

## **CITIZENS UNITED AND THE ILLUSION OF COHERENCE**

*Richard L. Hasen\**

*The self-congratulatory tone of the majority and concurring opinions in last term's controversial Supreme Court blockbuster, Citizens United v. Federal Election Commission, extended beyond the trumpeting of an absolutist vision of the First Amendment that allows corporations to spend unlimited sums independently to support or oppose candidates for office. The triumphalism extended to the majority's view that it had imposed coherence on the unwieldy body of campaign finance jurisprudence by excising an "outlier" 1990 opinion, Austin v. Michigan Chamber of Commerce, which had upheld such corporate limits, and parts of a 2003 opinion, McConnell v. FEC, extending Austin to unions and to a broader set of election-related television and radio broadcasts. The majority saw itself as returning the Court to the fountainhead of this jurisprudence, the Court's 1976 opinion in Buckley v. Valeo. Citizens United indisputably harmonized campaign finance law on the question of the constitutionality of spending limits on corporations, even if its view of Austin as an "outlier" remains contested. But the Court in doing so amplified and solidified other significant, incoherent aspects of its campaign finance jurisprudence.*

*Part I of this Article situates Citizens United in the campaign finance jurisprudence that preceded it and describes in detail the key opinions in the case. Part II explains how the Court's analysis in Citizens United is likely to lead to new incoherence in the Court's campaign finance jurisprudence, because it is unlikely that the Court will follow the new case to its extreme, for example to allow spending by foreign nationals to influence candidate elections, to treat spending in judicial elections the same way as spending for other races, or to strike down reasonable limits on campaign contributions made directly to candidates. Part III suggests that incoherence is likely to be an enduring feature of the Court's campaign finance jurisprudence, because consistent application of a coherent approach could well be politically unpalatable for majority of the Justices on the Court. It also considers the challenge such*

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\* William H. Hannon Distinguished Professor of Law, Loyola Law School—Los Angeles. Thanks to Ellen Aprill, Bill Araiza, Bruce Cain, Heather Gerken, Jacob Heller, Dan Lowenstein, David Primo, and Michael Waterstone for useful comments and suggestions. I presented an earlier version of this Article at the 2010 American Political Science Association annual meeting in Washington, D.C.

*incoherence poses for lawyers arguing campaign finance cases in the Supreme Court and lower courts.*

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## INTRODUCTION

The self-congratulatory tone of the majority and concurring opinions in last term's controversial Supreme Court blockbuster, *Citizens United v. FEC*,<sup>1</sup> extended beyond trumpeting an absolutist vision of the First Amendment that allows corporations to spend unlimited sums independently to support or oppose candidates for office.<sup>2</sup> The triumphalism extended to their view that the majority had imposed coherence on the unwieldy body of campaign finance jurisprudence by excising an "outlier" 1990 opinion, *Aus-*

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1. 130 S. Ct. 876 (2010). Justice Kennedy wrote a majority opinion for five Justices on the question of the constitutionality of limits on spending by corporations to influence candidate elections. Chief Justice Roberts, joined by Justice Alito, wrote a concurring opinion. Justice Scalia, joined by Justices Alito and Thomas, wrote a second concurring opinion. Justice Kennedy spoke for eight Justices (all except Justice Thomas) in upholding various campaign finance disclosure requirements. Unless otherwise indicated, references to the views of the "majority" of the Court in this Article refer to the five-Justice majority on the corporate spending issue, not the eight-Justice majority on the disclosure issue.

2. *See, e.g., id.* at 917 ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." (quoting *McConnell v. FEC*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part))); *id.* at 908 ("The First Amendment confirms the freedom to think for ourselves."); *id.* at 917 (Roberts, C.J., concurring) ("[Under the government's position,] First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy."); *id.* at 929 (Scalia, J., concurring) ("Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.").

tin v. Michigan Chamber of Commerce,<sup>3</sup> which had upheld such corporate limits, and parts of a 2003 opinion, *McConnell v. FEC*,<sup>4</sup> which extended *Austin* to unions and to a broader set of election-related television and radio broadcasts.<sup>5</sup> The majority saw itself as returning the Court to the fountainhead of this jurisprudence, the Court's 1976 opinion in *Buckley v. Valeo*.<sup>6</sup>

*Citizens United* indisputably harmonized campaign finance law pertaining to the constitutionality of spending limits on corporations, even if its view of *Austin* as an outlier remains contested.<sup>7</sup> But in doing so, the Court amplified other significant, incoherent aspects of its campaign finance jurisprudence. In this regard, consider the Court's declaration as an empirical matter—apparently for all types of elections and all types of spenders—that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>8</sup> As part of its justification for this unsupported empirical claim, the Court embraced a narrow, crabbed view of corruption.<sup>9</sup> This view is contrary to other precedent, including *Buckley* and other cases upholding campaign contribution limits. Most notably, *Citizens United* excludes “[i]ngratiation and access” as possible forms of corruption,<sup>10</sup> yet these concepts are at the core of the Court's decisions upholding contribution limitations. Consider also the Court's declaration in *Citizens United* that in the campaign finance context neither the identity of the speaker<sup>11</sup> nor any

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3. 494 U.S. 652, 654–55 (1990).

4. 540 U.S. 93, 126, 207 (2003).

5. See, e.g., *Citizens United*, 130 S. Ct. at 907 (calling *Austin*'s rationale an “aberration” inconsistent with other Court precedent); *id.* at 903 (“The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them.”); *id.* at 913 (“We return to the principle established in *Buckley* and *Bellotti* . . .”); *id.* at 921 (Roberts, C.J., concurring) (“[*Austin*] was an ‘aberration’ insofar as it departed from the robust protections we had granted political speech in our earlier cases.”); *id.* (“*Austin* undermined the careful line that *Buckley* drew. . . [and] was also inconsistent with *Bellotti*[ . . . ]”); *id.* (“Abrogating the errant precedent . . . might better preserve the law's coherence . . .”). But see *id.* at 948 (Stevens, J., concurring in part and dissenting in part) (“A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, ‘aberration[s],’ in our First Amendment tradition. The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law.”) (citations omitted). Justice Stevens used the term “outlier” five times in his dissenting opinion in describing the majority's view of *Austin*.

6. 424 U.S. 1 (1976) (per curiam).

7. For a contrary viewpoint on *Austin*'s status, see *Citizens United*, 130 S. Ct. at 948 (Stevens, J., concurring in part and dissenting in part) and Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361 (2004).

8. *Citizens United*, 130 S. Ct. at 909.

9. *McConnell v. FEC*, 540 U.S. 93, 152 (2003).

10. *Citizens United*, 130 S. Ct. at 910.

11. E.g., *id.* at 905 (“[T]he First Amendment generally prohibits the suppression of political speech based on the speaker's identity.”); *id.* at 902 (“[T]he Government cannot restrict political speech based on the speaker's corporate identity.”); *id.* at 930 (Stevens, J., concurring in part and dissenting in part) (“The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its ‘identity’ as a corporation.”).

distortion of the political process caused by disproportionate spending<sup>12</sup> can ever be the basis to limit someone's right to spend in elections.

This language will force the Court either to adopt a view that no limits on money in politics are ever constitutional or, more likely, vote to sustain some limits on money in politics through doctrinal incoherence. For example, it is unclear how, if the Court took its own broad pronouncements in *Citizens United* seriously, it could possibly sustain spending limits against foreign nationals and governments, who might seek to flood U.S. election campaigns with money. Indeed, if the Court took its own language seriously about the meaning of corruption, even normal limits on contributions to candidates would be in serious danger of being struck down as a First Amendment violation.

We need not wait for future cases to see this incoherence, however, because the Court's new doctrine is already incoherent. The *Citizens United* majority did not satisfactorily explain how independent expenditures—which apparently cannot corrupt—were so corruptive, apparently corruptive, or distorting of a judicial election in *Caperton v. Massey*<sup>13</sup> that the Court mandated the recusal of a state supreme court chief justice hearing a case involving a corporate executive who had made large independent expenditures supporting the chief justice's election.<sup>14</sup> The *Citizens United* majority is not treating all elections and speakers equally in deed, even if it is in word.

By criticizing the Court's campaign finance doctrine as incoherent, I do not mean to suggest that the Court could not or should not decide some campaign finance questions in an inconsistent manner. That is, the Court could develop coherent constitutional arguments justifying different treatment for campaign contributions and campaign expenditures, or for campaign expenditures in judicial elections and other elections, or for the treatment of foreign-initiated campaign spending on elections and spending by domestic corporations. On the contribution-expenditure distinction, for example, the Court could (and should) apply a single definition of corruption and impose on the state a single evidentiary burden for proving the existence or appearance of corruption, and then judge the constitutionality of contributions and expenditures under that single standard. As I show below, however, the Court has not done so. The Court's jurisprudence instead reads as though different courts have decided both its contribution and expenditure decisions. Instead of reconciling inconsistent standards for judging constitutional questions in this arena, the Court ignores the contradictions. The *Citizens United* Court's condemnation of *Austin* as a lone "aberration"<sup>15</sup> perniciously masks the regularity of its incoherence in the campaign finance arena. Most importantly, the capacious rhetoric in *Citizens*

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12. See *infra* notes 92–98 and accompanying text.

13. 129 S. Ct. 2252 (2009).

14. See *Citizens United*, 130 S. Ct. at 910 (purporting to distinguish *Caperton*); *id.* at 967 (Stevens, J., concurring in part and dissenting in part) (arguing that *Caperton* is indistinguishable).

15. See *supra* note 5.

*United* will lead lower courts astray, as they take the Court's reasoning and dicta—not just its holding—as directions for how to resolve other campaign finance cases.

The Court's present and future incoherence in its campaign finance jurisprudence reveals a broader concern: the Court's approach to jurisprudential questions may be tempered by political sensibilities. As explained below,<sup>16</sup> just as the Court before *Citizens United* treated corporations and labor unions as subject to identical campaign finance regulation despite the apparent inapplicability of the *Austin* antidistortion rationale to labor unions, it is likely to treat foreigners and American citizens wishing to make campaign expenditures differently despite the uniformity of the rhetoric of free speech rights in *Citizens United*. This analysis suggests that the Court's jurisprudence, while certainly shifting toward a deregulatory direction, may not move to complete deregulation unless the Court is willing to endure continued public backlash. At least in the campaign finance context, it may be that the Court's doctrine is bounded at its extremes by public opinion.

Part I of this Article situates *Citizens United* in the campaign finance jurisprudence that preceded it and describes in detail the key opinions in the case. Part II explains how the Court's analysis in *Citizens United* is likely to lead to new incoherence in the Court's campaign finance jurisprudence because it is unlikely that the Court will follow the new case to its extreme—for example to allow spending by foreign nationals to influence candidate elections, to treat spending in judicial elections the same way as spending for other races, or to strike down reasonable limits on campaign contributions made directly to candidates. Part III suggests that incoherence is likely to be an enduring feature of the Court's campaign finance jurisprudence because consistent application of a coherent approach could well be politically unpalatable for a majority of the Justices. It also considers the challenge such incoherence poses for lawyers arguing campaign finance cases in the Supreme Court and lower courts.

## I. *CITIZENS UNITED'S PLACE IN THE SUPREME COURT'S JURISPRUDENCE*

### A. *Campaign Finance Jurisprudence Before Citizens United*<sup>17</sup>

The fountainhead of modern U.S. campaign finance jurisprudence is the Supreme Court's opinion in *Buckley v. Valeo*.<sup>18</sup> The tensions in *Buckley* have reverberated over the decades as the Court has been, by turns, deferential to and skeptical of legislative decisions to limit campaign financing. *Buckley's*

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16. See *infra* notes 246–247 and accompanying text.

17. I have canvassed this area before in some of my earlier writings. For my most recent analysis of this area, see Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064 (2008) [hereinafter Hasen, *Beyond Incoherence*]; Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance By the Roberts Court*, 2009 SUP. CT. REV. 181 [hereinafter Hasen, *Avoidance*]; Richard L. Hasen, *What the Court Did—and Why*, THE AM. INT., July/Aug. 2010, at 49.

18. 424 U.S. 1 (1976) (per curiam).

tension is unsurprising given that it was drafted by a committee of Justices who did not agree on the fundamental issue of how to balance First Amendment rights of free speech and association with state interests.<sup>19</sup> In its most important compromise, the Court held that campaign contributions could be limited to prevent corruption or the appearance of corruption,<sup>20</sup> but limits on spending could not be justified by those same interests due to a lack of evidence that independent spending could corrupt candidates. The Court wrote, “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.”<sup>21</sup> In addition, the Court rejected an equality rationale for limits, holding that the concept that some voices could be limited to enhance the voice of others to be “wholly foreign” to the First Amendment.<sup>22</sup> The Court also recognized a difference on the rights side of the balance: limits on the amount of contributions only “marginally” restricted First Amendment rights, which are to be judged under lower, “exacting scrutiny.” In contrast, spending limits were subject to strict scrutiny because they limited speech more directly.<sup>23</sup>

Since *Buckley*, the Court’s campaign finance jurisprudence has swung like a pendulum toward and away from deference, as Court personnel changed and as Justices (occasionally) voted inconsistently.<sup>24</sup> Throughout these shifts between deference and deregulation, however, the Court had not formally overturned any of its campaign finance precedents until *Citizens United*.

Despite *Buckley*’s holding that lower, “exacting scrutiny” applied to review of contribution limits,<sup>25</sup> the Court held that limits on contributions to a local ballot measure committee were unconstitutional because the anticorruption interest did not apply to incorruptible ballot measures.<sup>26</sup> In the 2000s, as the Court entered its period of greatest deference, it upheld in

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19. Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 241 (2003).

20. See *Buckley*, 424 U.S. at 28–29.

21. *Id.* at 47. The Court continued, “Rather than preventing the circumvention of the contribution limitations [the federal law limiting individual independent expenditures] severely restricts all independent advocacy despite its substantially diminished potential for abuse.” *Id.* It then noted that “the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption.” *Id.* at 47–48.

22. *Id.* at 48–49.

23. *Id.* at 19–20, 44–51.

24. For example, Justice O’Connor changed her position on the constitutionality of spending limits imposed on corporations three times while on the Court. See DANIEL HAYS LOWENSTEIN, ET AL., ELECTION LAW: CASES AND MATERIALS 843, 852 (4th ed. 2008).

