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## *Citizens United*: How The New Campaign Finance Jurisprudence Has Been Shaped By Previous Dissents

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# ***Citizens United*: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents**

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I. INTRODUCTION .....	293
II. SETTING THE STAGE: BCRA, ELECTIONEERING COMMUNICATIONS, AND THE BEGINNING OF A TREND .....	296
A. <i>Background of BCRA</i> .....	296
B. <i>WRTL II and Davis</i> .....	297
III. <i>CITIZENS UNITED</i> .....	300
IV. FIRST AMENDMENT FRAMEWORK .....	303
V. NARROWING THE SCOPE OF ALLOWABLE STATE INTERESTS .....	307
A. <i>The Anti-Distortion Interest</i> .....	307
B. <i>Corruption and the Appearance of Corruption</i> .....	311
C. <i>Shareholder Protection</i> .....	316
D. <i>The Level Playing Field</i> .....	317
VI. CONCLUSION .....	319

## I. INTRODUCTION

“A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”<sup>1</sup> Should such an appeal prove successful, and a later composition of the court adopt the position advocated by the previous dissenter, the dissent takes on a second, reciprocal function by allowing observers of the later court to trace the origins of a development in the law. In the years since Chief Justice Roberts and Justice Alito joined the Supreme Court, this concept has perhaps been no better illustrated than in the Court’s campaign finance jurisprudence. Beginning with its decisions in *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*<sup>2</sup> and *Davis v. FEC*,<sup>3</sup> and culminating with its most recent decision in *Citizens United*

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1. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1936), quoted in Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990).

2. 551 U.S. 449 (2007).

3. 128 S. Ct. 2759 (2008).

v. *FEC*,<sup>4</sup> the Court has effectively channeled the dissents of its current and former members in creating a new majority position that is centered on a robust protection of free speech rights.<sup>5</sup>

Campaign finance regulations implicate both the First Amendment<sup>6</sup> and Congress's power to "make or alter" regulations for the governance of federal elections.<sup>7</sup> In the arena of campaign finance, the Court has split into two readily identifiable factions,<sup>8</sup> each of which have implicitly adopted one of the above constitutional provisions as a baseline.<sup>9</sup> Chief Justice Roberts articulated his baseline succinctly in *WRTL II*, writing that "[t]hese cases are about political speech."<sup>10</sup> To Justice Souter, by contrast, the case was about "the integrity of democratic government."<sup>11</sup> The purpose of this article is to examine the development of the "political speech" baseline, in terms of its articulation in previous dissents, of how the *WRTL II* and *Citizens United* majorities incorporated it into those opinions, and of the implications for future First Amendment challenges to campaign finance regulations.

Although challenges other than those based on the First Amendment are sometimes brought,<sup>12</sup> this article focuses on First Amendment claims. Accordingly, the focus will be on regulations that limit independent expenditures used to finance speech, as such regulations have long been held to implicate free speech concerns more so than do regulations that limit contributions, disclosures, etc.<sup>13</sup> It is this speech-expenditure relationship that was at issue in both *WRTL II* and *Citizens United*. In

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

5. *See id.* at 942 (Stevens, J., dissenting) (characterizing majority opinion as "essentially an amalgamation of resuscitated dissents"). *See also* Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin Right to Life*, 27 ST. LOUIS U. PUB. L. REV. 267 (2008) (characterizing the Court's decision in *WRTL II* as the adoption of the previous dissenters' "political speech framework").

6. U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

7. U.S. CONST. art. I, § 4. *See also* *Buckley v. Valeo*, 424 U.S. 1, 13–14 (1976) (identifying the issue as whether Congress interfered with First Amendment freedoms in exercising its power to regulate federal elections).

8. Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito on one side, and Justices Stevens, Souter, Ginsburg, and Breyer on the other. Justice Sotomayor appears to have joined the latter group.

9. *See* Hill, *supra* note 5, at 268–69 (characterizing the competing baselines as a "political speech framework" and a "democratic integrity framework").

10. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007) (opinion of Roberts, C.J.).

11. *Id.* at 536 (Souter, J., dissenting).

12. *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93, 134 (2003) (listing, *inter alia*, federalism and equal protection challenges), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

13. *See* *Buckley v. Valeo*, 424 U.S. 1, 20–21, 23 (1976) (*per curiam*) (explaining that limitations on expenditures impose "significantly more severe restrictions on protected freedoms of political expression" than do limits on contributions because, *inter alia*, the latter type of limitation does not "infringe the contributor's freedom to discuss candidates and issues").

each case, the claimants brought a First Amendment challenge to the validity of section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited corporations from spending general treasury funds to finance “electioneering communications.”<sup>14</sup> Thus, the bulk of the analysis will focus on that provision, with other provisions to be introduced as necessary.

