 886.

7. See *id.* at 913 (expressly overruling *Austin*, which upheld a state statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office, and overruling the portion of *McConnell* that restricted corporate independent expenditures).

spending, but for what it signals for the future of campaign finance reform. Not only does the ruling mark the first time that the Roberts Court has struck down a previous campaign finance decision, but also it does so in a way that signals the Court's newfound hostility toward campaign finance regulation in all but the most limited of circumstances.

Citizens United is a nonprofit corporation that receives funds from both individuals and for-profit corporations.<sup>8</sup> In 2008, Citizens United created *Hillary: The Movie*, a ninety-minute documentary about then-Senator and presidential candidate, Hillary Clinton, and sought to expand the film's distribution by using cable video-on-demand offerings in addition to movie theater and DVD releases.<sup>9</sup> The Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>10</sup> however, barred the use of corporate general treasury funds for electioneering communications.<sup>11</sup> The law did not, however, bar spending by segregated corporate or union funds through the use of political action committees (PACs).<sup>12</sup> Because Citizens United feared that its plans to make *Hillary* available through video-on-demand before certain 2008 presidential primaries ran afoul of the corporate expenditure prohibition contained in § 441b, it sought to have the federal ban as well as the disclaimer and disclosure requirements related to those corporate expenditures declared unconstitutional as applied to *Hillary*.<sup>13</sup>

The district court denied Citizens United's motion for a preliminary injunction and granted the government's motion for summary judgment, holding that the corporate expenditure ban was facially constitutional based on the Supreme Court's ruling in

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8. *Id.* at 886–87.

9. *Id.* at 887.

10. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, 47 U.S.C.). BCRA extended an existing limitation on the use of corporate funds to expressly advocate for the election or defeat of a candidate. 2 U.S.C. § 441b (2000).

11. *Citizens United*, 130 S. Ct. at 887 (citing 2 U.S.C. § 441b(B)(2) (2006)). As defined in 2 U.S.C. § 434(f)(3)(A), an "electioneering communication" is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within thirty days of a primary or sixty days of a general election. 2 U.S.C. § 434(f)(3)(A)(i).

12. 2 U.S.C. § 441b(b)(2). PACs, however, must abide by numerous contribution limits and disclosure requirements dictated by the Federal Election Commission.

13. *Citizens United*, 130 S. Ct. at 888.

*McConnell v. FEC*,<sup>14</sup> which, in turn, relied on the Court's earlier holding in *Austin v. Michigan State Chamber of Commerce*.<sup>15</sup> *Citizens United* appealed its case to the Supreme Court.<sup>16</sup> Following the initial arguments in the case in October Term 2008, the Supreme Court ordered the parties to file supplemental briefs and reargue the case to address whether the Court should overrule *Austin* and the part of *McConnell* that addressed the facial validity of § 441b.<sup>17</sup>

The Supreme Court held five to four that the government could not prohibit corporate-funded independent expenditures.<sup>18</sup> Writing for the majority, Justice Kennedy<sup>19</sup> wrote that "the Government may not suppress political speech on the basis of the speaker's corporate identity" because "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."<sup>20</sup> With an even larger eight-to-one majority,<sup>21</sup> the Court held that disclaimer and disclosure requirements related to campaign communications were constitutional.<sup>22</sup>

To arrive at its conclusions, the majority first rejected arguments that the case could be resolved on narrower grounds.<sup>23</sup> The Court began by holding that *Hillary* fits within the type of corporate communication barred by § 441b. First, the Court dismissed *Citizens United's* arguments that video-on-demand dis-

14. See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280–82 (D.D.C. 2008) (discussing *McConnell v. FEC*, 540 U.S. 93 (2003)), *aff'd in part, rev'd in part* 130 S. Ct. 876 (2010).

15. See *McConnell*, 540 U.S. at 204–06 (citing *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657–60 (1990)).

16. The district court decision was directly appealed under BCRA § 403(a)(3), codified at 28 U.S.C. § 1253 (2006).

17. *Citizens United*, 130 S. Ct. at 888.

18. *Id.* at 913.

19. Justice Kennedy was joined for this part of the opinion by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

20. *Citizens United*, 130 S. Ct. at 913.

21. Justice Kennedy was joined for this part of his opinion by Chief Justice Roberts and Justices Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor.