25. *Buckley*, 424 U.S. at 35, 44.

26. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299–300 (1981) (“Whatever may be the state interest . . . in regulating and limiting contributions to or expenditures of a candidate[,] . . . there is no significant state or public interest in curtailing debate and discussion of a ballot measure.”).

*Nixon v. Shrink Missouri Government PAC* a \$1,075 contribution limit in Missouri state elections against a challenge that the amount was too low for challengers to mount an effective campaign.<sup>27</sup> The Court did so even though the \$1,075 limit was much lower in 1976 dollars than the value of the \$1,000 limit upheld in *Buckley*.<sup>28</sup>

Soon after *Shrink Missouri*, the Court abruptly changed course when Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor. The Court in *Randall v. Sorrell* held that Vermont's campaign contribution limits were unconstitutionally low because they did not give challengers enough resources for meaningful competition in competitive elections.<sup>29</sup> Moving in the same direction, the Roberts Court in *Davis v. FEC*, relying on *Buckley*'s rejection of the equality rationale for campaign finance regulation, struck down a provision of the McCain-Feingold campaign finance law giving U.S. House candidates the right to collect increased individual contributions for their campaigns when they faced a self-financed opponent spending large sums.<sup>30</sup>

The Court's jurisprudence has vacillated on the spending side as well. In *First National Bank of Boston v. Bellotti*, the Court followed *Buckley*'s rejection of individual spending limits in candidate elections and struck down limits on spending by corporations in ballot measure elections.<sup>31</sup> Though the Court took an expansive view of corporate free speech rights, it added an important footnote, footnote 26, stating that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."<sup>32</sup> Footnote 26 stood in tension with *Buckley*'s statement that independent spending by individuals cannot corrupt candidates because of the absence of the possibility of a quid pro quo.

Eight years later, the Court in *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL") first confronted the question of corporate spending limits in candidate elections. The MCFL Court held that nonprofit, ideological corporations (later known as "MCFL corporations") that do not take corporate or labor union money cannot be limited in spending their treasury funds in candidate elections.<sup>33</sup> In *Austin v. Michigan Chamber of Commerce*, the Court more directly addressed the question left open by *Bellotti*'s footnote 26, upholding electoral spending limits on for-profit corporations in candidate elections.<sup>34</sup> The Court did not address *Bellotti*'s suggestion that

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27. 528 U.S. 377, 382–83, 397–98 (2000).

28. See *Shrink Mo.*, 528 U.S. at 382, 395–97.

29. 548 U.S. 230, 262 (2006).

30. 128 S. Ct. 2759, 2773 (2008).

31. 435 U.S. 765, 767–70, 795 (1978).

32. *Bellotti*, 435 U.S. at 788 n.26 ("[O]ur consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.")

33. 479 U.S. 238, 241, 263 (1986).

34. 494 U.S. 652, 654–55, 668–69 (1990).

corporate limits might be justified to prevent the corruption of candidates. Instead, the Court held the law was justified to prevent “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>35</sup>

Though cast as an “anti-corruption” rationale,<sup>36</sup> *Austin*’s emphasis on preventing “distort[ion]” of the electoral process through large corporate spending suggested the Court in fact was espousing an equality rationale,<sup>37</sup> which it had rejected with respect to individuals in *Buckley*.

The Court retreated even further from *Bellotti* in *FEC v. Beaumont*,<sup>38</sup> another case from its deferential post-2000 period. The Court in *Beaumont* wrote that “corporate contributions are furthest from the core of political expression, since corporations’ First Amendment speech and association interests are derived largely from those of their members, and of the public in receiving information.”<sup>39</sup> The Court added that “[a] ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.”<sup>40</sup>

The latest struggle over corporate spending limits began when Congress passed the Bipartisan Campaign Reform Act of 2002 (“BCRA,” popularly known as “McCain-Feingold”).<sup>41</sup> The BCRA aimed to strengthen what its supporters characterized as “loopholes” in existing campaign finance law. Its “electioneering communications” provision was one of the most significant provisions.

Federal law, like the Michigan state law at issue in *Austin*, barred corporations and unions from spending general treasury funds on certain election-related activities.<sup>42</sup> The Federal Election Campaign Act (“FECA”) blessed the political action committee (“PAC”) alternative: corporations and unions could establish separate political committees to spend money on these campaigns, but these PACs were limited in both the amount that could be contributed to candidates and who could be solicited to contribute.

The general treasury fund limitation proved ineffective, thanks to an interpretation of the statute by the Court in *Buckley*.<sup>43</sup> The *Buckley* Court held

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35. *Id.* at 660.

36. *Id.*

37. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 111–14 (2003).

38. 539 U.S. 146 (2003).

39. *Beaumont*, 539 U.S. at 161 n.8 (citations omitted).

40. *Id.*

41. Bipartisan Campaign Reform Act of 2002 § 101, 2 U.S.C. § 441i(a) (2000 & Supp. V 2005).

42. 2 U.S.C. § 441b (2006).

43. *See* *McConnell v. FEC*, 540 U.S. 93, 126 (2003).

that, to avoid vagueness and overbreadth problems within the FECA, its provisions should be interpreted to reach only election-related activity containing “express advocacy,” like “Vote against Jones.”<sup>44</sup> “Issue ads,” paid for by corporations, labor unions, and wealthy individuals, began appearing in the 1990s. These ads appeared to be aimed at influencing federal elections, but they escaped FECA regulation through avoidance of express advocacy. “Call Senator Jones and tell her what you think of her lousy vote on the stimulus bill” went unregulated, even though the person running the ad certainly wanted to defeat Senator Jones for reelection. Spending on such ads skyrocketed in the 1990s.<sup>45</sup>

The BCRA responded to the issue-advocacy problem through the electioneering communications provision. Electioneering communications are television or radio (not print or internet) advertisements that feature a candidate for federal election; they are capable of reaching 50,000 people in the relevant electorate 30 days before a primary or 60 days before a general election. The definition applied to both disclosure rules and spending limitations. Under § 201, anyone making electioneering communications over a certain dollar threshold must disclose contributions funding the ads and spending related to the ads to the Federal Elections Commission (“FEC”).<sup>46</sup> In addition, under § 203 corporations and unions could not fund such ads from general treasury funds, but had to rely on their PACs.<sup>47</sup>

In *McConnell v. FEC*, the Court upheld, on a 5–4 vote, § 203 of the BCRA against facial challenge.<sup>48</sup> Reaffirming *Austin*, the *McConnell* Court upheld the rules because most of the ads covered by the statute were “the functional equivalent of express advocacy.”<sup>49</sup> The Court upheld the provision against labor unions, too, without explaining how labor unions could distort the political process like corporations.<sup>50</sup>

As with the contribution limits cases, the Court’s spending limits cases shifted dramatically when Justice Alito replaced Justice O’Connor. In *Wisconsin Right to Life, Inc. v. FEC* (“*WRTL I*”), decided as Justice O’Connor was retiring, the Court held that *McConnell* did not prevent a corporation or union from bringing an as-applied challenge to § 203 on the basis that its

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44. See *Buckley v. Valeo*, 424 U.S. 1, 43 n.51 (1976) (per curiam).

45. *McConnell*, 540 U.S. at 126–27.

46. 2 U.S.C. § 434(f)(1).

47. *Id.* § 441b(b)(2). The Court later interpreted § 203 so as not to apply to *MCFL* corporations. *McConnell*, 540 U.S. at 210–11.

48. 540 U.S. at 207–09.

49. *McConnell*, 540 U.S. at 206. By an 8–1 vote, the Court also upheld BCRA §§ 201 and 311 against a facial challenge. *Id.* at 201–02, 231.

50. *Id.* at 206; see also Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 56–57 (2004) [hereinafter Hasen, *Buckley is Dead*] (discussing *McConnell*’s treatment of unions); Richard L. Hasen, *Justice Souter: Campaign Finance Law’s Emerging Egalitarian*, 1 ALB. GOV’T L. REV. 169, 191–92 (2008) [hereinafter Hasen, *Justice Souter*] (discussing Justice Souter’s treatment of labor unions in his dissent in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)).

ads were not “the functional equivalent of express advocacy.”<sup>51</sup> *WRTL I* concerned an electioneering communication discussing Wisconsin Senators Feingold and Kohl’s position on judicial filibusters. The group wanted to broadcast the ad in Wisconsin during Senator Feingold’s reelection campaign. The case returned to the Supreme Court after the lower court, on remand, held that the ads were not the functional equivalent of express advocacy and therefore were not entitled to an as-applied exemption.

In another 5–4 vote, the Court in *FEC v. Wisconsin Right to Life, Inc.* (“*WRTL II*”) reversed the lower court.<sup>52</sup> Three Justices in the majority (Kennedy, Scalia, and Thomas), echoing their dissenting opinions in *McConnell*, took the position that § 203 was unconstitutional as applied to any corporate spending. They contended that *McConnell* and *Austin* should be overruled.<sup>53</sup> Chief Justice Roberts and Justice Alito wrote a narrower (and therefore controlling) opinion, which did not reach the question whether *McConnell* and *Austin* should be overruled. They instead concluded that the only corporate-funded advertisements that the BCRA could constitutionally bar were those that were the “functional equivalent of express advocacy,”<sup>54</sup> and they read “functional equivalency” very narrowly.

More specifically, Chief Justice Roberts and Justice Alito determined that in making the functional equivalency determination, one must consider whether, without regard to context (such as the fact that the filibuster issue was one that conservatives were using to attack liberal Democrats) and without detailed discovery of the advertisers’ intentions, an advertisement that was susceptible of “no reasonable interpretation” other than as an advertisement supporting or opposing a candidate for office.<sup>55</sup> Otherwise, it would be unconstitutional to apply § 203 to bar corporate funding for an election-related advertisement.

Applying this new test, the controlling opinion held that the *WRTL* ad was not the functional equivalent of an express advocacy against Senator Feingold; it did not mention Senator Feingold’s character or fitness for office, and had no other clear indicia of the functional equivalent of express advocacy.<sup>56</sup> The new functional equivalency test appeared likely to eviscerate § 203.<sup>57</sup>

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51. 546 U.S. 410, 412 (2006) (per curiam).

52. 551 U.S. 449, 482 (2007).

53. *WRTL II*, 551 U.S. at 483–504 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia was quite critical of the limited nature of the controlling opinion, calling it “faux judicial restraint” that was “judicial obfuscation.” *Id.* at 498 n.7.

54. *Id.* at 454–82 (principal opinion).

55. *Id.* at 469–70.

56. *Id.* at 470, 480–81.

57. See Hasen, *Beyond Incoherence*, *supra* note 17, at 1096. Because the Court in *Citizens United* mooted application of the *WRTL II* “no reasonable interpretation” test before it was used in a few elections, we do not know definitively how it would have worked in practice as construed by the courts and the FEC.

## B. Citizens United

### 1. *The Background*

Though *Citizens United* ultimately brought down *Austin* and part of *McConnell*, the case did not begin as such an audacious challenge. Like *WRTL II*, *Citizens United* began as a suit to weaken existing campaign finance precedent.<sup>58</sup> Citizens United, a nonprofit ideological corporation that accepted some for-profit corporate funding,<sup>59</sup> produced a feature-length documentary entitled *Hillary: The Movie*.<sup>60</sup> Though the documentary was available in theaters and on DVD during the 2008 primary season, Citizens United also wished to distribute the movie through a cable television “video-on-demand” service. Citizens United wanted to use its general treasury funds to pay a \$1.2 million fee to a cable television operator consortium to make the documentary available for free download by cable subscribers “on demand.”<sup>61</sup>

The documentary contained no express advocacy but, unlike the *WRTL II* ad, it did contain a great many negative statements about a candidate for office,<sup>62</sup> including a statement that the candidate, Hillary Clinton, was a “European socialist” not fit to be commander in chief.<sup>63</sup> The FEC argued that the documentary met *WRTL II*’s functional equivalency test.<sup>64</sup> Though the group’s PAC had ample resources,<sup>65</sup> it did not wish to pay for the broadcasts with its own funds.

Citizens United filed suit against the FEC under a special jurisdictional provision of the BCRA.<sup>66</sup> It made a motion for a preliminary injunction to

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58. Matthew Mosk, *Citizens United v. the FEC: The Return of Corporate Influence Peddling?*, ABC News (Jan. 13, 2010), <http://abcnews.go.com/Blotter/citizens-united-fec-return-corporate-influence-peddling/story?id=9545153&page=1>. Both cases were litigated by Jim Bopp. Ted Olson took over as Citizens United’s lawyer when the Supreme Court agreed to hear the case. *Id.*

59. *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010). By taking some for-profit corporate money, the corporation appeared ineligible for the *MCFL* exemption.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 276 n.4 (D.D.C. 2008) (three-judge court) (per curiam) (television advertisement quoting Dick Morris from the movie stating that “Hillary is the closest thing we have in America to a European socialist”).

64. Brief for Appellee, No. 08-205, *Citizens United*, 130 S. Ct. 876, available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205\\_Appellee.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellee.pdf). Citizens United also wanted to broadcast some ten-second and thirty-second advertisements promoting the documentary without complying with some BCRA disclosure provisions, including § 201 (requiring disclosure of funders) and § 311 (requiring the “disclaimer” stating who paid for the advertisement and that it was not approved by any candidate or committee).

65. *Citizens United*, 130 S. Ct. at 929 (Stevens, J., concurring in part and dissenting in part) (“Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets.”).

66. See Bipartisan Campaign Reform Act of 2002 § 403, 2 U.S.C. § 437(h) (2000 & Supp. V 2005); 28 U.S.C. § 2284 (2000).

allow it to pay for the on-demand cable broadcast of its documentary.<sup>67</sup> The court unanimously rejected Citizens United's arguments.<sup>68</sup> It held that the documentary satisfied *WRTL II*'s functional equivalency test and therefore Citizens United was not entitled to an as-applied exemption.<sup>69</sup> Citizens United appealed from the denial of the preliminary injunction to the Supreme Court. After the Court dismissed the appeal,<sup>70</sup> the case returned to the district court, which then granted summary judgment for the FEC.<sup>71</sup>

Back in the Supreme Court,<sup>72</sup> Citizens United advanced numerous arguments, both statutory and constitutional. Most narrowly, it argued that the FEC regulations should not be construed to apply to video-on-demand cable broadcasts.<sup>73</sup> Most broadly, it argued that *Austin* was wrongly decided and should be overruled.<sup>74</sup>

The case was first argued in March of 2009,<sup>75</sup> and at this point its broader significance became clear. The deputy solicitor general had trouble answering a hypothetical question about the regulation of books containing "the functional equivalent of express advocacy." Many of the Justices at oral argument expressed alarm that Congress might have the power to ban books on election-related issues.<sup>76</sup> Rather than issue an opinion in the case, on the last regular day of its term in June 2009, the Court announced a rehearing of the case for September. The Court asked for supplemental briefing on the following question:

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003),

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67. *Citizens United*, 530 F. Supp. 2d at 275. It also sought to bar enforcement of BCRA §§ 201's and 311's disclosure requirements as to the advertisements. *Id.* at 277.