Part II of this article serves to provide a brief background of BCRA and of section 203. It also includes a brief discussion of the Court’s decisions in *WRTL II* and in *Davis*. Part III discusses the Court’s opinion in *Citizens United*. Part IV is devoted to a discussion of why the First Amendment was implicated by the electioneering-communications provision of BCRA. Part V, which analyzes how the Court incorporated previous dissents into its holdings, is split into several subparts, each devoted to a discussion of a particular asserted state interest. The purpose of organizing the analysis in this way is to identify how the new majority position views these interests, which may result in the identification of at least a somewhat uniform approach to adjudicating First Amendment challenges to campaign finance laws. Thus, Part V-A discusses the interest in combating the “corrosive and distorting effects of immense aggregations of wealth”;<sup>15</sup> Part V-B discusses the interest in preventing corruption or the appearance thereof;<sup>16</sup> Part V-C discusses the interest in protecting shareholders from having their money spent “to support political candidates to whom they may be opposed”;<sup>17</sup> and Part V-D discusses the interest in “leveling the playing field” by equalizing resources.<sup>18</sup> Part VI concludes.

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14. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, § 203, 116 Stat. 81, 91 (codified at 2 U.S.C. §§ 441b(b)(2), (c)(1)–(5) (2006)), *invalidated by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

15. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

16. *See, e.g., McConnell*, 540 U.S. at 143 (asserting such an interest as justification for contribution limits); *see also* *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985)) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”).

17. *See* *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982)).

18. *See* *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008).

## II. SETTING THE STATE: BCRA, ELECTIONEERING COMMUNICATIONS, AND THE BEGINNING OF A TREND

### A. Background of BCRA

BCRA<sup>19</sup> represents the latest in a line of campaign finance reforms dating to the Tillman Act of 1907.<sup>20</sup> The provisions of BCRA were enacted as amendments to the Federal Election Campaign Act of 1971 (FECA).<sup>21</sup> The “central provisions” of BCRA were “designed to address Congress’ concerns about the increasing use of soft money<sup>22</sup> and issue advertising to influence federal elections.”<sup>23</sup> In *McConnell v. FEC*, the Court upheld numerous provisions of BCRA, including section 203, against facial challenges.<sup>24</sup> However, the Court in *Citizens United* has now overruled the part of *McConnell* that upheld section 203.<sup>25</sup>

Section 203 of BCRA prohibited corporations from financing “electioneering communications” with general treasury funds.<sup>26</sup> An “electioneering communication” is defined as “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office”; is made within sixty days before a general election, or thirty days before a primary election, for the office sought by the candidate; and “in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.”<sup>27</sup> In the case of a presidential or vice presidential candidate, the “targeting” criterion is met when the communication can

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19. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

20. Tillman Act, Pub. L. No. 59-36, 34 Stat. 864-65 (1907). The Tillman Act has been referred to as “the first federal campaign finance law.” *Beaumont*, 539 U.S. at 152 (quoting ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW xvii (1988)).

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

22. “Soft money” refers to funds that are not subject to FECA’s disclosure requirements and source and amount limitations. *See McConnell v. FEC*, 540 U.S. 93, 122-23 (2003). *Citizens United* involved only independent expenditures and thus left untouched BCRA’s limitations on contributions to political parties, also known as soft-money bans. *See RNC v. FEC*, 698 F. Supp. 2d 150, 153 (D.D.C. 2010), *aff’d*, 130 S. Ct. 3544 (2010). The court in *RNC* relied on *McConnell* in holding that large soft-money contributions could be prohibited even if used to fund issue advertisements. *Id.* at 157. The effect of the Supreme Court’s affirmance is that “outside groups,” including corporations, have an advantage over political parties in that only the former “may receive unlimited donations both to advocate in favor of federal candidates and to sponsor issue ads.” *Id.* at 160 n.5.

23. *Id.* at 132.

24. *Id.* at 209.

25. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

26. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified at 2 U.S.C. §§ 441b(b)(2), (c)(1)-(5) (2006)).

27. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(a), 116 Stat. 81, 89 (codified at 2 U.S.C. § 434(f) (2006)).

be received by at least 50,000 people in the United States (starting from thirty days before the national nominating convention), or by at least 50,000 people in a state in which a primary election is being held within thirty days.<sup>28</sup>

While corporations were prohibited from funding electioneering communications with general treasury funds, they could do so via segregated funds known as political action committees (PACs).<sup>29</sup> However, corporations generally may not solicit contributions to their PACs from anyone other than their stockholders, executive and administrative personnel, and their families.<sup>30</sup> Certain nonprofit corporations were exempt from the “electioneering communications” provisions.<sup>31</sup> Among other characteristics, such corporations had to be organized solely for the promotion of political ideas, could not engage in political activities, and could not accept donations from for-profit corporations.<sup>32</sup>

### B. WRTL II and Davis

Although the Court in *McConnell* held that section 203 was not invalid on its face, the Court in *Wisconsin Right to Life, Inc. v. FEC* (WRTL I) clarified that as-applied challenges were still available.<sup>33</sup> In WRTL II, the Court entertained such a challenge. Wisconsin Right to Life (WRTL) was a “nonprofit, nonstock, ideological advocacy corporation” with tax-exempt status under section 501(c)(4) of the Internal Revenue Code.<sup>34</sup> WRTL had aired radio advertisements that urged listeners to contact Senators Feingold and Kohl and to tell them to oppose a judicial filibuster.<sup>35</sup> As the ads were paid for with funds from its general treasury, and would thus become subject to the restriction on electioneering communications thirty days before the Wisconsin primary, WRTL sought an injunction and brought a First Amendment challenge.<sup>36</sup>

Although the challenge was successful, no clear majority position emerged. Chief Justice Roberts, joined by Justice Alito, established at

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28. 11 C.F.R. § 100.29(b)(3)(ii) (2009).

29. *McConnell*, 540 U.S. at 204; 2 U.S.C. § 441b(b)(2)(C) (2006).

30. *See* 2 U.S.C. § 441b(b)(4)(A)(i) (2006).

31. *See* 11 C.F.R. § 114.10(d)(2) (2009).

32. 11 C.F.R. § 114.10(c) (2009).

33. 546 U.S. 410, 412 (2006) (per curiam).

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

35. *Id.* at 458–59 (citing *Wis. Right to Life, Inc. v. Fed. Election Comm’n*, 466 F. Supp. 2d 195, 198 n.3 (D.D.C. 2006) (three-judge court), *aff’d*, 551 U.S. 449 (2007)). The relevant portion of the advertisement informed listeners that a “group of Senators” was blocking judicial nominees, and that listeners should “[C]ontact Senators Feingold and Kohl and tell them to oppose the filibuster.”

36. *Id.* at 460.

the outset that section 203 burdened speech and was therefore subject to strict scrutiny.<sup>37</sup> After noting that BCRA survived strict scrutiny “to the extent it regulates express advocacy or its functional equivalent,”<sup>38</sup> Chief Justice Roberts rejected a test for “functional equivalence” that would depend on whether the advertisements were intended to influence voters’ decisions (and on whether they had such an effect).<sup>39</sup> Instead, the following test was devised: “[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>40</sup> Applying this test, the ads were held to be something less than the functional equivalent of express advocacy.<sup>41</sup> The following characteristics were said to suggest issue, as distinct from express, advocacy: The ads (1) urged the adoption of a particular position on an issue; (2) did not mention an election, candidate, or party; and (3) “[did] not take a position on a candidate’s character, qualifications, or fitness for office.”<sup>42</sup>

Justice Scalia, writing for Justices Kennedy and Thomas, went further. In rejecting both an “intent and effects” test and Chief Justice Roberts’ “no reasonable interpretation” test as “impermissibly vague,”<sup>43</sup> those three Justices served notice that their view of the First Amendment would allow little room for the regulation of issue advocacy. Indeed, Justice Scalia’s opinion suggested that there would be three votes for overruling that part of *McConnell* which upheld section 203 on its face, noting that “any clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by § 203 that § 203

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37. *Id.* at 464 (opinion of Roberts, C.J.).

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

39. *Id.* at 468–69; see also *Furgatch v. FEC*, 807 F.2d 857, 863 (9th Cir. 1987) (in defining express advocacy, “[t]he subjective intent of the speaker cannot alone be determinative.”).