22. *Citizens United*, 130 S. Ct. at 914. The disclaimer provisions in BCRA require that any televised communication funded by an entity other than a candidate's campaign include a written and spoken disclaimer identifying who funded the communication. *Id.* at 913–14 (citing 2 U.S.C. § 441d(d)(2) (2006)). The disclosure provision requires "any person who spends more than \$10,000 on electioneering communications within a calendar year" to file a disclosure statement with the FEC "identify[ing] the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors." *Id.* at 914 (citing 2 U.S.C. § 434(f)(1)).

23. *Id.* at 888–92.

tribution did not qualify as a public distribution because it would not be sent to 50,000 or more persons at once, as federal regulation requires.<sup>24</sup> The Court explained that, even though each transmission is sent to only one home, the number of cable subscribers in the relevant viewing areas meant that the transmission could be received by 50,000 or more persons.<sup>25</sup> Second, the Court held that *Hillary* qualified as an “electioneering communication,” as defined in *McConnell* and *Wisconsin Right to Life*, because “[t]he movie, in essence, is a feature-length negative advertisement” and “there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton.”<sup>26</sup> Finally, the Court rebuffed Citizens United’s argument that it qualified for the exception established in *FEC v. Massachusetts Citizens for Life, Inc.* for non-profit political speech funded largely by individuals.<sup>27</sup> The Court held Citizens United did not qualify for this exception because a portion of the funds used to make *Hillary* came from for-profit corporations.<sup>28</sup>

After rejecting these as-applied arguments, the Court then reasoned that it was proper to consider a facial challenge to § 441b, even though Citizens United’s current argument did not include

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24. See *id.* at 888–89 (citing 11 C.F.R. §§ 100.29(a)(2), 100.29(b)(3)(ii) (2010)).

25. See *id.* at 889. The Court also rejected arguments that video-on-demand transmissions should be exempt because “th[e] delivery system has a lower risk of distorting the political process than do television ads.” *Id.* at 890. The Court explained that it was improper for the judiciary to decide which media influence voters and which do not. *Id.* at 890–91.

26. *Id.* at 889–90. In *McConnell*, the Court had held that the limitation on “‘electioneering communications’ was facially constitutional insofar as it restricted speech that was ‘the functional equivalent of express advocacy’ for or against a specific candidate.” *Id.* at 889 (quoting *McConnell v. FEC*, 540 U.S. 93, 206 (2003)). The controlling opinion in *Wisconsin Right to Life* further adjusted the functional-equivalent test, stating that “a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 889–90 (quoting *Wis. Right to Life, Inc. v. FEC*, 551 U.S. 449, 481 (2007)) (internal quotation marks omitted).

27. Citizens United based this argument on the Court’s decision in *Massachusetts Citizens for Life*, where the Court held that § 441b’s expenditure restrictions were unconstitutional as applied to nonprofit corporations that (1) “were formed for the sole purpose of promoting political ideas,” (2) “did not engage in business activities,” and (3) “did not accept contributions from for-profit corporations or labor unions.” *Id.* at 891 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986)).

28. *Id.*

such a challenge.<sup>29</sup> In so doing, the Court first stated that even if a party could waive a facial challenge, a court could address the validity of an underlying statute if the argument had been considered below.<sup>30</sup> As a result, the Court could address this broader challenge to § 441b because the district court, bound by the Supreme Court's ruling in *McConnell*, had addressed and rejected Citizens United's facial challenge.<sup>31</sup> Second, the Court contended that Citizens United had consistently argued that the FEC had violated its First Amendment rights.<sup>32</sup> Finally, the Court stated that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge."<sup>33</sup>

Turning to the constitutional validity of § 441b, the *Citizens United* majority premised its holding on two propositions. The first, grounded in the Court's holding in *First National Bank of Boston v. Bellotti*, was that "First Amendment protection extends to corporations."<sup>34</sup> The second was the contribution-expenditure distinction from *Buckley*, in which the Court held independent expenditure ceilings were unconstitutional because, unlike campaign contribution limits, they fail to "stem[] the reality or appearance of corruption in the electoral process."<sup>35</sup> The Court in *Citizens United* ruled that the Court in *Austin* upheld restrictions on corporate-funded political speech by effectively "bypass[ing]" these holdings and identifying "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the

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29. *Id.* at 892–96.

30. *Id.* at 892 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)).

31. *Id.* at 892–93 (citing *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278 (D.D.C. 2008), *aff'd in part, rev'd in part*, 130 S. Ct. 876 (2010)).