68. *Id.* at 275.

69. *Id.* at 279–80. As to the advertisements, the district court held that the *WRTL II* exemption did not apply to the disclosure rules, relying on language in *McConnell* broadly upholding these requirements. *Id.* at 281.

70. *Citizens United v. FEC*, 552 U.S. 1278 (2008).

71. *Citizens United v. FEC*, No. 07-2240, 2008 WL 2788753, at \*1 (D.D.C. July 18, 2008) (three-judge court).

72. *Citizens United v. FEC*, 552 U.S. 1240 (2008).

73. Brief for Appellant at 26 n.2, *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](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellant.pdf).

74. *Id.* at 30 ("*Austin* was wrongly decided and should be overruled.").

75. Transcript of Oral Argument, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf).

76. Adam Liptak, *Justices Consider Interplay Between First Amendment and Campaign Finance Laws*, N.Y. TIMES, Mar. 25, 2009, at A16, <http://query.nytimes.com/gst/fullpage.html?res=9A07E5D8113EF936A15750C0A96F9C8B63> ("Several of the court's more conservative justices reacted with incredulity to a series of answers from a government lawyer about the scope of Congressional authority to limit political speech. The lawyer, Malcolm L. Stewart, said Congress has the power to ban political books, signs and Internet videos, if they are paid for by corporations and distributed not long before an election.").

which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b<sup>77</sup>

The Court reheard argument in September 2009.<sup>78</sup>

## 2. The Opinions

### a. The Majority Opinion<sup>79</sup>

Justice Kennedy's majority opinion began with some significant brush clearing. The Court rejected arguments to resolve Citizens United's complaint against corporate spending limits on statutory grounds or to issue a narrow constitutional ruling.<sup>80</sup> The Court also rejected extending the *MCFL* exemption to nonprofit corporations who take some corporate or labor union

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77. *Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (parallel citations omitted).

78. Transcript of Oral Reargument, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205%5BReargued%5D.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf).

79. Justice Kennedy wrote the majority opinion on the corporate spending limits question for himself, Chief Justice Roberts, and Justices Alito, Scalia, and Thomas. *Citizens United*, 130 S. Ct. at 886–917. All those Justices besides Justice Thomas, as well as all the Justices dissenting on the spending limits issue, concurred with Part IV of Kennedy's opinion upholding Citizen United's challenges against the BCRA disclosure provisions. *Id.* at 913–16. Chief Justice Roberts wrote a concurrence for himself and Justice Alito, addressing arguments related to constitutional avoidance and stare decisis. *Id.* at 917–25 (Roberts, C.J., concurring). Justice Scalia, joined by Justice Alito and in part by Justice Thomas, wrote a concurring opinion addressing arguments as to the original understanding of the First Amendment. *Id.* at 925–29 (Scalia, J., concurring). Justice Stevens, for himself and Justices Breyer, Ginsburg, and Sotomayor, dissented on the spending limits question. *Id.* at 929–79 (Stevens, J., concurring in part and dissenting in part).

80. The Court first rejected the nonconstitutional argument that video-on-demand cable broadcasts, or at least this instance of their use, were not covered by the FEC regulation or underlying statute. *Id.* at 888–89. The majority also rejected the related argument that the corporate spending limit “should be invalidated as applied to movies shown through video-on-demand [on grounds] that this delivery system has a lower risk of distorting the political process than do television ads.” *Id.* at 890. Such an approach “would raise questions as to the courts’ own lawful authority . . . [a]nd in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.” *Id.* Moreover, the Court found such an approach in violation of the First Amendment because “[t]he interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.” *Id.* at 891.

The Court then quickly rejected the argument that the documentary was not the “functional equivalent of express advocacy” under the *WRTL II* exemption: “The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.” *Id.* at 890. One of the great ironies here, unacknowledged by the Court, is the ease with which the Court was able to apply Chief Justice Roberts's controlling *WRTL II* test of functional equivalence, despite skepticism expressed by Justices Kennedy, Scalia, and Thomas in *WRTL II* that the test was too vague to be applied:

There is a fundamental and inescapable problem with all of these various tests. Each of them (and every other test that is tied to the public perception, or a court's perception, of the import, the intent, or the effect of the ad) is impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights of the large segment of society to which § 203 applies.

*FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 492 (2007) (Scalia, J., concurring in part and concurring in the judgment).

money but whose “political speech [is] funded overwhelmingly by individuals.”<sup>81</sup>

On the merits, the Court began its discussion by defending its characterization of federal law as a “ban” on corporate political speech, rejecting the argument that the law merely imposed a requirement that non-*MCFL* corporations use PAC funds rather than general treasury funds for election-related communications. The Court stated that a PAC does not “allow a corporation to speak,”<sup>82</sup> and PACs are “burdensome alternatives [that] are expensive to administer and subject to extensive regulations.”<sup>83</sup> Having found the law’s “prohibition on corporate independent expenditures . . . a ban on speech,”<sup>84</sup> the Court explained the First Amendment interests at stake: “Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process.”<sup>85</sup> Recognizing political speech as central to the First Amendment, the Court stated that the law would have to survive strict scrutiny.<sup>86</sup>

The First Amendment, “[p]remised on mistrust of governmental power, . . . stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”<sup>87</sup> A government decision to privilege some speakers over others “deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.”<sup>88</sup>

The Court then canvassed its pre-*Austin* caselaw on the topic of corporate spending in elections,<sup>89</sup> including *Buckley* and *Bellotti*. It stated that

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81. *Citizens United*, 130 S. Ct. at 891. While acknowledging that “the Court should construe statutes as necessary to avoid constitutional questions, the series of steps suggested would be difficult to take in view of the language of the statute.” *Id.* at 892. The Court declined “to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially” because the Court was convinced that “this corporation has a constitutional right to speak on this subject.” *Id.* The Court then launched into an extensive discussion as to why the Court was going to strike down the statute “facially” (that is, unconstitutional for all corporations—and presumably labor unions) rather than “as applied” (that is, unconstitutional just for *Citizens United* and similar groups). *Id.* at 892–96.

82. *Id.* at 897.

83. *Id.*; see also *id.* at 897–98 (describing PAC regulations).

84. *Id.* at 898.

85. *Id.*

86. *Id.*

87. *Id.* (citation omitted).

88. *Id.* at 899. The Court distinguished cases in which speech would “interfere with governmental functions,” *id.*, such as rules limiting the rights of government employees to participate in elections.

89. *Id.* at 899–903.

prior caselaw contradicted *Austin*,<sup>90</sup> and the question before the Court was whether *Austin* should be overruled.<sup>91</sup> It then turned to the three arguments made in support of *Austin*: antidistortion, anticorruption, and shareholder protection.

*Antidistortion.* Noting that the government “all but abandon[ed] reliance” on *Austin*’s antidistortion interest,<sup>92</sup> the Court strongly and unequivocally rejected antidistortion as a permissible governmental interest. The Court said that the interest could justify the banning of books, and constituted an equalization rationale inconsistent with *Buckley*, *Davis*, and other cases.<sup>93</sup> The special advantages that the state conferred on corporations, such as limited liability and perpetual life, “do[] not suffice” for prohibiting speech under the First Amendment,<sup>94</sup> and it is irrelevant if the speech of corporations has “little or no correlation” with public support.<sup>95</sup> The Court stated that the antidistortion rationale “would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations.”<sup>96</sup> It concluded that *Austin* “permits the Government to ban the political speech of millions of associations of citizens. . . . The censorship we now confront is vast in its reach.”<sup>97</sup> *Austin* was “all the more an aberration”

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90. *Id.* at 903 (“The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”).

91. *Id.* at 888.

92. *Id.* At the time the government filed its supplemental brief, I noted the government’s surprising failure to defend the *Austin* antidistortion rationale, and to recast it as an interest in shareholder protection. Rick Hasen, *The Government’s Remarkable Supplemental Brief in Citizens United: No Mention of Corporate “Distortion,”* ELECTION L. BLOG (July 27, 2009, 9:37 AM), <http://electionlawblog.org/archives/014156.html>. The question of whether this was a strategic error reemerged when Solicitor General Kagan, who argued the second argument in *Citizens United*, was nominated to be a Justice of the Supreme Court. Adam Liptak, *Stints in Court May Yield Clues to a Style*, N.Y. TIMES, Apr. 15, 2010, at A1, available at <http://www.nytimes.com/2010/04/15/us/politics/15scotus.html>; see also Robert Barnes, *In Elena Kagan’s work as solicitor general, few clues to her views*, WASH. POST, May 13, 2010, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051205049.html>; Jess Bravin, *Kagan and Key Case: The Jury Is Out*, WALL ST. J., May 12, 2010, <http://online.wsj.com/article/SB10001424052748703565804575238691604135782.html>; Adam Liptak, *On Speech, Kagan Leaned Toward Conservatives*, N.Y. TIMES, May 16, 2010, at A19, available at <http://www.nytimes.com/2010/05/16/us/politics/16court.html>.

93. *Citizens United*, 130 S. Ct. at 904.

94. *Id.* at 905.

95. *Id.* (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

96. *Id.* Among other arguments, the Court stated that:

[E]ven assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

*Id.* at 906. The Court further stated that such a view has “no support” as the First Amendment was “originally understood.” *Id.*

97. *Id.* at 906–07.

because the law included both small and nonprofit corporations,<sup>98</sup> neither of which had vast accumulations of wealth.

*Anticorruption.* The Court then rejected the argument that a corporate spending limit could be justified on anticorruption grounds. It cited portions of *Buckley* rejecting a similar argument,<sup>99</sup> and brushed aside the fact that *Bellotti's* footnote 26 left the issue open: "For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>100</sup> The Court then distinguished *FEC v. National Right to Work Committee* ("NRWC"), which held that a nonprofit corporation could be limited in terms of whom it could solicit for contributions to its PAC.<sup>101</sup> The Court in *NRWC*, relying on the *Bellotti* footnote, "did say that there is a 'sufficient' governmental interest' in 'ensur[ing] that substantial aggregations of wealth amassed' by corporations would not 'be used to incur political debts from legislators who are aided by the contributions.'"<sup>102</sup> The Court stated that *NRWC* has "little relevance here," because the case "involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption."<sup>103</sup>

The Court then explained its understanding of the meaning of the term "corruption." "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."<sup>104</sup> The Court quoted Justice Kennedy's partial dissent in *McConnell*<sup>105</sup> for the proposition that "[t]he fact that speakers may have influence over or access to elected officials does not mean [they] are corrupt."<sup>106</sup> "Favoritism and influence" are unavoidable in representative politics, and a "substantial and legitimate reason" to cast a vote or make a contribution to one candidate or another "is that the candidate will respond by producing those political outcomes the supporter

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98. *See id.* at 907.

99. *Id.* at 908.

100. *Id.* at 909. The Court stated that the *Bellotti* footnote was "supported only by a law review student comment, which misinterpreted *Buckley*." *Id.*

101. 459 U.S. 197 (1982).

102. *Citizens United*, 130 S. Ct. at 909 (quoting *NRWC*, 459 U.S. at 559–60).

103. *Id.* (citations omitted). The Court further explained that "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." *Id.* Moreover, the Court, in explaining *Buckley's* holding that contribution limitations could be imposed to prevent *quid pro quo* corruption, explained that "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The *Buckley* Court nevertheless sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." *Id.* at 908 (citations omitted).

104. *Id.* at 909.

105. *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part).

106. *Citizens United*, 130 S. Ct. at 910.

favors.”<sup>107</sup> The Court further stated that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy,” and independent spending which is uncoordinated with a candidate cannot give rise to an appearance of corruption because the additional political speech simply seeks to persuade voters who have “the ultimate influence over elected officials.”<sup>108</sup>

The Court concluded the discussion of the anticorruption argument by distinguishing the *Caperton* case as “limited to the rule that the judge [who benefited from significant spending on his behalf] must be recused, not that the litigant’s political speech could be banned.”<sup>109</sup> It also stated that the extensive record in *McConnell* “confirms *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”<sup>110</sup> The Court stated the record showed “scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption.”<sup>111</sup> The Court concluded that it would be a “cause for concern” “[i]f elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle.”<sup>112</sup> Though the Court must “give weight to attempts by Congress . . . to dispel either the appearance or the reality of these influences,” the remedy “must comply with the First Amendment,” and an “outright ban on corporate political speech during the critical pre-election period is not a permissible remedy.”<sup>113</sup>

*Shareholder protection.* Though the government put most of its eggs into the shareholder protection basket,<sup>114</sup> the Court disposed of the argument in two short paragraphs. First, the Court said, the argument was an impermissible basis to limit corporate spending because, like the antidistortion argument, it would allow the government to apply the ban to media corporations.<sup>115</sup> There was also “little evidence of abuse that cannot be corrected by shareholders” through corporate democracy.<sup>116</sup> The statute also suffered from being underinclusive in serving the shareholder protection interest, because it covered certain media ads in the short period before the election,

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107. *Id.* (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (citations omitted)

112. *Id.* at 911. The Court did not explain why elected officials could succumb to improper influences from independent expenditures if such expenditures have no potential to corrupt.

113. *Id.*

114. *See supra* note 92.

115. *Citizens United*, 130 S. Ct. at 911.