40. *Id.* at 469–70. The Ninth Circuit in *Furgatch* had held that “speech need not include any of the words listed in *Buckley* to be express advocacy under the [Federal Election Campaign] Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *Furgatch*, 807 F.2d at 864. The court found that “express” advocacy presents an “unmistakable” message, presents a “clear plea for action,” and makes “clear what action is advocated.” *Id.* *Buckley*’s “magic words” test had provided that express advocacy contained words such as “vote for,” “elect,” “support,” etc. *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). The Court later clarified that express advocacy could be found in communications that were “marginally less direct than “Vote for Smith.” *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). For a criticism of the “magic words” test for express advocacy, see Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here To Stay Under the “Magic Words” Doctrine?*, 10 STAN. L. & POL’Y REV. 33 (1998).

41. *Id.* at 470.

42. *Id.*

43. *Id.* at 492 (opinion of Scalia, J.).

would be rendered substantially overbroad.”<sup>44</sup> Noting that “the First Amendment was not designed to facilitate legislation, even wise legislation,”<sup>45</sup> Justice Scalia appeared to agree with Chief Justice Roberts on at least this much: “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”<sup>46</sup>

One year later, the Court had an opportunity to expand on the more skeptical approach taken in *WRTL II*. In *Davis v. FEC*, the Court considered a challenge to BCRA section 319(a).<sup>47</sup> Section 319(a) provided, inter alia, that when a candidate’s expenditure of personal funds exceeded a certain amount, the candidate’s opponent would be allowed to receive individual contributions at three times the usual limit.<sup>48</sup> Thus, rather than impose a limit on the amount of personal funds a candidate could spend, the provision sought to “level the playing field” by raising the contribution limit for one candidate without doing so for the other. In that sense, it was neither a true expenditure limit nor a typical (i.e. uniform) contribution limit.

The Court first applied a form of intermediate scrutiny, explaining that contribution limits must be “closely drawn” to serve a “sufficiently important interest.”<sup>49</sup> The Court then characterized the asymmetrical contribution limits as “an unprecedented penalty” on a candidate who exercises the First Amendment right “to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.”<sup>50</sup> Accordingly, the Court re-characterized the asymmetrical contribution limit as imposing a substantial burden on First Amendment rights, thereby triggering strict scrutiny.<sup>51</sup> Finally, the Court found no compelling government interest, rejecting the interest in preventing corruption or the appearance of corruption as inapposite to a scheme that would tend to discourage the use of personal funds, and rejecting the purported interest in “leveling the playing field” as entirely illegitimate.<sup>52</sup> In both *Davis* and *WRTL II*, the new majority’s analysis of the various asserted state interests was informed by a skeptical, less deferential approach—one which had long before been articulated, and one which would be cemented in its *Citizens United* decision.

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44. *Id.* at 498.

45. *Id.* at 503.

46. *Id.* at 474 (opinion of Roberts, C.J.).

47. 128 S. Ct. 2759 (2008).

48. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, § 319(a), 116 Stat. 81, 109 (codified at 2 U.S.C. § 441a–1 (2006)), *invalidated by* *Davis v. FEC*, 128 S. Ct. 2759 (2008).

49. *Davis*, 128 S. Ct. at 2770 (2008) (citing *McConnell v. FEC*, 540 U.S. 93, 136 (2003)).

50. *Id.* at 2771 (quoting *Buckley v. Valeo*, 424 U.S. 1, 52 (1976)).

51. *Id.* at 2772 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986)).

52. *Id.* at 2773.



### III. CITIZENS UNITED

Like WRTL, Citizens United is a nonprofit corporation exempt from taxation under 26 U.S.C. § 501(c)(4).<sup>53</sup> In January 2008, it released a film entitled *Hillary: The Movie* (hereinafter *Hillary*), a movie which was said to be “quite critical” of then-Senator Clinton.<sup>54</sup> Citizens United sought to make the movie available through video-on-demand, and to promote the film by airing advertisements on broadcast and cable television.<sup>55</sup> Realizing that the film and the ads would likely be prohibited by section 203’s ban on electioneering communications should they be aired within thirty days of the 2008 primary elections, Citizens United sought declaratory and injunctive relief.<sup>56</sup>

Although the Court ultimately invalidated section 203 on its face, the challenge was brought in as-applied form.<sup>57</sup> Justice Kennedy, writing for the Court, concluded that the case could not be resolved under any of Citizens United’s proposed narrow grounds “without chilling political speech.”<sup>58</sup> The Court first made short shrift of the argument that the film was not “publicly distributed” (and therefore did not qualify as an electioneering communication) because a single video-on-demand transmission would be seen by only one household.<sup>59</sup> Citing a regulation that provided that “the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area,” the Court held that *Hillary* was an electioneering communication on the ground that it could have been viewed by at least 50,000 people (because the video-on-demand system “had 34.5 million subscribers nationwide”).<sup>60</sup>

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53. Brief for Appellant at 5, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205).