32. *Id.* at 893.

33. *Id.* The Court also listed several other reasons for considering a facial challenge to § 441b, including the uncertainty caused by as-applied litigation, *id.* at 894, the short timeframe to bring as-applied challenges during the election cycle, *id.* at 895, and "the primary importance of speech itself to the integrity of the election process." *Id.*

34. *Id.*, 130 S. Ct. at 899 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 (1978)).

35. *Id.* at 901–02 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976)) (internal quotation marks omitted).

corporate form” —the so-called “antidistortion interest.”<sup>36</sup> The majority in *Citizens United* rejected this antidistortion interest,<sup>37</sup> overruling *Austin*, and, in part, *McConnell*.<sup>38</sup>

Like most of the Court’s earlier campaign finance decisions, the ruling in *Citizens United* sparked an array of concurring and dissenting opinions. Chief Justice Roberts wrote a concurrence, defending the Court’s opinion as one of judicial restraint.<sup>39</sup> Justice Thomas wrote a short partial dissent objecting to the Court’s decision to uphold the federal disclaimer and disclosure requirements.<sup>40</sup> In a dissent roughly twenty pages longer than the majority opinion, Justice Stevens<sup>41</sup> questioned the Court’s interpretation of campaign finance precedents and referred to the decision as “a dramatic break from our past.”<sup>42</sup> Justice Stevens lambasted the majority, picking apart its opinion and criticizing its analysis as one that “rest[ed] on a faulty understanding of *Austin* and *McConnell* and of our campaign finance jurisprudence more generally.”<sup>43</sup> Justice Stevens contended that the “original understandings”<sup>44</sup> of the First Amendment support restrictions on corporate speech because “[t]he Framers . . . took it as a given that corporations could be comprehensively regulated in the service of public welfare” and, “[u]nlike our colleagues . . . had little trouble distinguishing corporations from human beings.”<sup>45</sup> Justice Scalia wrote a concurring opinion<sup>46</sup> addressing Justice Stevens’s First Amendment analysis, and argued that “it is far from clear” that the Framers “despised” corporations or sought to deny them First Amendment protection.<sup>47</sup>

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36. *Id.* at 903 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

37. *Id.* at 905.

38. *Id.* at 913.

39. *Id.* at 917–18 (Roberts, C.J., concurring). Justice Alito joined in Chief Justice Roberts’s concurrence. *Id.* at 917.

40. *Id.* at 979–82 (Thomas, J., concurring in part and dissenting in part).

41. Justice Stevens was joined by Justices Ginsburg, Breyer, and Sotomayor.

42. *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

43. *Id.* at 930–31.

44. *Id.* at 948.

45. *Id.* at 949–50.

46. Justice Scalia was joined by Justice Alito and joined in part by Justice Thomas.

47. *Citizens United*, 130 S. Ct. at 925 (Scalia, J., concurring); *see id.* at 925–29.

The Court's ruling in *Citizens United* removes some of the legal hurdles to corporate campaign spending, allowing corporations and unions to pay for political advertising and mailings directly out of their main treasuries in the days leading up to federal elections, rather than depending on PAC spending. Even before the conclusion of the 2010 midterm elections, the ruling already had altered the campaign landscape, but the timing of this Comment prevents a full analysis of the role corporate expenditures played in November 2010. Regardless of what later reviews ultimately show, however, the decision's influence likely will extend far beyond the corporate and union campaign spending provision at issue in *Citizens United*. Instead, the true measure of the decision's influence likely will be found in future campaign finance cases, not on the 2010 campaign trail.

Taken on its own, the Court's decision simplifies the process for corporations and unions that seek to influence the electoral process. Within days of the decision, political observers already posited that corporate expenditures could play a role in several high-profile races.<sup>48</sup> Unions, in particular, have taken advantage of their newfound spending power.<sup>49</sup> It is unclear, however, whether any candidates who benefitted from a corporate or union boost in 2010 would not have received a similar boost from a corporate or union PAC. In the 2008 election cycle, PACs tied to corporations