116. *Id.*

and overinclusive, because it covered nonprofit and for-profit corporations with single shareholders.<sup>117</sup>

Following the rejection of the three potential government interests, the Court concluded by quickly noting that it did not reach the question “whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”<sup>118</sup> It then argued that principles of stare decisis did not prevent overruling *Austin*: *Austin* “was not well reasoned,”<sup>119</sup> the government failed to “defend[] the reasoning of a precedent,”<sup>120</sup> the case was “undermined by experience” in circumventing the restriction,<sup>121</sup> and “[n]o serious reliance interests are at stake.”<sup>122</sup> Given the Court’s conclusion that *Austin* must be overruled, it followed that the Court overruled that part of *McConnell* upholding the BCRA’s § 203.<sup>123</sup>

In the final substantive part of the majority opinion, Justice Kennedy, joined by all of the Justices of the Court besides Justice Thomas, rejected Citizens United’s challenges to the BCRA’s § 311, requiring that televised electioneering communications include a disclaimer stating who was responsible for the content of the advertisement, and to § 201, requiring disclosure by anyone spending more than \$10,000 on electioneering communications in a calendar year.<sup>124</sup> The Court stated that these rules impose “no ceiling on campaign-related activities”<sup>125</sup> and could be justified by the government’s “sufficiently important” interest in providing the electorate with information about the sources of election-related spending.<sup>126</sup> “The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.”<sup>127</sup> It reiterated that those facing the potential for harassment from disclosure are free to bring an as-applied chal-

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117. *Id.* For an argument that Congress or state legislatures should pass new rules limiting corporate political spending without shareholder approval, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010).

118. *Citizens United*, 130 S. Ct. at 911.

119. *Id.* at 912.

120. *Id.*

121. *Id.*

122. *Id.* at 913.

123. *Id.*

124. *Id.* at 913–16.

125. *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)).

126. *Id.* The Court rejected the arguments that disclosure was unjustified for commercial advertisements (e.g., advertising the movie), that the disclosure law was underinclusive because it did not cover print or media advertising, and that the disclosure law could be limited to ads which are the functional equivalent of direct advocacy. On this latter point, the Court stated, “Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.” *Id.* at 915. The Court’s statement that “the informational interest alone is sufficient to justify application of § 201 to these ads,” *id.* at 915–16, and its approval of disclosure requirements applied to lobbying activities, *id.* at 915, together mean the Court is likely to uphold a variety of broad disclosure provisions against constitutional challenge.

127. *Id.*

lenge, but noted that Citizens United “has offered no evidence that its members may face . . . threats or reprisals.”<sup>128</sup>

### b. *The Concurring Opinions*

Chief Justice Roberts and Justice Scalia each wrote concurring opinions.<sup>129</sup> The Chief Justice’s opinion was devoted exclusively to defending the majority’s decision against charges that the Court acted immodestly in deciding the case. The opinion began by stating fidelity to the avoidance canon, and noted that the Court applied it in *Northwest Austin Municipal Utility District Number One v. Holder* (“NAMUDNO”),<sup>130</sup> the term prior so as to avoid striking down a major portion of the Voting Rights Act.<sup>131</sup> It stated, however, that there was no principled statutory way to resolve the case in Citizens United’s favor,<sup>132</sup> nor a way to decide the constitutional question narrowly through the use of an as-applied challenge.<sup>133</sup>

According to the Chief Justice, *stare decisis* should not prevent overruling *Austin*. He disagreed with the notion that cases relying on *Austin* constituted cases “reaffirming” *Austin*<sup>134</sup> because “[n]ot a single party in any of those cases asked us to overrule *Austin*.”<sup>135</sup> “Abrogating the errant precedent . . . might better preserve the law’s coherence and curtail the precedent’s disruptive effects.”<sup>136</sup> *Austin* was “errant” because it contradicted *Buckley*’s rejection of the equalization rationale and *Bellotti*’s rejection of limits on free speech rights of corporations. Moreover, *Austin*’s rationale is “uniquely destabilizing” because its equalization rationale could affect Court decisions outside the campaign finance area.<sup>137</sup> He criticized the dissent for rejecting the argument that *Austin* offered an equalization rationale, “a point that most scholars acknowledge (and many celebrate).”<sup>138</sup> He stated that “[a] speaker’s ability to persuade . . . provides no basis for government

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128. *Id.* at 916. The Court reiterated the centrality of as-applied challenges in dealing with the threat of harassment in *Doe v. Reed*, 130 S. Ct. 2811 (2010), a case it decided later in 2010.

129. The Chief Justice’s opinion is the more important one for the purposes of this Article. Justice Scalia’s concurrence addressed itself to the “original understanding” of the First Amendment, *Citizens United*, 130 S. Ct. at 925 (Scalia, J., concurring), taking strong issue with the dissent’s claim that the Framers of the Constitution would have approved of corporate spending limits in candidate elections, *id.* at 925–29.

130. 129 S. Ct. 2504 (2009).

131. *Citizens United*, 130 S. Ct. at 918 (Roberts, C.J., concurring).

132. *Id.*

133. *Id.* at 919.

134. *Id.* at 919–20.

135. *Id.* at 920; *see also id.* (“[A]s the dissent points out, the Court generally does not consider constitutional arguments that have not properly been raised.” (citation omitted)).

136. *Id.* at 921.

137. *Id.* at 922.

138. *Id.*

regulation of free and open public debate on what the laws should be.”<sup>139</sup> “Finally and most importantly” was the government’s own failure to defend *Austin*’s rationale:<sup>140</sup> “to the extent the Government relies on new arguments—and declines to defend *Austin* on its own terms—we may reasonably infer that it lacks confidence in that decision’s original justification.”<sup>141</sup>

### c. *The Dissenting Opinions*<sup>142</sup>

Justice Stevens, for the four dissenters on the corporate spending limits question, issued a lengthy dissenting opinion.<sup>143</sup> He began with two sections addressing why the Court should have decided the case on narrower statutory grounds,<sup>144</sup> as well as why the Court should have affirmed *Austin* under principles of stare decisis.<sup>145</sup> He concluded that “[e]ach of the [narrower]

139. *Id.* at 923. Like the majority, the Chief Justice stressed the application of *Austin* to media corporations. *Id.*

140. *Id.* The Chief Justice explained that the *Austin* majority opinion relied on neither the threat of quid pro quo corruption nor the need for shareholder protection. *Id.* at 924.

141. *Id.*

142. I focus here solely on Justice Stevens’s dissent. Justice Thomas dissented for himself alone on the constitutionality of the disclosure and disclaimer provisions. *Id.* at 979–82 (Thomas, J., concurring in part and dissenting in part). Consistent with his views in earlier cases, see Richard L. Hasen, *Justice Thomas: leading the way to campaign-finance deregulation*, FIRST AMENDMENT CENTER (Oct. 8, 2007), <http://www.firstamendmentcenter.org/analysis.aspx?id=18958>, Justice Thomas stated that the First Amendment contains a right to anonymous speech that cannot be overcome by a government interest in providing information to the electorate, particularly given the potential chill on First Amendment activity caused by disclosure of campaign-related speech over the internet. *Citizens United*, 130 S. Ct. at 981–82 (Thomas, J., concurring in part and dissenting in part). He made the same points in *Doe v. Reed* later in the term. 130 S. Ct. 2811, 2844–47 (2010) (Thomas, J., dissenting).

143. The opinion runs fifty pages in the Supreme Court Reporter. Justice Stevens even apologized for the length of the dissent: “I regret the length of what follows, but the importance and novelty of the Court’s opinion require a full response.” *Citizens United*, 130 S. Ct. at 931 (Stevens, J., concurring in part and dissenting in part).

144. On the first point, Justice Stevens argued that the issue of overruling *Austin* was not properly before the Court, because a facial challenge was abandoned in the lower court and the issue was not presented in the jurisdictional statement to the Court. *Id.* at 931–32. “Our colleagues’ suggestion that ‘we are asked to reconsider *Austin* and, in effect, *McConnell*,’ would be more accurate if rephrased to state that ‘we have asked ourselves’ to consider those cases.” *Id.* at 931 (citation omitted). He then argued that the case should have been adjudicated as an as-applied, rather than facial, challenge, *id.* at 933–36, noting that the facial challenge allowed the Court to adjudicate the issues in the case, including the question whether the spending limits were justified on anticorruption grounds, without giving the government the opportunity to develop evidence on the question in the lower courts, *id.* at 933.

Justice Stevens then discussed three ways the Court could have decided the case on narrower grounds: that video-on-demand is not covered by § 203, *id.* at 937; that the *MCFL* exemption should be expanded to cover nonprofit corporations that take a de minimis amount of money from corporations, *id.*; and that *Citizens United*’s feature length film “look[ed] so unlike the types of electoral advocacy Congress has found deserving of regulation” that the group was entitled to an as-applied constitutional exemption, *id.* at 938.

145. On this point, Justice Stevens disagreed with the majority’s assertions that *Austin* was poorly reasoned and that it was undermined by experience. On the latter point, the dissent stated that “[t]he majority has no empirical evidence with which to substantiate the claim.” *Id.* at 939. Federal, state, and local governments relied on *Austin* in crafting their campaign finance laws, *id.* at 940, and

arguments made above is surely at least as strong as the statutory argument the Court accepted in last year's Voting Rights Act case, [*NAMUDNO*].<sup>146</sup>

On the merits, Justice Stevens disagreed with the majority's repeated insistence that the PAC requirement "banned" political speech, calling the characterization "highly misleading, and need[ing] to be corrected."<sup>147</sup> The idea that corporate speech would be banned is "nonsense."<sup>148</sup> Justice Stevens defended the media exemption, noting the "unique role played by the institutional press in sustaining public debate."<sup>149</sup>

The dissent rejected the "identity-based" distinctions of the majority, noting that in the election context, laws ban political activities of foreigners and government employees.<sup>150</sup> It then turned to the "original understandings" of the First Amendment,<sup>151</sup> the pre-*Austin* campaign finance cases,<sup>152</sup> and the post-*Austin* cases which "reaffirmed" its holding.<sup>153</sup> The dissent also disagreed with the majority's reading of *Buckley* and *Bellotti*, stating that *Austin* did not conflict with *Buckley*'s rejection of the equalization rationale,<sup>154</sup> and noting that *Bellotti* footnote 26 expressly left the anticorruption rationale open as to corporate spending limits in candidate elections.<sup>155</sup>

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the Court's contrary ruling "makes a hash" out of the BCRA's regulatory scheme, weakening parties by strengthening outside groups, *id.*

146. *Id.* at 938 n.16. Chief Justice Roberts called the dissent's views of these narrower grounds "quite perplexing" because the dissenters "presumably agree[] with the majority that Citizens United's narrower statutory and constitutional arguments lack merit—otherwise its conclusion that the group should lose this case would make no sense." *Id.* at 918 (Roberts, C.J., concurring). The dissent responded that there is "nothing perplexing about the matter" because the dissenters "do not share [the majority's] view of the First Amendment" and therefore there is no occasion "to practice constitutional avoidance or to vindicate Citizens United's as-applied challenge." *Id.* at 938 n.16 (Stevens, J., concurring in part and dissenting in part). One might add that the dissent likely wanted to avoid the political optics of a 9–0 defeat for the government (albeit on vastly different grounds), recalling the majority's controversial statement in *Bush v. Gore* that "[s]even Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy." 531 U.S. 98, 111 (2000) (*per curiam*) (citations omitted).

147. *Citizens United*, 130 S. Ct. at 942 (Stevens, J., concurring in part and dissenting in part).

148. *Id.* at 944.

149. *Id.* at 943; *see also id.* at 976 (discussing the role of the press and media exemption). Justice Stevens added that "with a media corporation there is also a lesser risk that investors will not understand, learn about, or support the advocacy messages that the corporation disseminates." *Id.* at 943 n.32. He also stated that the majority "[r]oam[ed] far afield from the case at hand" by worrying "that the government will use § 203 to ban books, pamphlets, and blogs." *Id.* at 943 n.31.

150. *Id.* at 946–48. "Campaign finance distinctions based on corporate identity tend to be less worrisome . . . because the 'speakers' are not natural persons, much less members of our political community, and the governmental interests are of the highest order." *Id.* at 947.

151. *Id.* at 948–52.

152. *Id.* at 952–56.

153. *Id.* at 956–57.

154. *Id.* at 958. In *Austin*, the Court "*expressly* ruled that the compelling interest supporting Michigan's statute was not [the equalization rationale] but rather the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars." *Id.* (citation omitted).

155. *Id.* at 959 ("A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation.").

Finally, the dissent turned to discuss the anticorruption, antidistortion, and shareholder protection rationales.

*Anticorruption.* The dissent disagreed with the narrow view of corruption embraced by the majority: “[T]he difference between selling a vote and selling access is a matter of degree, not kind.”<sup>156</sup> Setting forth a broad view of “undue influence” that could justify campaign finance regulations, the dissent rejected the idea that *Buckley* compelled a conclusion that independent spending can never corrupt a candidate.<sup>157</sup> It concluded that corporations raised a special problem of quid pro quo corruption because corporations as a class “tend to be more attuned to the complexities of the legislative process and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes.”<sup>158</sup> The dissent saw the majority’s rejection of these arguments as inconsistent with its opinion the term before in *Caper-ton*.<sup>159</sup> The dissent also rejected arguments that Congress passed the law as a means of incumbent self-protection.<sup>160</sup>

*Antidistortion.* While acknowledging “that *Austin* can bear an egalitarian reading,”<sup>161</sup> the dissent disputed the claim that it was “just” an “‘equalizing’ ideal in disguise.”<sup>162</sup> Instead, “[u]nderstood properly” the argument “is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process.”<sup>163</sup> According to the dissent, corporations do not engage in self-expression the way human beings do.<sup>164</sup> In any case, some corporations actually wanted limits on spending to prevent officeholders from “shak[ing]

156. *Id.* at 961. Justice Stevens discussed the evidence found by the district court in the *McConnell* case that members of Congress were grateful for independent negative advertisements run with corporate and labor union money. Further, groups running these ads received special consideration from grateful officials when matters arose that affected these corporations and organizations. *Id.* at 961–62 (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 623–24 (D.D.C. 2003)). He also added that even if ingratiation and access are not corruption, “they are necessary prerequisites to it; they can create both the opportunity for, and the appearance of, *quid pro quo* arrangements.” *Id.* at 965.

157. *Id.* at 964 (“[I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions . . .” (quoting *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam))). Despite stating that the majority seemed to decide this issue with finality and without any empirical evidence, the dissent suggested that a new version of § 203 might be “supported by additional evidence of quid pro quo corruption or its appearance.” *Id.* at 978 n.76.

158. *Id.* at 965; see also *id.* (“Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort . . . make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.”).

159. *Id.* at 967–68.

160. *Id.* at 968–70.

161. *Id.* at 971 n.69.

162. *Id.* at 970; see also *id.* at 971 n.69 (disagreeing with the Chief Justice that there is “nothing more to it” than equality).

163. *Id.* at 970.

164. *Id.* at 970–72.

them down for supportive ads.”<sup>165</sup> Finally, large corporate spending could “marginalize[]” the opinions of “real people” by “drowning out . . . non-corporate voices.”<sup>166</sup> This in turn “can generate the impression that corporations dominate our democracy”<sup>167</sup> and give corporations “special advantages in the market for legislation.”<sup>168</sup>

*Shareholder protection.* The dissent reasoned that the law can “serve First Amendment values” by protecting the rights of shareholders from a “kind of coerced speech: electioneering expenditures that do not reflect [their] support.”<sup>169</sup> The PAC mechanism prevents managers from advancing personal agendas, and limits the “rent seeking behavior of executives and respects the views of dissenters.”<sup>170</sup>

The Stevens dissent concluded by alluding to the troubled U.S. economy in 2010 driven by corporate excess, declaring that it was “a strange time to repudiate” the “common sense” of the American people dating back to Theodore Roosevelt’s efforts to fight “against the distinctive corrupting potential of corporate electioneering.”<sup>171</sup>

## II. THE CONTINUED INCOHERENCE OF CAMPAIGN FINANCE JURISPRUDENCE AFTER *CITIZENS UNITED*

The *Citizens United* opinions are full of fascinating empirical, doctrinal, and jurisprudential issues that are likely to keep legal scholars busy for years, on issues ranging from constitutional avoidance<sup>172</sup> to facial versus as-applied challenges to First Amendment theory<sup>173</sup> to corporate

165. *Id.* at 973.

166. *Id.* at 974.

167. *Id.*; see also *id.* at 975–76 (“In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener’s exposure to relevant viewpoints, and it may diminish citizens’ willingness and capacity to participate in the democratic process.”).

168. *Id.* at 975. The dissent stated that corporations are “uniquely equipped” to engage in this “rent seeking.” See *id.*

169. *Id.* at 977 (internal quotation marks omitted).

170. *Id.*

171. *Id.* at 979. Bill Araiza, writing before the Court’s *Citizens United* decision, nicely situates the case in the context of disputes over the economic marketplace. See William D. Araiza, *Campaign Finance Regulation: the Resilience of the American Model*, 2 AMSTERDAM L. F. 55 (2009), available at <http://ojs.uvu.vu.nl/alf/article/view/108>.

172. Before the Court decided *Citizens United*, but after the Court set it for reargument, I wrote a law review article contrasting the Court’s use of avoidance in *NAMUDNO* with its failure to do so in *Citizens United*. See Hasen, *Avoidance*, *supra* note 17. Justice Stevens in his dissent also noted the contrast in the Court’s treatment of avoidance in the two cases. See *Citizens United*, 130 S. Ct. at 938 n.16 (Stevens, J., concurring in part and dissenting in part) (calling the statutory arguments in *Citizens United* “at least as strong” as those accepted by the Court in *NAMUDNO*).

173. One issue is the majority’s discussion of the Press Clause. See Eugene Volokh, *State Attorneys General Argue that Non-Media Speakers Should Get Less First Amendment Protection than Media Speakers*, THE VOLOKH CONSPIRACY (June 1, 2010 2:21 PM), <http://volokh.com/2010/06/01/state-attorneys-general-argue-that-non-media-speakers-should-get-less-first-amendment-protection-than-media-speakers> (arguing that *Citizens United* rejects special protections for institutional press).

governance<sup>174</sup> to the tax treatment of nonprofits.<sup>175</sup> Even within campaign finance scholarship, there is much to say, on issues ranging from campaign finance disclosure<sup>176</sup> to how corporate and labor union spending patterns in elections may change in light of the decision,<sup>177</sup> regarding the Justices' divergent treatment of the antidistortion interest.<sup>178</sup>

My focus in this Article is limited to the question of the coherence of the *Citizens United* majority's approach, in light of both the earlier doctrinal incoherence of the Court<sup>179</sup> and the majority's celebration of its own decision as restoring coherence to campaign finance doctrine.<sup>180</sup> The question of coherence is interesting for both doctrinal and theoretical reasons. Doctrinally, it is important as the federal, state, and local governments attempt to rework their campaign finance laws to comport with both the *Citizens United* decision and for the likely lower courts' judicial reactions to that decision. Theoretically, the continued incoherence of Supreme Court doctrine sheds some light on the interaction of legal doctrine and the political legitimacy of

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174. See *The DISCLOSURE Act: Hearing on H.R. 5175 Before the Comm. on H. Admin.*, 111th Cong. (2010) (statement of Professor John C. Coates IV, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1604567](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604567); Bechuk & Jackson, *supra* note 117; Reuven S. Avi-Yonah, *To Be or Not to Be? Citizens United and the Corporate Form* (Univ. of Mich. Law Sch. Law & Econ. Research Paper Series, Paper No. 10-005, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1546087](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546087); Anne Tucker Nees, *Politicizing Corporations: A Corporate Law Analysis of Corporate Personhood and First Amendment Rights after Citizens United* (Jan. 27, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1542063](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542063).

175. See Miriam Galston, *When Statutory Regimes Collide: Will Wisconsin Right to Life and Citizens United Invalidate Federal Tax Regulation of Campaign Activity?* (George Wash. Univ. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 499, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1572511](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1572511); Ellen Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations after Citizens United* (unpublished manuscript) (on file with author).

176. See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273 (forthcoming Oct. 2010).

177. See Raymond J. La Raja, *Will Citizens United v. FEC give more political power to corporations?* (Sept. 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1642175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642175).

178. As I hope to discuss in a future article, the dissent's treatment of the antidistortion interest is the least coherent portion of the dissenting opinion. The dissent seems to simultaneously (1) reject the argument that the antidistortion interest is (solely) an equality rationale; (2) defend the argument as really about traditional corruption; and (3) mix equality and corruption concepts in discussing how corporate speech can "drown out" other voices. More promising is the dissent's discussion of anti-extortion and anti-rent-seeking rationales for corporate spending limits.

Despite Justice Stevens recognizing in his dissent that he himself has endorsed the equalization rationale for campaign finance regulation more broadly, *Citizens United v. FEC*, 130 S. Ct. 876, 963 n.65 (2010) (Stevens, J., concurring in part and dissenting in part), the dissenting Justices chose not to offer a full-throated defense of the rationale. This could well be due to the government's failure to defend the rationale, a point stressed by both the majority opinion and the Chief Justice's concurring opinion.

179. I have written three earlier articles exploring the Court's doctrinal incoherence. See Hasen, *Beyond Incoherence*, *supra* note 17; Hasen, *Buckley is Dead*, *supra* note 50; Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849 (2007).

180. See *supra* notes 1–6 and accompanying text.

the Court. This Part focuses on the doctrinal question, looking at issues related to spending limitations on foreigners, limitations in judicial elections, and contribution limitations generally. The next Part explores the theoretical question.

### A. Foreign Spending

The *Citizens United* majority tacked on to the end of its discussion of the anticorruption interest a brief statement reserving the question of the constitutionality of election spending limits imposed on foreigners. It expressed no opinion whether the “[g]overnment has a compelling interest in limiting foreign influence over our political process.”<sup>181</sup>

The majority likely added these three sentences in response to the dissent, which raised the ghost of World War II propagandist “Tokyo Rose” in arguing that the logic of the majority’s approach to free speech rights would mean that foreigners could not be limited in attempts to influence U.S. elections through campaign spending.<sup>182</sup>

The dissent overstated it a bit in contending that the majority’s short discussion of the foreign spending issue “all but confesses that a categorical approach to speaker identity is untenable.”<sup>183</sup> After all, the majority committed to nothing regarding how it would actually resolve the constitutional question of spending limits on foreigners, should the issue ever come before the Court—and it might be that the Justices in the majority would not agree on how to resolve it. But the dissent is likely right that the tenability of any argument a future majority could make to distinguish foreign spending from corporate spending in candidate elections is in serious question.

As framed by the majority, the question before the Court in some future case would be whether the government has a compelling interest in “limiting foreign influence over our political process.”<sup>184</sup> Before turning to the government’s possible interests in limiting foreign spending, consider how foreign individuals or associations—or anyone else—might influence our political process though spending on candidate elections.

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181. *Citizens United*, 130 S. Ct. at 911. The Court explained:

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to “foreign national[s]”). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.

*Id.*

182. *Id.* at 947–48 (Stevens, J., concurring in part and dissenting in part).

183. *Id.* at 948 n.51.

184. *Id.* at 911 (majority opinion). Of course, this question presupposes that foreign individuals and associations have First Amendment rights, and that point is not clear for certain foreign individuals and associations. See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367 (2003).

Money can influence the political process in two ways: electorally and legislatively.<sup>185</sup> Campaign spenders who pursue an electoral strategy use money to try to convince the electorate to vote for or against a certain candidate for office. Though it is true that the candidate who spends the most money on an election does not always win,<sup>186</sup> having enough money is a *sine qua non* to be competitive in modern campaigns. On the federal level, in 2008 the average cost to win a House seat was over \$1.2 million and the average Senate race cost over \$6.5 million.<sup>187</sup> Presidential campaigning hit \$1.8 billion in 2008,<sup>188</sup> and each candidate in 2012 may be looking to raise at least \$1 billion. Though there is wider variation, state campaigns can also be quite expensive.<sup>189</sup> And of course, the fundraising needs in competitive races are even higher.<sup>190</sup>

Some campaign spenders pursue a legislative strategy instead of or in addition to an electoral strategy. Under a legislative strategy, a spender's support for a candidate can help secure access—if not more—from grateful elected officials.

It is easy to see why governments would enact laws barring foreign individuals, governments, and associations from spending money on candidate elections, whether such foreigners pursue an electoral or legislative strategy. But it is difficult to see how any of the arguments supporting a foreign spending limit could be squared with the reasoning of the majority in *Citizens United*. Consider this sketch of three potential arguments in favor of

185. On the terms “electoral strategy” and “legislative strategy,” see Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 *HOFSTRA L. REV.* 301, 308 (1989). Some foreigners might want to spend money on U.S. elections just for the joy of doing so—the “consumption” value of political activity. See Stephen Ansolabehere et al., *Why is There so Little Money in U.S. Politics?*, 17 *J. ECON. PERS.* 105 (2003). It is hard to see a foreigner's strong First Amendment interest in such circumstances.

186. Among prominent examples are self-financed candidates, who rarely win but can usually run a competitive campaign through self-funding. See Anne Bauer, *The Efficacy of Self-Funding a Political Campaign*, *NAT'L INST. ON MONEY ST. POL.* (June 22, 2010), <http://www.followthemoney.org/press/PrintReportView.phtml?r=429&PHPSESSID=6876d32e911ce6c20e13fc685e6908d4> (finding only 11 percent of self-funded candidates at state level successful in the 2000–2009 period).

187. *Table 1: Cost of Winning: House and Senate Winners' Receipts, 1998–2008*, *CAMPAIGN FIN. INST.*, Nov. 6, 2008, [http://www.cfinst.org/congress/pdf/Table1\\_PostElec.pdf](http://www.cfinst.org/congress/pdf/Table1_PostElec.pdf).

188. Richard L. Hasen, *The Transformation of the Campaign Financing Regime for U.S. Presidential Elections* (Loyola Law Sch. L.A. Legal Studies Working Paper Series, Paper No. 2009-45, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1505527](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1505527).

189. See Denise Roth Barber, *An Overview of State Campaigns, 2007–2008*, *NAT'L INST. ON MONEY ST. POL.*, tbl. 1 (Apr. 6, 2010), <http://www.followthemoney.org/Research/> (follow “An Overview of State Campaigns, 2007–2008” hyperlink; then follow “Legislative Campaigns” hyperlink).

190. See Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 *J. POL.* 75, 82–83 (2006) (discussing much greater competitiveness of House elections when challenger to incumbent raised over \$1 million and much less competitive when competitors raised under \$500,000); *Table 4: Open Seat Winners and Losers, Senate and House, 2000–2008*, *CAMPAIGN FIN. INST.*, Nov. 6, 2008, [http://www.cfinst.org/congress/pdf/Table4\\_PostElec.pdf](http://www.cfinst.org/congress/pdf/Table4_PostElec.pdf) (reporting that open House seat winners in 2008 spent an average of \$1.6 million and open Senate seat winners in 2008 spent an average of just under \$7.4 million).

such limits and how the *Citizens United* majority responded to each in the corporate context.<sup>191</sup>

1. *Foreign spending could lead to corruption of elected officials.* Unlike American citizens, foreign individuals, governments, and associations are unlikely to have allegiance to the United States. A foreign entity may even have interests adverse to the United States, militarily, diplomatically, economically, or in some other way. Foreign individuals, governments, and associations could spend money independently supporting candidates in the hopes of currying favor with those candidates, getting them to take legislative positions that these foreign individuals and associations favor. At the very least, foreigners could engage in this spending as part of a legislative strategy to secure preferential access to elected officials and policymakers, access which most non-spenders would not have, in the hopes of convincing elected officials and policymakers to adopt the foreigners' preferred legislative and policy positions.

Though these seem to be reasonable arguments in favor of a ban on foreign campaign spending, they run counter to many of the key assertions and suppositions of the *Citizens United* majority. As the dissent noted, a foreigner spending limitation would be an identity-based restriction,<sup>192</sup> which under the majority's view would interfere with the free speech rights of those who would want to hear what might be said in an election about a candidate.<sup>193</sup> If more speech is always better,<sup>194</sup> and if "[t]he First Amendment protects speech and speaker, and the ideas that flow from each,"<sup>195</sup> then it is hard to see the basis for limiting speech simply by the identity of the speaker. In addition, the majority has declared that independent spending simply cannot corrupt,<sup>196</sup> and that in any case ingratiation and access are not corruption.<sup>197</sup>

2. *Foreign spending could affect who is elected to office in the United States.* Even putting aside the possibility of corruption and the sale of access, foreign spending aimed purely at an electoral strategy is objectionable. In recent years, federal elections in the United States have been marked by a rise in partisanship. The Democratic and Republican parties fight hard in "battleground" states for the presidency, and in "swing districts" and "purple" areas for House and Senate seats. Large amounts of

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191. For each of these arguments against spending by "foreign individuals or associations," I leave aside the question of spending by permanent U.S. resident aliens, which presents different questions because resident aliens may have greater allegiance and attachment to the United States. I am including foreign governments, however.