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48. See, e.g., Dan Eggen & Ben Pershing, *Democrats Scramble After Campaign Ruling*, WASH. POST, Jan. 23, 2010, at A1; Thomas Fitzgerald, *Justices Shift Campaign-Finance Rules*, THE PHILADELPHIA INQUIRER, Jan. 22, 2010, at A1; David D. Kirkpatrick, *Lobbies' New Power: Cross Us, and Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1; Alex Leary, *Court Lifts Election Limits*, ST. PETERSBURG TIMES, Jan. 22, 2010, at 3A. On the other hand, early campaign finance reports suggest that corporations have not been exercising their newfound spending freedom, at least not directly. See Michael Luo, *G.O.P. Allies Outspending Their Rivals*, N.Y. TIMES, Sept. 14, 2010, at A1. Instead, they have opted to continue to funnel their money through third-party groups. *Id.* These groups existed long before the decision in *Citizens United* but are now free to spend on direct advocacy when before they were limited to issue advertisements only under BCRA. See Griff Palmer, *Decision Could Allow Anonymous Political Contributions by Businesses*, N.Y. TIMES, Feb. 27, 2010, at A25. Part of the reason for this could be that such groups allow corporations to avoid some of the disclosure and disclaimer requirements of independent spending. *Id.*

49. See Brody Mullins & John D. McKinnon, *Campaign's Big Spender*, WALL ST. J., Oct. 22, 2010, at A1 (reporting that the American Federation of State, County, and Municipal Employees was poised to become the biggest outside spender in the 2010 election thanks in part to *Citizens United*.) As of Election Day, the union was the top independent Democratic group, spending about \$12 million, according to reports filed with the FEC. Dan Eggen, *In Preview of 2012, Interest Groups Drive Spending Through the Roof*, WASH. POST, Nov. 3, 2010, at A24.

and labor unions spent more than \$59 million advocating for or against candidates for federal office<sup>50</sup>—nearly three times the amount similar groups spent in the prior presidential election cycle.<sup>51</sup> In fact, corporate and union PAC spending accounted for nearly half of the PAC independent expenditures in the 2008 cycle.<sup>52</sup> In addition to PAC independent expenditures, many large corporations also funnel millions of dollars more through outside groups, such as the U.S. Chamber of Commerce, a trend that existed long before the decision in *Citizens United*.<sup>53</sup> These numbers suggest that corporations and unions were major players on the political stage even before *Citizens United*, and it is unclear how much the Court's ruling is likely to change that influence.<sup>54</sup>

The majority's rhetoric and reasoning, however, suggest the decision likely will have a profound ripple effect on future campaign finance cases. Not only does the ruling mark the first time the Roberts Court has overturned a campaign finance precedent, but it also indicates that the current Court is wary of, if not openly hostile to, certain forms of campaign finance regulation. In fact, the majority opinion resembles the type of opinion conservative Justices on the Court would bemoan if it had been written by the Court's liberal faction.<sup>55</sup> The decision overstates the limitations that § 441b placed on corporate campaign speech, glosses over the nuance in some of the Court's campaign finance precedent, and relies heavily on concurring and dissenting opinions, frequently treating them as binding authority. Finally, reading *Citizens United* together with *Buckley*,

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50. Press Release, Fed. Election Comm'n, Growth in PAC Financial Activity Slows, tbl.3 (Apr. 24, 2009), available at <http://www.fec.gov/press/press2009/20090415PAC/20090424PAC.shtml>. Unions account for most of this total, with about \$58.6 million in independent expenditures during the 2008 election cycle. *Id.*

51. *Id.* at tbl.4.

52. *Id.* at tbl.3.

53. See Eric Lipton, Mike McIntire & Don Van Natta Jr., *Large Donations Aid U.S. Chamber in Election Drive*, N.Y. TIMES, Oct. 22, 2010, at A1. The U.S. Chamber of Commerce, itself a corporation, reported spending \$32 million, largely in support of Republicans, according to FEC data. Eggen, *supra* note 49.

54. In fact, some political observers have argued that concerns about alienating customers or damaging one's corporate interests could create powerful disincentives for corporations looking to take advantage of their new campaign spending abilities. See generally Fitzgerald, *supra* note 48.

55. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 850 (2008) (Scalia, J., dissenting) (chiding the majority for "break[ing] a chain of precedent" in a way that "[t]he Nation will live to regret"). This dissent was joined by Chief Justice Roberts, and Justices Thomas and Alito.

*Randall v. Sorrell*,<sup>56</sup> and *Davis v. FEC*<sup>57</sup> displays the Court's willingness to strike down campaign finance laws in an increasingly broad number of cases, a change that could have a pronounced effect on the way states regulate their own elections.