192. See *supra* note 183 and accompanying text.

193. See *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

194. See *id.* at 911 ("[I]t is our law and our tradition that more speech, not less, is the governing rule.").

195. *Id.* at 899; *cf. id.* at 923 (Roberts, C.J., concurring) ("A speaker's ability to persuade . . . provides no basis for government regulation of free and open public debate on what the laws should be.").

196. *Id.* at 909 (majority opinion).

197. *Id.* at 910.

spending on a relatively small number of races have the potential to swing not only individual elections, but an entire house of Congress. While Democrats and Republicans strongly disagree about which party should control the House or Senate, I would venture that they would reach consensus that the choice of who should be elected is one that should be influenced by those in the United States, who have loyalty to the United States, and not to those who live outside the U.S.'s borders.

Once again, though the arguments banning foreign campaign spending are sensible and appealing, they seem to counter the majority opinion in *Citizens United*. The idea that foreign entities should not have too much influence over U.S. elections is a variant on antidistortion arguments. Though the antidistortion concern expressed in relation to corporations has been one about wealth accumulated with the corporate form that does not have a correlation with the public's support for the corporation's political ideas, the antidistortion concern in relation to foreign individuals and corporations is one about electoral influence by those without allegiance to, and potentially with allegiance adverse to, the interests of the United States. Yet to the *Citizens United* majority, the antidistortion interest is pernicious, smacking of a ban on speech and censorship that threatens the very fabric of American democracy.<sup>198</sup> The majority's logic applied to this context is that we should not be afraid of more speech and that we should trust that full disclosure will allow the American people to decide whether to support candidates who may be supported by foreign interests.

3. *Foreign spending could undermine public confidence in the integrity of the U.S. government.* Since the Founding, Americans have been suspicious of foreign intervention in domestic U.S. elections.<sup>199</sup> To take two recent examples, the Senate investigated reports in the 1990s that the Chinese government sought to influence the 1996 presidential election through conduit campaign contributions benefitting Bill Clinton and congressional Democrats.<sup>200</sup> More recently, in 2008 opponents of President Obama raised the possibility that then-candidate Obama had been receiving significant foreign contributions via the internet through unitemized contributions below \$200.<sup>201</sup> In both cases, the dispute was over the extent of foreign

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198. See *supra* notes 92–98 and accompanying text.

199. See *Citizens United*, 130 S. Ct. at 948 n.51 (Stevens, J., concurring in part and dissenting in part) (citing Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 n.245 (2009)).

200. For a critical analysis of the investigation, see L. Ling-chi Wang, *Beyond Identity and Racial Politics: Asian Americans and the Campaign Fund-raising Controversy*, 5 ASIAN L.J. 329 (1998).

201. Neil Munro, *FEC Rules Leave Loopholes For Online Donation Data*, NAT'L J. ONLINE (Oct. 24, 2008), [http://www.nationaljournal.com/njonline/no\\_20081024\\_9865.php](http://www.nationaljournal.com/njonline/no_20081024_9865.php). Concern over foreign influence in the Obama Administration extends to the fringe "Birthers" movement, which contends despite clear evidence to the contrary that President Obama is ineligible to be president because he was born outside the United States. See Jeff Zeleny, *Persistent "Birthers" Fringe Disorients Strategists*, N.Y. TIMES, Aug. 4, 2009, <http://www.nytimes.com/2009/08/05/us/politics/05zeleny.html>. In the 2010 election as well, foreign campaign influence was an issue. This time, Democrats accused the Republican-leaning U.S. Chamber of Commerce of taking foreign money,

influence, not over whether there was something normatively wrong with the illegal attempt of foreign influence if it occurred.

There is at least the potential that foreign spending on U.S. elections could undermine the integrity of the electoral process. If such spending is significant and it is disclosed, voters could believe that foreign nationals are improperly influencing either the outcome of U.S. elections (through pursuit of an electoral strategy) or the legislative decisions made by elected officials (through pursuit of a legislative strategy).

The *Citizens United* majority gave the back of its hand to the appearance argument raised in the corporate context, and it is an argument that by its terms should apply equally to spending by foreigners:

The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, *or any other speaker*, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse to take part in democratic governance because of additional political speech made by a corporation *or any other speaker*.<sup>202</sup>

Note the majority's unsupported empirical statement—apparently for all types of elections and any identity of speaker—that independent spending can never cause voters to “lose faith in our democracy.”<sup>203</sup>

Despite the apparent application of *Citizens United's* reasoning to the question of foreign spending limits, I have little doubt that the Court would uphold such limitations<sup>204</sup> even though the foreign spending limit is more severe than the corporate limitation. It is an actual *ban*, as there is no PAC alternative for foreigners. As I explain in Part III, at least some of the Justices appear to care about public opinion, and the public outcry over *Citizens United*<sup>205</sup> could well pale compared to a Court decision allowing unlimited

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though they offered no proof of the accusation. Eric Lichtblau, *Topic of Foreign Money in U.S. Race Hits Hustings*, Oct. 9, 2010, at A14, <http://www.nytimes.com/2010/10/09/us/politics/09donate.html>.

202. 130 S. Ct. at 910 (emphases added) (citation omitted) (internal quotation marks omitted).

203. *Id.* This is not to say that foreign spending would necessarily cause voters to lose confidence in our democracy. The empirical evidence linking campaign rules and faith in government is unclear at best. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 123 (2004). But the Court apparently has closed the courts to arguments that spending can affect voter confidence in any electoral context and for any kind of speaker.

204. Heather Gerken agrees, though she seems to think that it might be enough for the government to show a “legitimate” interest to justify such limitations. *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 & Admin.*, 111th Cong. 10 (2010) (statement of Professor Heather K. Gerken, J. Skelly Wright Professor of Law, Yale Law School), available at [http://rules.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=46b20c68-8e8b-44ba-a206-32703e280a4e](http://rules.senate.gov/public/index.cfm?a=Files.Serve&File_id=46b20c68-8e8b-44ba-a206-32703e280a4e).

205. See *infra* notes 258–259 and accompanying text.

foreign funds in our elections.<sup>206</sup> Indeed, it was probably to forestall such an attack after *Citizens United* itself that the majority added those three sentences keeping the issue open.

So how could the Court sustain a law imposing foreign spending limits without overturning *Citizens United*?<sup>207</sup> The short answer is through doctrinal incoherence. For example, the Court could state that the threat from foreign spending influencing U.S. elections is one different in kind than that posed by domestic corporate spending, and that when it comes to protecting the country from foreign influence, the First Amendment must give way.<sup>208</sup> Or the Court could state that barring foreign influence is supported by the same interest “in allowing governmental entities to perform their functions”<sup>209</sup> that justifies limitations on some political activities of government employees under the Hatch Act,<sup>210</sup> an interest the Court reaffirmed in *Citizens United*.

As the last Section showed, neither of these arguments would be convincing under a literal application of the principles of *Citizens United*, because the arguments are premised on corruption, appearance of corruption, or distortion. Most likely, a majority that would make an argument favoring foreign spending limits would simply ignore the inconsistent parts of *Citizens United* and move on. In short, there is no reason we should expect a consistent application of *Citizens United* in the context of foreign election spending.<sup>211</sup>

206. The only polling on this question of which I am aware has been criticized for its methodology. See Memorandum from Joel Benenson, President, Benenson Strategy Grp., to Interested Parties (June 21, 2010), available at <http://www.scribd.com/doc/33452341/Citizens-United-Survey> (“When voters learn that the ruling would make it easier for foreigners to spend money in U.S. elections, only 13% support it, while 82% oppose it.”); Sean Parnell, *More biased polling on Citizens United*, CTR. FOR COMPETITIVE POL. (June 23, 2010), <http://www.campaignfreedom.org/blog/detail/more-biased-polling-on-citizens-united> (criticizing methodology).

207. The Court overturning the 5–4 decision in *Citizens United* is not out of the question if one of the Justices in the five-Justice majority leaves the Court. Justices Scalia and Kennedy had been arguing against *Austin* since it was decided in 1986, and the Chief Justice, in his *Citizens United* concurrence, pointed to the continued disagreement among the Justices over the case as a reason for not granting the case stare decisis effect. *Citizens United*, 130 S. Ct. at 922 (Roberts, C.J., concurring). The majority’s and concurrence’s strong reliance on prior dissenting opinions provoked a tart response from Justice Stevens: “Under this view, it appears that the more times the Court stands by a precedent in the face of requests to overrule it, the weaker that precedent becomes.” *Id.* at 939 n.18 (Stevens, J., concurring in part and dissenting in part); see also *id.* at 953–54 (commenting on the fact that the majority relied on earlier opinions of Justices writing separately, not for the Court, and observing that “those Justices were writing separately; which is to say, their position failed to command a majority. Prior to today, this was a fact we found significant in evaluating precedents”).

208. Interestingly, most of the times that the *Citizens United* majority mentions the identity issue, it couches the question in terms of “corporate identity,” rather than identity generally. See *supra* note 5 (quoting the majority’s discussions of identity-based restrictions).

209. *Citizens United*, 130 S. Ct. at 899.

210. See *U.S. Civil Service Comm’n v. Nat’l Ass’n of Letter Carriers (Letter Carriers)*, 413 U.S. 548 (1973). Notably, the restrictions on government employees do not prevent their voluntary contributions directly to candidate campaigns.

211. Both Ned Foley and Sam Issacharoff rely on the cases upholding limitations on the political activities of government employees to suggest that the Court would uphold corporate spending limitations on corporations that have contracts with the government. *Corporate America*

### B. Judicial Elections

Though the jurisprudential conflict between *Citizens United* and the foreign spending ban is yet to come, there is already a conflict between *Citizens United* and the Court's recent jurisprudence related to money and judicial elections. In 2009, the Court decided *Caperton v. Massey*,<sup>212</sup> a case arising out of the election of the chief justice of the West Virginia Supreme Court.

*Caperton* involved the actions of a corporate CEO with a \$50 million lawsuit pending before the West Virginia Supreme Court.<sup>213</sup> The CEO spent considerable sums supporting the election of a candidate for chief justice of that court. "In addition to contributing the \$1,000 statutory maximum to [the judicial candidate's] campaign committee, [the CEO] donated almost \$2.5 million to 'And For The Sake Of The Kids,'" a § 527 corporation that ran ads targeting [the candidate's] opponent."<sup>214</sup> The CEO also made independent expenditures of over \$500,000 supporting the candidate.<sup>215</sup> The candidate was elected and refused to recuse himself from

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vs. *The Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections: Hearing Before the S. Comm. on Rules & Admin.*, 111th Cong. 13 (2010) (statement of Professor Edward B. Foley, Dir., Election Law @ Moritz, Robert M. Duncan/Jones Day Designated Professor in Law, Moritz College of Law at The Ohio State University), available at [http://rules.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=071efe1d-8181-4fc9-aa09-7b2933910468](http://rules.senate.gov/public/index.cfm?a=Files.Serve&File_id=071efe1d-8181-4fc9-aa09-7b2933910468) ("But as long as Congress does legislate with appropriate sensitivity, there should be little doubt that Congress can regulate the campaign spending of government contractors, just like it can do so with respect to government employees."); Samuel Issacharoff, *Still Spinning*, AM. LAW., Apr. 2010, at 41, 42, available at [http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202446435293&Still\\_Spinning&hblogin=1](http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202446435293&Still_Spinning&hblogin=1) ("But if pay-to-play is the concern, we may already have a partial solution, and a constitutionally tested one. The Hatch Act restricts political activities by federal employees. It was founded on the concern that public employees are both too vulnerable and too concerned; they are both uniquely able to affect public policy and uniquely vulnerable to extortionate demands for contributions from those who would end up being their employers. The Hatch Act scheme could be broadened to include corporations who receive government contracts or subsidies."); see also Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010) (expanding on argument for constitutionality of spending limits on government contractors).

As much as I am sympathetic to the argument, I am much less sanguine than Foley and Issacharoff that the Roberts Court, as currently constituted, would uphold such a limitation (even with relatively high dollar thresholds, as suggested by Foley), especially considering the broad range of corporations with significant government contracts. The Court could well view this as a ban on the speech of the most important and largest corporations in the United States, each of which does significant business with the federal government. Consider how Justice Scalia ended his concurring opinion: "Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate." *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring).

The contrast with *Letter Carriers* is also instructive. The political limitations on government employees in *Letter Carriers* did not bar employee campaign contributions or spending. Corporations with significant government contracts also do considerable business outside the government, unlike the government employees who depend solely or primarily upon government employment for their income. The threat of extortion of such corporations therefore seems far lower than the threat to government employees, even though the monetary stakes are much higher.

212. 129 S. Ct. 2252 (2009).

213. *Id.* at 2257.

214. *Id.*

215. *Id.*

consideration of the corporation's case, casting the decisive vote in the corporation's favor.<sup>216</sup>

The Supreme Court in *Caperton* ruled that the CEO's "pivotal role"<sup>217</sup> in electing the West Virginia jurist mandated the justice's recusal on due process grounds. "Though no[] . . . bribe or criminal influence" was involved, the Court recognized that "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected."<sup>218</sup>

To the *Citizens United* dissent, the Court in *Caperton* "accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption."<sup>219</sup> The dissent noted how the majority in *Caperton* repeatedly described the CEO as having made "contributions" to the candidate, even though virtually all of his money went to fund independent expenditures, not contributions. The reason for the conflation, according to the dissent, was the recognition of spending in this context as the "functional[] equivalent" of a contribution.<sup>220</sup>

The *Citizens United* majority's response to the dissent's use of *Caperton* was curt and dismissive:

*Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.<sup>221</sup>

The majority's attempt to distinguish *Caperton* as a recusal case is unpersuasive. The last sentence seeks to harmonize *Caperton* with *Citizens*

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216. *Id.* at 2258.

217. *Id.* at 2262.

218. *Id.*

219. *Citizens United v. FEC*, 130 S. Ct. 876, 967 (2010) (Stevens, J., concurring in part and dissenting in part).

220. *Id.* at 968 ("The reason the Court so thoroughly conflated expenditures and contributions, one assumes, is that it realized that some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes."); see also Symposium, *State Judicial Independence—A National Concern, Transcript: Session 1: One Symptom of a Serious Problem: Caperton v. Massey*, 33 SEATTLE U. L. REV. 569, 581 (2010) (comments of Richard Hasen) ("In the majority opinion in *Caperton*, Justice Kennedy elides over the distinction between contributions and expenditures and this history of campaign finance jurisprudence."). The dissent further explained that the *Caperton* decision "underscore[d]" (1) the need for "prophylactic measures," given the extreme difficulty in proving corruption; (2) the tendency of for-profit corporations to use "nonprofit conduits" with "misleading names;" and (3) the fact that the Court's decision would extend to all types of elections, including judicial elections. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part).

221. *Citizens United*, 130 S. Ct. at 910 (citations omitted).

United by stating that the facts in *Caperton* justified only the milder remedy of recusal, and not a limit on a campaign spender's speech. But why do the facts in *Caperton* give the complaining party any remedy (in this case, recusal) based on the CEO's independent campaign spending? The answer appears to be rooted in one of three possibilities, each of which was rejected by the Court in *Citizen United*.

First, the *Caperton* majority may have accepted an antidistortion argument. The CEO's hefty spending, making up the vast majority of the total spending supporting the judicial candidate in the election, had a "significant and disproportionate influence"<sup>222</sup> on the candidate's election. For spending to be disproportionate, it has to be compared to something; it appears that the problem here was that the CEO's spending was disproportionate to the public's support for his ideas. It is *Austin* all over again, but this time applied to a wealthy individual with corporate interests, not a corporation.

Second, as noted by the *Citizens United* dissent, the CEO's substantial spending raised the specter of corruption.<sup>223</sup> It would not surprise anyone to think that the judicial candidate would be extremely grateful to the CEO for spending such large sums supporting his election, and could well favor him in ruling on his case. That common sense notion seems to be the basis of the due process recusal argument that the Court accepted in *Caperton*. But it flies in the face of the *Citizens United* majority's flat-out empirical statement that independent spending cannot corrupt.<sup>224</sup>

Finally, the CEO's significant spending raises concerns about the appearance of corruption. Even if the candidate was completely unmoved by the CEO's multimillion dollar support for his judicial campaign, the public could well be very concerned about the impartial administration of justice. The public's confidence in the integrity of the judiciary could be undermined by this spending, and the public is unlikely to draw fine legal distinctions between contributions to candidates and contributions to independent expenditure committees. This argument runs straight into *Citizens United*'s other unsupported empirical statement that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy," and independent spending which is uncoordinated with a candidate cannot give rise to an appearance of corruption because the additional political speech simply seeks to persuade voters who have "the ultimate influence over elected officials."<sup>225</sup>

What explains the Court's incoherent treatment of the effect of independent spending in *Caperton* and *Citizens United*? We can isolate the question more precisely by focusing on Justice Kennedy, the only Justice

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222. *Caperton*, 129 S. Ct. at 2263–64 (emphasis added).

223. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part).

224. *Id.* at 909 (majority opinion).

225. *Id.* at 910.

in the majority in both cases.<sup>226</sup> Though we can only speculate, it may be that Justice Kennedy views the balancing of interests in judicial elections differently, or perhaps does not fully believe the nonnuanced empirical statements about the effects of independent spending on corruption and the appearance of corruption contained in *Citizens United*.

On the interests at stake, Justice Kennedy perhaps has come to reject what Justice Ginsburg, in her dissent in the 2002 case, *Republican Party of Minnesota v. White*,<sup>227</sup> disparagingly termed a “unilocular, an election is an election, approach” to the First Amendment.<sup>228</sup> The Court in *White* involved the question whether certain parts of a speech code for judicial candidates violated the First Amendment. Justice Kennedy was a member of the five-Justice majority holding that it was, but by *Caperton* he had more fully expressed his reservations about judicial elections.<sup>229</sup>

Justice Kennedy’s statements in *Caperton* about the importance of the impartiality of the judiciary and the importance of public faith in that impartiality are in tension with the view of the general relationship of money and politics that he expressed in his *Citizens United* majority opinion, quoting his earlier dissent in *McConnell* and noting that “[f]avoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.”<sup>230</sup>

If Justice Kennedy believes that the role of the judge chosen through a judicial election is different from the role of the representative described above, it would not be surprising for him to reach different conclusions about the connection between money and politics in cases involving judicial elections. If so, it raises hopes that the monolithic approach mandated

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226. The four Justices concurring in Justice Kennedy’s *Citizens United* majority opinion dissented in *Caperton*; the four *Citizens United* dissenters joined his majority opinion in *Caperton*.

227. 536 U.S. 765 (2002).

228. *Id.* at 805 (Ginsburg, J., dissenting) (internal quotation marks omitted) (“I do not agree with this unilocular, ‘an election is an election,’ approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons.”).

229. Justice O’Connor was also a member of the *White* majority. She has since expressed regret about her vote in that case, and has been one of the leading voices calling for judicial elections to be abolished. Tony Mauro, *Court backs N.Y. judicial-election system despite concerns*, FIRST AMENDMENT CENTER (Jan. 17, 2008), <http://www.firstamendmentcenter.org/analysis.aspx?id=19565>. It was no coincidence that Justice Stevens cited Justice O’Connor’s statements about the problems of money in judicial elections in his *Citizens United* dissent. *See Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part) (“At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, e.g., O’Connor, Justice for Sale, Wall St. Journal, Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as *Amici Curiae* 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”).

230. *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part)). Justice Kennedy added, “It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” *Id.*

by *Citizens United* may have more flexibility than it appears on the surface,<sup>231</sup> and the rule could erode over time at least as to some elections.<sup>232</sup>

The other possibility, overlapping with the first, is that Justice Kennedy does not quite believe the flat-out empirical statements about the relationship between independent spending on the one hand and corruption and its appearance on the other. I explore this possibility further in the final Section of this Part.

### C. Contribution Limitations

The tension between the Supreme Court's treatment of contributions and expenditures is nothing new,<sup>233</sup> but the *Citizens United* Court puts serious pressure on the doctrinal edifice of campaign finance law. The result of a future challenge to campaign contribution laws will be either erosion of the rules upholding the constitutionality of campaign contribution limitations to candidates or, more likely, greater incoherence in judicial doctrine. As I will show, to mask the tension, the Court appears to have deployed contradictory evidentiary presumptions.

The *Citizens United* majority went out of its way to state that its opinion did not have direct implications for the constitutionality of contribution limitation laws. Contribution limits "have been an accepted means to prevent *quid pro quo* corruption," and *Citizens United* "has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."<sup>234</sup> The Court explained that "[t]he *Buckley* Court recognized a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption.' This followed from the Court's concern that large contributions could be given

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231. In James J. Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 NYU ANNUAL SURVEY AM. L. (forthcoming 2011), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1662630](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662630), Professor Sample refers to independent spending made in the judicial elections context as a "*Caperton* contribution." He praises Justice Kennedy's rejection of "formalism" in holding that such a "contribution" should trigger judicial recusal. *Id.* Whether or not one agrees with the result in *Caperton* (as I do), relabeling independent spending as a "contribution" so as to reach a desired result will only increase the incoherence of existing law. For example, it would raise questions such as when other expenditures should doctrinally be treated as "contributions." One defensible way to reach the result in *Caperton* without resorting to incoherent terminology would be to recognize that independent spending does have the potential to corrupt, but that outside the context of judicial elections where we are concerned especially with the public's confidence in the fairness of the judicial process, the state's interest in preventing such corruption is outweighed by the considerable First Amendment costs of limiting such spending. I suspect that is what Justice Kennedy believes, and it is unhelpful to hide behind a "contribution" label.

232. Another question is whether the Court might view the First Amendment application to state elections more leniently than its application to federal elections. The existing empirical evidence casts doubt on the likelihood of this scenario. Adam Winkler found in a study of federal court decisions in a fourteen-year period that free speech laws were more likely to be upheld if passed by the federal government, and less so if passed by state, or especially local, governments. Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153 (2009).

233. LOWENSTEIN ET AL., *supra* note 24, at 707-13 (describing controversy since *Buckley* over the contribution-expenditure distinction).

234. *Citizens United*, 130 S. Ct. at 909.

‘to secure a political *quid pro quo*.’”<sup>235</sup> It further explained that “restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements. The *Buckley* Court, nevertheless, sustained limits on direct contributions to protect against the reality or appearance of corruption.”<sup>236</sup>

On the surface the Court appears to have carved out a safe harbor for contribution limitations to candidates. But there is tension just below the surface. In *Buckley*, the Court recognized that bribery laws only dealt with the most egregious exchanges of money for political outcomes, and that campaign contribution limitations were justified because of the concern about undue influence that extended far beyond concern about quid pro quo corruption.<sup>237</sup> Contribution limitations have been treated as prophylactic, necessary to prevent both corruption, rather broadly defined, and preserve voter confidence in the integrity of the electoral process.

For years, those challenging contribution limits have argued that the Supreme Court should read the definition of corruption narrowly and should require actual evidence that contribution limitations are necessary to prevent corruption or its appearance.<sup>238</sup> The Court has repeatedly rejected such arguments, using deferential standards to judge the constitutionality of contribution limitations,<sup>239</sup> with a broad reading of the term “corruption” and an extremely lax evidentiary standard.<sup>240</sup>

This entire approach is now in considerable tension with the Court’s dicta in *Citizens United*. If access and ingratiation are not corruption and corruption is really limited to quid pro quo corruption,<sup>241</sup> then contribution limitations would appear to be in serious danger of being struck down. As Heather Gerken argued, the *Citizens United* dicta evincing a stingy definition of corruption could have implications well beyond imposing spending limits on corporations.<sup>242</sup>

But a majority of the Court is unwilling to apply its own view of corruption to contribution limitations, at least not yet. This became clear in the *Citizens United* Court’s discussion of a relatively obscure Supreme Court

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235. *Id.* at 901 (citations omitted).

236. *Id.* at 908 (citations omitted).

237. *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976) (per curiam).

238. See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 427–30 (2000) (Thomas, J., dissenting).

239. E.g., *id.* at 390–95 (majority opinion). The only significant crack in this treatment thus far came in the Court’s fractured decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), striking down Vermont’s contribution limits as unconstitutionally low, but the controlling opinion there did not purport to alter the Court’s fundamental approach to contribution limitations.

240. See Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing That Wouldn’t Leave,”* 17 CONST. COMMENT. 483, 491–96 (2000).

241. See *supra* notes 104, 111 and accompanying text.

242. Heather K. Gerken, *The Real Problem with Citizens United*, AM. PROSPECT (Jan. 22, 2010), [http://www.prospect.org/cs/articles?article=the\\_real\\_problem\\_with\\_citizens\\_united](http://www.prospect.org/cs/articles?article=the_real_problem_with_citizens_united).

campaign finance case, *NRWC*.<sup>243</sup> In *Citizens United*, the Court distinguished *NRWC*, which held that a nonprofit corporation could be limited in terms of whom it could solicit to contribute to its PAC. As *Citizens United* explained, the Court in *NRWC*, relying upon *Bellotti* footnote 26, “did say there is a ‘sufficient’ governmental interest in ‘ensur[ing] that substantial aggregations of wealth amassed’ by corporations would not ‘be used to incur political debts from legislators who are aided by the contributions.’”<sup>244</sup>

Taking the rest of *Citizens United* seriously, the *NRWC* dicta appeared to be in serious danger. Under the *Citizens United* framework, it is hard to see the corruption potential of even substantial aggregations of wealth amassed by corporations contributed to PACs. At least as to independent spending by such PACs, the Court has flatly said that it cannot create political debts. Moreover, the group at issue in *NRWC* was a nonprofit corporation, which had no substantial aggregations of wealth. So how could *NRWC* survive *Citizens United*?

The Court punted on this issue. It stated that *NRWC* has “little relevance here” because the case “involved contribution limits, which unlike limits on independent expenditures have been an accepted means to prevent *quid pro quo* corruption.”<sup>245</sup>

The brief aside on *NRWC* shows the Court’s apparent strategy: keep the evidentiary standard on proving corruption low and the definition of corruption loose when it comes to considering the constitutionality of contribution limitations, but keep the evidentiary standard impossibly high and the definition of corruption extremely narrow when it comes to considering the constitutionality of spending limitations. This kind of evidentiary stacking-the-deck allows the Court to maintain the contribution-expenditure dichotomy, and it does so without the Court having to confront the more difficult doctrinal questions, like whether spending limits could ever be justified using strict scrutiny under the looser definition of corruption applied in the contribution limits cases.

Incoherent? Of course; but it is sustainable so long as the Court is willing to ignore gaps in logic and inconsistencies in its treatment of similar issues as it decides future campaign finance cases.

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243. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197 (1982). The case gets little treatment in the two leading casebooks. Of the 280 pages on campaign finance in the Lowenstein, Hasen, and Tokaji casebook, *NRWC* is discussed on three pages (795, 796, and 844). LOWENSTEIN ET AL., *supra* note 24, at 795–96, 844. The case does not appear in the index of SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (3d ed. 2007).

244. *Citizens United v. FEC*, 130 S. Ct. 876, 909 (quoting *NRWC*, 459 U.S. at 207–08).

245. *Id.* (citations omitted). The Court further explained that “Citizens United has not made direct contributions to candidates and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.” *Id.* Moreover, the Court, in explaining *Buckley*’s holding that contribution limitations could be imposed to prevent *quid pro quo* corruption, explained that “restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption.” *Id.* at 908 (citations omitted).

## III. DOCTRINAL INCOHERENCE, POLITICAL COHERENCE?

The present and likely future incoherence of campaign finance doctrine surely was not lost on the *Citizens United* majority. Justice Stevens wrote in his dissent of the Court's inconsistent treatment of *Bellotti* footnote 26, which left open the question whether limits on independent corporate spending could be justified on grounds of preventing quid pro quo corruption. He wrote that the Court was in "the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*. *Bellotti*, apparently, is both the font of all wisdom and internally incoherent."<sup>246</sup> The majority had no response to this point.