For roughly a decade before Chief Justice Roberts's tenure, the Court had exercised considerable deference toward campaign finance laws.<sup>58</sup> Since the start of Chief Justice Roberts's tenure, the Court has been increasingly critical of campaign finance regulation. The Roberts Court's first two campaign finance decisions<sup>59</sup> were plurality opinions delivered as the new Court attempted to define the contours of its campaign finance jurisprudence.<sup>60</sup> Not until *Davis v. FEC* did the Roberts Court issue a single majority opinion striking down a campaign finance provision.<sup>61</sup> In *Davis*, the Court struck down the so-called "Millionaire's Amendment," which allowed congressional candidates to exceed federal contribution caps when facing a self-funded opponent who commits to spending more than \$350,000 of personal funds on the race.<sup>62</sup> The Court's decision in *Davis* also was significant because it held that "level[ing] electoral opportunities" was not a legitimate government objective and could not justify a substantial burden on free speech.<sup>63</sup>

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56. 548 U.S. 230 (2006).

57. 128 S. Ct. 2759 (2008).

58. See Richard Briffault, WRTL and *Randall*: The Roberts Court and the Unsettling of Campaign Finance Law, 68 OHIO ST. L.J. 807, 808 n.6 (2007) (noting that before the Court's decision in *FEC v. Wis. Right to Life*, 551 U.S. 449 (2006), the antiregulatory side had not won a campaign finance case before the Supreme Court in a decade). In fact, the Court's proregulatory stance prompted one scholar to dub four pre-Roberts cases the "New Deference Quartet." Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 886 (2005) (pointing to the Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Beaumont*, 539 U.S. 146 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); and *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000)).

59. *Wis. Right to Life*, 551 U.S. at 476–77 (holding that the First Amendment requires a sweeping as-applied exception to the federal ban on corporate money for electioneering communications); *Randall*, 548 U.S. at 236 (holding that Vermont's campaign contribution and expenditure limits were unconstitutional).

60. Both *Randall* and *Wisconsin Right to Life* were decided within two years of the beginning of Chief Justice Roberts's tenure. See Richard Briffault, *Davis v. FEC: The Roberts Court's Continuing Attack on Campaign Finance Reform*, 44 TULSA L. REV. 475, 475 & n.4 (2009).

61. See *id.* at 476.

62. 128 S. Ct. at 2766–71.

63. *Id.* at 2773–74.

Despite these less deferential rulings, the Court stopped short of overturning any campaign finance precedents until *Citizens United*. In overruling *Austin* and portions of *McConnell*, the Court based its departure from precedent on alleged inconsistencies between those rulings and the Court's earlier decisions in *Buckley* and *Bellotti*.<sup>64</sup> In fact, the majority spent considerable time and space defending its decision to eschew *stare decisis*, resting much of its argument on the premise that *Austin* was not "well reasoned."<sup>65</sup> A close reading of the majority opinion, however, suggests that the Court's willingness to overturn campaign finance laws is not limited to just one restriction based on the antidistortion interest identified in *Austin*.

Throughout the opinion, for example, the majority characterized § 441b's limit on corporate speech as a "ban" on corporate speech.<sup>66</sup> In reality, however, § 441b permitted corporate expenditures so long as they were not made fewer than sixty days before a general election or fewer than thirty days before a primary.<sup>67</sup> Even within this preelection window, the law also permitted corporate expenditures from segregated funds through PACs.<sup>68</sup> The majority justified its characterization by arguing that a PAC is a distinct legal entity.<sup>69</sup> Given that donations from officers, shareholders, and their families fund corporate PACs,<sup>70</sup> the Court seems to be making a tenuous distinction. The majority also contended that even if a PAC could speak for the corporation, PACs are "burdensome alternatives" because they are "expensive to administer and subject to extensive regulations."<sup>71</sup> The approximately 1,780 corporate and 296 union PACs in the 2008 election cycle made up roughly forty percent of all PACs in the last election cycle.<sup>72</sup> Of the fifty PACs that collected the most

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64. *Citizens United v. FEC*, 130 S. Ct. 876, 912 (2010) (stating that *Austin* "contravened this Court's earlier precedents in *Buckley* and *Bellotti*").

65. *Id.* at 911–13. Justice Stevens seizes on this argument in his dissent, contending that it is little more than a restated merits argument. *Id.* at 938–39 (Stevens, J., concurring in part and dissenting in part) Stevens stated: "The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*." *Id.* at 938.