Incoherence is nothing new in the Supreme Court's campaign finance decisions, and the post-*Citizens United* jurisprudence is not necessarily more incoherent than the pre-*Citizens United* jurisprudence. Before *Citizens United*, of course, *Austin* lived uncomfortably with *Bellotti*. Moreover, the Court's application of *Austin* itself was internally incoherent. For example, the antidistortion rationale was premised upon limiting the influence of large amounts of wealth accumulated with the corporate form. Yet in *McConnell*, the Supreme Court upheld the extension of *Austin* to labor unions without so much as a word of recognition that unions do not accumulate wealth in the same way as corporations do, much less a justification for the extension.<sup>247</sup>

While no one besides the Justices can say for sure why almost all of them have been willing to sustain various kinds of incoherence in campaign finance jurisprudence for so many years,<sup>248</sup> one promising possibility is that Justices have tempered their legal theories with a political sensibility. Leaving to one side the question whether the Supreme Court generally follows public opinion,<sup>249</sup> the pattern in the campaign finance field has been one of compromise that appears to, if not track the center of public thinking on campaign finance questions, at least avoid the extremes. Thus, the Court's equal treatment of corporate and labor union campaign spending in *McConnell* echoed the parallel treatment of these groups by Congress since the 1940s. One of the major talking points against the proposed DISCLOSE Act,<sup>250</sup> which seeks to increase certain disclosure requirements and limit spending by certain corporations that are foreign, government contractors, or recipients of recent financial "bailouts," is that it treats labor unions more

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246. *Id.* at 959 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 925 (Roberts, C.J., concurring) ("We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues.").

247. *See supra* note 50 and accompanying text.

248. Justice Thomas appears to be the lone exception among current Justices. *See* Hasen, *supra* note 142.

249. *See generally* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009); PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008).

250. S. 3295, 111th Cong. (2d Sess. 2010); H.R. 5175, 111th Cong. (2d Sess. 2010).

favorably than corporations.<sup>251</sup> In addition, my understanding as to why labor unions did not raise the argument in *McConnell* that *Austin* distortion did not apply to unions was a fear that if the Court agreed, but kept the corporate spending limits in place, Congress would be pressured to remove the corporate spending limits legislatively because of this lack of parity. The Court's parallel treatment of labor unions and corporations was legally incoherent but politically coherent.

Similarly, the exemption from the PAC requirement for media corporations engaged in bona fide media activities was a constant source of complaint of incoherence by opponents of the *Austin* rule. The *Citizens United* dissent described it as a Catch-22 problem for *Austin* supporters.<sup>252</sup> During the *Austin* era, the Court's inconsistent treatment of media corporations was arguably legally incoherent (though the point is debatable<sup>253</sup>) but politically coherent: neither Congress nor the public would support spending limitations on media corporations engaged in media activities, but they would support limits on non-media corporations' election-related spending.

To make the point more generally,<sup>254</sup> the Court's campaign finance jurisprudence has been conducted on a background of ideological struggle, bounded at its extremes by public opinion. Since the 1970s the campaign finance reform proponents and opponents have been engaged in a battle to win the hearts of the Supreme Court Justices. The reformers, hearkening back to Watergate, tell a story about politicians tempted to exchange dollars for political favors and a public growing ever more cynical about the integrity of government, as each new campaign finance scandal hits the newspapers, airwaves, and blogs. They also focus on the very large amounts of money flowing into the system, particularly from groups that can plausibly be labeled "special interests." The opponents paint campaign finance regulation as a big incumbent protection racket, in which incumbent politicians enact election laws to benefit themselves and insulate themselves from

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251. See, e.g., Bradley A. Smith, *Disclosed Partisanship*, NAT'L REV., June 7, 2010, at 26, 27, available at <http://article.nationalreview.com/434739/disclosed-partisanship/bradley-a-smith?page=1> ("DISCLOSE's partisanship is apparent in its different treatment of corporations and unions.").

252. Justice Stevens acknowledges this Catch-22:

Under the majority's view, the legislature is thus damned if it does and damned if it doesn't. If the legislature gives media corporations an exemption from electioneering regulations that apply to other corporations, it violates the newly minted First Amendment rule against identity-based distinctions. If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.

*Citizens United v. FEC*, 130 S. Ct. 876, 976 n.75 (2010) (Stevens, J., concurring in part and dissenting in part).

253. The point is debatable if one recognizes the different role media corporations play in society. See *supra* note 149 and accompanying text.

254. I describe the competing stories in historical terms in Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* (Richard W. Garnett & Andrew Koppelman, eds.) (forthcoming 2010), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1593253](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593253).

competition and criticism. To these opponents, campaign finance regulation is the modern day equivalent of the Alien and Sedition Acts.

On the Court, thus far the liberals have taken the reform side and conservatives have taken the opponents' side.<sup>255</sup> But neither side has adopted the more extreme vision of campaign finance jurisprudence proposed by either the reformers or the opponents. Though a few of the liberal Justices have entertained the notion that some individual spending limits beyond corporate spending limits could be constitutional,<sup>256</sup> they have not had to face that question in a case in which the issue mattered.<sup>257</sup> It might not be legally coherent to say that corporations may be limited in their spending but wealthy individuals may not be, but the liberals on the Court had been content with their half a loaf.

Similarly, whether the conservatives on the Roberts Court now would be willing to overrule *Buckley* and allow unlimited contributions directly to candidates is seriously questionable, despite the language of *Citizens United* that gives the Court a way to reach that result if it chooses to do so. A Supreme Court majority likely would be wary of recognizing an individual First Amendment right to give multimillion dollar contributions directly to federal candidates and officeholders. Such recognition would certainly reignite public ire at the Court, especially after the next inevitable campaign finance scandal.

If 80% of the public “oppose[s] the recent ruling by the Supreme Court that says corporations and unions can spend as much money as they want to help political candidates win elections,”<sup>258</sup> how many people would welcome

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255. It is not at all clear that Justice Kagan will side with the other liberals on the campaign finance issue. See Richard L. Hasen, *The Big Ban Theory*, SLATE (May 24, 2010, 12:16 PM), <http://www.slate.com/id/2254830/> (describing position of then-Solicitor General Elena Kagan on campaign finance reform issues).

256. See *Citizens United*, 130 S. Ct. at 963 n.65 (Stevens, J., concurring in part and dissenting in part).

257. In *Randall v. Sorrell*, 548 U.S. 230, 240–44 (2006), the Court, applying *Buckley*, refused to reconsider the unconstitutionality of candidate spending limits.

258. ABC News/Washington Post Poll Results, ABC NEWS, <http://abcnews.go.com/images/PollingUnit/1102a6Trend.pdf> (last visited Oct. 24, 2010). Significantly, the Court's ruling in *Citizens United* was opposed by 76% of Republicans polled and 73% of conservatives. Gary Langer, *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABC NEWS (Feb. 17, 2010, 7:00 AM), <http://blogs.abcnews.com/thenumbers/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents.html>. Two other polls reached similar, though not quite as strong, results. News Release, The Pew Research Ctr. For The People & The Press, *Midterm Election Challenges for Both Parties*, 31 (Feb. 12, 2010), available at <http://people-press.org/reports/pdf/589.pdf> (68% disapproval of *Citizens United* decision compared to 17% approval); Fox News Poll: *Opinion Dynamics*, FOX NEWS (Feb. 4, 2010), [http://www.foxnews.com/projects/pdf/020410\\_Obama-Washington\\_web.pdf](http://www.foxnews.com/projects/pdf/020410_Obama-Washington_web.pdf) (report which specifically mentioned the First Amendment rights of corporations found the *Citizens United* decision opposed by 53% of respondents, with 27% approving). The only poll of which I am aware to reach a somewhat contrary result, conducted for the Center for Competitive Politics, asked the question, “Do you believe that the government should have been able to prevent *Citizens United*, an incorporated nonprofit advocacy group, from making its movie available through video-on-demand technology?” *Citizens United poll shows broad support for free political speech*, CTR. FOR COMPETITIVE POL. (Mar. 4, 2010), [http://www.campaignfreedom.org/docLib/20100304\\_CCPpoll03042010.pdf](http://www.campaignfreedom.org/docLib/20100304_CCPpoll03042010.pdf) (19% said yes and just over 51% said no). The poll did not ask about a PAC

a ruling allowing direct corporate contributions to candidates? A Gallup poll conducted right after the Court decided *Citizens United* found that although a majority of Americans believed that giving campaign contributions is a form of free speech and that the corporations, labor unions, and others should be subject to the same campaign finance rules as individuals, 76% of respondents supported corporate and labor union contribution limits, and 61% supported individual contribution limits.<sup>259</sup> In the same poll, a majority of Americans thought it was more important to limit campaign donations than to protect free speech rights.<sup>260</sup>

Although these findings would likely give the Justices considerable pause before overturning core campaign contribution limitations, it does not mean that the Court's campaign finance jurisprudence is likely to remain stagnant. Campaign finance issues are barely understood by the public and generally not a national priority.<sup>261</sup> Only extreme opinions like *Citizens United* are likely to get the public's attention. Assuming this same five-Justice majority stays on the Court, the Justices will be presented with many less-salient ways to loosen the campaign finance rules.<sup>262</sup> However, complete deregulation, along the lines proposed by Justice Thomas, would take political courage to issue additional politically unpopular decisions. It is not clear that there are five Justices willing to spend considerable goodwill and political capital on such a strategy.

If my main supposition is correct—that the Court's jurisprudence will vary within a wide range, but is likely constrained at its edges more by political considerations than legal coherence—this presents a challenge for lawyers arguing before the federal courts. Lawyers generally argue doctrine, not politics, and a Supreme Court Justice or federal judge can seize on an

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requirement imposed on corporations generally. *Id.* Nor did its question explain that Citizens United could have used its PAC to pay for making its movie available. *Id.*

259. Lydia Saad, *Public Agrees With Court: Campaign Money Is "Free Speech,"* GALLUP, (Jan. 22, 2010), <http://www.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx>.

260. *Id.* (52 percent to 41 percent).

261. See David M. Primo, *Public Opinion and Campaign Finance: Reformers Versus Reality*, 7 INDEP. REV. 207, 210, 212 (2002), available at <http://www.rochester.edu/college/psc/primo/primoindev.pdf>.

262. A federal district court recently rejected the Republican National Committee's "as applied" challenge to the BCRA's soft money rules. *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (three-judge court). The district court held the claims indistinguishable from the ones rejected in *McConnell*, but added the following observation:

In due course, the Supreme Court will have the opportunity to clarify or refine this aspect of *McConnell* as the Court sees fit, and to consider the RNC's challenge to § 323(a) in light of the RNC's pledge to no longer grant preferential access to soft-money contributors. As a lower court, however, we do not believe we possess authority to clarify or refine *McConnell* in the fashion advocated by the RNC, or to otherwise get ahead of the Supreme Court.

*Id.* at 160. The Supreme Court summarily affirmed the district court decision. *Republican Nat'l Comm. v. FEC*, 130 S. Ct. 3544 (2010). Justices Kennedy, Scalia, and Thomas would have heard the case. *Id.* If the RNC refiles its case as a straightforward facial challenge to *McConnell*'s soft money holding, I would be unsurprised if the Court took the case and then either overturned *McConnell* or whittled it away first, along the lines of *WRTL II*.

inconsistency within campaign finance doctrines to reject a doctrinal argument. Moreover, if Supreme Court doctrine is incoherent, lower court judges may be at a loss as to how to apply it,<sup>263</sup> and the judges' general political views about the wisdom of the reform or opponent's story about campaign finance regulation could subconsciously sway campaign finance decisions. As John Matsusaka and I note in another context, the more room there is in judicial doctrine for judgment calls, the more likely it is that a judge's ideological views color the doctrinal analysis.<sup>264</sup>

In short, in campaign finance law there remains a lot of play in the joints even as the Supreme Court moves in a decidedly deregulationist direction. My worst fears<sup>265</sup> of a completely deregulated campaign finance system may not be realized, so long as the Justices care about what the public thinks, to some extent.

### CONCLUSION

In her commentary on the Supreme Court's deferential decision in *McConnell v. FEC*,<sup>266</sup> Lillian BeVier was feeling "quite thoroughly vanquished" by the Court's opinion, which stood at odds with her scholarly writing supporting deregulation.<sup>267</sup> The question now is what supporters of reasonable campaign finance regulation can contribute to the debate in light of *Citizens United*. My contribution in this Article has been to demonstrate that the *Citizens United* majority opinion is far less pure and coherent than its packaging suggests. This recognition has both practical and theoretical consequences. Practically, it provides some guidelines for reformers to whittle down the decision through exposing incoherence that can move doctrine more favorably back toward the center. Theoretically, it illustrates the political context in which the Court works and the likely limits of the Court's doctrinal shifts. It also suggests that public pressure on the Supreme Court for unpopular decisions, as currently led by President Obama,<sup>268</sup> may ultimately influence the Court not to move to full and total deregulation of the campaign finance system.

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263. In *Majors v. Abell*, 361 F.3d 349, 355–58 (7th Cir. 2004), Judge Easterbrook, issuing a separate opinion *dubitante*, lamented the lack of guidance from the Supreme Court on its campaign finance disclosure jurisprudence. After reviewing the contradictory caselaw, he remarked, "How can legislators or the judges of other courts determine what is apt to tip the balance?" *Id.* at 357 (Easterbrook, J., *dubitante*). Judge Easterbrook wrote before *Citizens United*, and *Doe v. Reed* clarified the general constitutionality of campaign finance disclosure regimes.

264. John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399 (2010).

265. See Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669 (2006).

266. 540 U.S. 93 (2003).

267. See Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 127 (2004).

268. On President Obama's attacks on the Court as part of a political strategy, see Richard L. Hasen, *Scalia's Retirement Party*, SLATE (Apr. 12, 2010, 3:55 PM), <http://www.slate.com/id/2250579/>.

Other than that, supporters of campaign finance reform may have to wait another generation and a change in Supreme Court personnel for the opportunity to overturn *Citizens United*, just as deregulationists have fought *Austin* at every opportunity since 1990. If the opportunity comes to overturn *Citizens United*, I do not expect the decision to be a model of coherence.