66. See, e.g., *id.* at 888, 891, 893, 897–98 (majority opinion).

67. 2 U.S.C. § 434(f)(3)(A) (2006).

68. *Id.* § 441b(b)(2).

69. *Citizens United*, 130 S. Ct. at 897.

70. See 2 U.S.C. § 441b(b)(4)(A)(i).

71. *Citizens United*, 130 S. Ct. at 897.

72. Press Release, Fed. Election Comm'n, *supra* note 50, at tbl.4.

money in the 2008 cycle, corporations and labor unions operated more than half of them.<sup>73</sup> Moreover, corporate and union PAC expenditures have increased in every presidential election since at least 1992.<sup>74</sup> This data suggest that, at least for the country's largest corporations and unions, the regulations in § 441b have not prohibited corporate speech. The majority's characterization of these restrictions on speech as an absolute ban suggests that the current Court is willing to take a much broader view on what constitutes an impermissible limitation on speech, even if that means reinterpreting the reach of a particular campaign finance statute to justify the repudiation of that provision.

The Court similarly ignored legal nuance when addressing at least one of the cases that provides the foundation for its ruling. Much of the decision in *Citizens United* rested on the proposition that "First Amendment protection extends to corporations," an idea the Court traced back to the holding in *Bellotti*.<sup>75</sup> Despite the majority's attempts to attribute such an expansive proposition to *Bellotti*, the *Bellotti* decision was far more restrained. The *Bellotti* Court expressly refrained from framing the case in terms of whether corporations have First Amendment rights.<sup>76</sup> Instead, the Court asked whether the law was depriving a corporate speaker of a particular type of speech that would otherwise be protected.<sup>77</sup> In reframing this question, the *Citizens United* majority changed the relevant inquiry from one that looks at the societal benefits of a particular type of speech—the ability to make informed electoral choices, the freedom to discuss government affairs, and so on—to one focused on the identity of the speaker. By doing so, the Court created for itself a great deal of discretion to strike down future restrictions based on corporate identity.

The *Citizens United* majority likewise ignored the distinction made in *Bellotti* between speech regarding referenda (at issue in *Bellotti*) and speech regarding candidates for public office. This

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73. Compare *id.* at tbl.8 with *id.* at tpls.12, 16, 32.

74. *Id.* at tbl.4.

75. *Citizens United*, 130 S. Ct. at 899 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)); see also *id.* at 903 (stating that the holding in *Bellotti* "rested on the principle that the Government lacks the power to ban corporations from speaking").

76. *Bellotti*, 435 U.S. at 775–76 ("The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons.").

77. *Id.* at 778.

distinction was crucial to the *Bellotti* Court, which held that the “risk of corruption” motivating the regulation of candidate elections “simply is not present in a popular vote on a public issue.”<sup>78</sup> To support its considerable extension of *Bellotti*’s protection of corporate political speech, the *Citizens United* majority provided merely a conclusory statement predicated on the Court’s own misinterpretation of *Bellotti*, stating “[i]n our view, however, that restriction would have been unconstitutional under *Bellotti*’s central principle: that the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”<sup>79</sup> The *Citizens United* majority’s treatment of *Bellotti* suggests the Court is willing to look at campaign finance precedent through its current ideological lens to shape its jurisprudence.

Furthermore, although the heart of the majority’s opinion relied heavily on *Buckley* and *Bellotti*, two longstanding majority decisions, the decision also frequently relies on nonbinding authority. The Court’s treatment of *Wisconsin Right to Life*—a patchwork of concurring opinions—as though it were binding authority<sup>80</sup> actually had a limited effect on the Court’s analysis. This is because the case simply clarified an earlier definition of electioneering communication,<sup>81</sup> and even if the Court had not relied on *Wisconsin Right to Life*, it would have reached the same conclusion using the standard set forth in *McConnell*.<sup>82</sup> More troubling is the Court’s frequent reliance on earlier dissenting and concurring opinions written by Justices in the *Citizens United* majority. In fact, portions of the majority opinion are “essentially . . . amalgamation[s] of resuscitated dissents.”<sup>83</sup> In some instances, the majority simply used these nonbinding opinions to support its interpretation of recent campaign finance juris-

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78. *Id.* at 790.

79. *Citizens United*, 130 S. Ct. at 903.

80. See, e.g., *id.* at 889 (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007) (Roberts, C.J., controlling opinion)); *id.* at 891 (citing *Wisconsin Right to Life*, 551 U.S. at 469); *id.* at 892 (citing *Wisconsin Right to Life*, 551 U.S. at 468–69).

81. See *id.* at 889–90 (explaining the “functional-equivalent test” enumerated in *McConnell v. FEC.*, 540 U.S. 93 (2003)).

82. See *id.* at 890 (holding that under the standard in *McConnell*, *Hillary* qualifies as an electioneering communication because it is the functional equivalent of express advocacy).

83. *Id.* at 942 (Stevens, J., concurring in part and dissenting in part).

prudence.<sup>84</sup> In others, however, it used these nonbinding opinions to support several sweeping free speech propositions: that “*Austin* was a significant departure from ancient First Amendment principles;”<sup>85</sup> that the special financial privileges corporations receive from the government do not justify limitations on corporate First Amendment freedom;<sup>86</sup> that the First Amendment protects speech enabled by those who might not agree with the speaker’s ideas;<sup>87</sup> and that the antidistortion rationale in *Austin* “would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations.”<sup>88</sup> The Court also cited the dissents in *McConnell* as evidence of an increased willingness to overturn the decision in *Austin*.<sup>89</sup> As with the other dissenting opinions the *Citizens United* majority cited, however, “[t]he only relevant thing that has changed . . . is the composition of [the] Court.”<sup>90</sup>

Reading *Citizens United* in conjunction with *Buckley*, *Randall*, and *Davis* further underscores the Court’s shifting view on campaign finance regulation and suggests that the Court would be willing to strike down campaign finance laws in a variety of circumstances. In *Buckley*, the Court upheld federal contribution limitations because “[t]o 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 de-

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84. See, e.g., *id.* at 902 (majority opinion) (citing *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 683 (1990) (Scalia, J., dissenting)); *id.* at 903 (citing *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting)).

85. *Id.* at 886 (quoting *Wisconsin Right to Life*, 551 U.S. at 490 (Scalia, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

86. *Id.* at 905 (citing *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

87. *Id.* (citing *Austin*, 494 U.S. at 707 (Kennedy, J., dissenting)).

88. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 283 (2003) (Thomas, J., concurring in part, concurring in the result in part, concurring in judgment in part, and dissenting in part)).

89. *Id.* at 894 (citing *McConnell*, 540 U.S. at 256–62 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 273–75 (Thomas, J., concurring in part, concurring in the result in part, concurring in the judgment in part, and dissenting in part); *id.* at 322–38 (Kennedy, J., concurring in part, concurring in the result in part, concurring in the judgment in part, and dissenting in part)).

90. *Id.* at 942 (Stevens, J., concurring in part and dissenting in part). Other scholars also have noted the Court’s “disputable reliance on precedent” in *Davis*, in which the Court relied on a dissenting and a concurring opinion written by Justice Thomas. Briffault, *supra* note 60, at 486–87 (citing *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008)).

mocracy is undermined.”<sup>91</sup> Even the appearance of corruption could justify a limit on political contributions.<sup>92</sup> On the other hand, corruption and the appearance of corruption could not provide a similar justification for expenditure limitations because “avoiding undisclosed and undue influence on candidates from outside interests has a lesser application when the monies involved come from the candidate himself.”<sup>93</sup> Corruption concerns also failed to justify restrictions on outside expenditures because “[t]he 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.”<sup>94</sup> The Court in *Davis* further restricted the circumstances in which campaign finance regulations are permissible when it rejected the “level[ing] of electoral opportunities” as a legitimate government interest.<sup>95</sup> In *Citizens United*, the Court limited the realm of legitimate state interests further still by rejecting the broader antidistortion rationale articulated in *Austin*<sup>96</sup> and returning to the *quid pro quo* conception of corruption used in *Buckley*.<sup>97</sup> Based on these conclusions, the Court held that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>98</sup> Thus, by narrowing the sphere of legitimate state interests and returning to the narrower *quid pro quo* conception of corruption, the Court has created a legal framework that effectively invalidates campaign expenditure limitations.

Examining the Court’s ruling in *Randall v. Sorrell* suggests that even contribution limitations, which the Court upheld in *Buckley*, could come under fire in the future. The Court in *Randall* invalidated state contribution limits in Vermont, which imposed a \$400 limit on contributions to statewide candidates, a \$300 limit on contributions to state senate candidates, and \$200 on contribu-

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91. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam).

92. *See id.*

93. *Id.* at 53 (quoting *Buckley v. Valeo*, 519 F.2d 821, 855 (D.C. Cir. 1975)).

94. *Id.* at 47.

95. *See Davis*, 128 S. Ct. at 2773 (“[T]he interest in equalizing the financial resources of candidates’ did not provide a ‘justification for restricting’ candidates’ overall campaign expenditures’”) (quoting *Buckley*, 424 U.S. at 56–57)).

96. *See Citizens United v. FEC*, 130 S. Ct. 876, 904–06 (2010).

97. *See id.* at 909–11.

98. *Id.* at 909.

tions to state house candidates.<sup>99</sup> The Court held that the low maximums imposed a “disproportionately severe” burden on free speech.<sup>100</sup> The holding in *Randall* suggests a greater openness to striking down contribution limits, which could have implications for states that have similar contribution restrictions.<sup>101</sup>

The effect of *Citizens United* already is being felt in federal courtrooms around the country as judges and lawyers come to see the decision as a dramatic shift in how the Court views campaign finance laws. Most notably, the D.C. Circuit held that if independent expenditures do not cause corruption or the appearance of corruption, as the *Citizens United* majority concluded, then contributions to groups that only make such expenditures also do not cause corruption.<sup>102</sup> About four months later, a federal judge in Florida noted that his decision upholding a state version of the “Millionaire’s Amendment” likely would be overruled if the case arrived before the Supreme Court.<sup>103</sup> Earlier in the year, the Ninth Circuit applied the narrowed definition of corruption expounded in *Citizens United* in holding that a city ordinance

99. *Randall v. Sorrell*, 548 U.S. 230, 238 (2006) (citing VT. STAT. ANN. tit. 17, § 2805(a) (2002)).

100. *Id.* at 236–37.

101. Colorado, for example, had a \$200 limit on an individual’s contributions to legislative candidates as of January 2010, while Maine had a \$250 limit for non-gubernatorial candidates. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES (2010), available at [http://www.ncsl.org/Portals/1/documents/legismgt/limits\\_candidates.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf).

102. See *Speechnow.org v. FEC*, 599 F.3d 686, 694–95 (D.C. Cir. 2010) (en banc). The *Speechnow* decision opened the door a new campaign weapon—-independent expenditure-only committees, more commonly known as “Super PACs.” See Dan Eggen & T.W. Farnam, ‘Super PACs’ alter campaign, WASH. POST, Sept. 28, 2010, at A1. These groups can spend unlimited amounts on direct advocacy provided they do not coordinate their activities with a candidate or political party. *Id.* In the run up to the 2010 election, more than three dozen of these new committees registered with the Federal Election Commission in just two months, and about a month before the November election, Super PACs already were pouring money into several close races around the country. See *id.* For example, in the days before the election, one such PAC spent more than \$1.1 million in one week, including \$870,000 in an effort to unseat U.S. Sen. Harry Reid, of Nevada. Dan Eggen, *A Surge in PACs at the Last*, WASH. POST, Oct. 30, 2010, at A4.

103. See Josh Hafenbrack, *Ruling on Matching Funds Throws McCollum a Lifeline*, ORLANDO SENTINEL, July 15, 2010, at A1. When the U.S. Court of Appeals for the Eleventh Circuit later reversed the district court’s decision, political observers cited the decision in *Citizens United* as one of the reasons an appeal would have been unlikely to succeed. See, e.g., John Frank, *Spending Cap Ruling Won’t Be Fought*, ST. PETERSBURG TIMES, Aug. 5, 2010, at 5B (reporting on *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010)).

prohibiting corporate- and union-funded groups that accept contributions above certain thresholds from making independent expenditures is unconstitutional as applied to state independent expenditure committees.<sup>104</sup> A recent Supreme Court stay that effectively barred Arizona officials from providing matching funds to candidates for state office who accept public financing<sup>105</sup> further suggests that *Citizens United* has set the stage for future decisions that have the potential to imperil myriad campaign finance regulations and that could have a profound effect on the way state and federal elections are run.

*Breanne Gilpatrick*

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104. See *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 694–96 (9th Cir. 2010).

105. See Adam Liptak, *Justices Block Matching Funds for Candidates in Arizona*, N.Y. TIMES, June 9, 2010, at A16 (reporting on *McComish v. Bennett*, 130 S. Ct. 3408 (2010)).