54. *Citizens United*, 130 S. Ct. at 887.

55. *Id.* The video-on-demand system “allows digital cable subscribers to select programming from various menus” and enables viewers to “watch the program at any time” and to rewind or pause the program.

56. *Id.* at 888.

57. See Brief for Appellant, *supra* note 53, at i (identifying the question presented as whether section 203 could “constitutionally be applied to a feature-length documentary film about a political candidate funded almost exclusively through noncorporate donations and made available to digital cable subscribers through Video On Demand”).

58. *Citizens United*, 130 S. Ct. at 892.

59. *Id.* at 888–89.

60. *Id.* at 889 (citing 11 C.F.R. §§ 100.29(b)(7)(i)(G), 100.29(b)(3)(ii) (2009)). The American Civil Liberties Union had argued in its amicus brief that whether a communication could be received by at least 50,000 people required “a plausible likelihood that the communication will be viewed by 50,000 or more potential voters.” See Supplemental Brief of Former Officials of the American Civil Liberties as Amici Curiae at 5, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (No. 08-205). The Court rejected such a standard and noted that an “inaccurate estimate” of the number of people a communication is likely to reach would “potentially subject[ ] the speaker to criminal sanctions.” *Citizens United*, 130 S. Ct. at 772. As it did in much of its opinion, the Court focused on the potential chill of free speech in noting that “[t]he First

The Court then addressed the argument that *WRTL II* mandated *Hillary*'s exclusion from the electioneering communications provision. Under Chief Justice Roberts' controlling test in *WRTL II*,<sup>61</sup> however, the movie was deemed "equivalent to express advocacy" because it "concentrate[d] on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President."<sup>62</sup> The Court found that the movie could not reasonably be interpreted as anything other than an appeal to vote against then-Senator Clinton in the presidential election.<sup>63</sup> Thus, the movie and promotional advertisements still would have fallen within section 203's restrictions.

Citizens United then argued that movies viewed through the video-on-demand system had a "lower risk of distorting the political process than do television ads."<sup>64</sup> However, the Court "decline[d] to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."<sup>65</sup> Given the rapid development of new technologies, the Court predicted that a First Amendment standard that depended on analysis of such technologies would not only be flawed, but would result in protracted litigation that would itself impermissibly chill political speech.<sup>66</sup>

Finally, the Court rejected a proposed exception "for nonprofit corporate political speech funded overwhelmingly by individuals."<sup>67</sup> Although the Court had previously invalidated expenditure limitations as applied to nonprofit corporations "that were formed for the sole purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit corporations or labor unions,"<sup>68</sup> it declined to extend this holding to nonprofits that accepted only a minimal amount of contributions from for-profit corporations.<sup>69</sup>

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Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Id.*

61. "[A] court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 889–90 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007) (opinion of Roberts, C.J.)) (alterations in original).

62. *Id.* at 890.

63. *Id.* This finding was amply supported, given that the movie's closing line stated as follows: "Finally, before America decides on our next president, voters should need no reminders of . . . what's at stake—the well being and prosperity of our nation."

64. *Id.*

65. *Id.* at 891.

66. *Id.*

67. *Id.*

68. *Id.* (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986)). See also 11 C.F.R. 114.10, which was based on the Court's holding in *MCFL*.

69. *Id.* at 891–92.

The Court explained that doing so “would be to allow for-profit corporate general treasury funds to be spent for independent expenditures that support candidates,” thus requiring it to revisit its holding in *Austin v. Michigan State Chamber of Commerce*<sup>70</sup> “that the Government can restrict corporate independent expenditures for political speech.”<sup>71</sup>

Having concluded that *Austin* was implicated by Citizens United’s challenge, and reasoning that the part of *McConnell* that upheld section 203 against facial challenge was based on *Austin*, the Court proceeded to reconsider both holdings.<sup>72</sup> The analysis began by characterizing the prohibition on general-treasury expenditures as “a ban on corporate speech,” the corporation’s ability to utilize a PAC for such speech being discounted because a PAC “is a separate association from the corporation.”<sup>73</sup> This rejection of a PAC as a constitutionally sufficient alternative was pulled directly from Justice Kennedy’s dissent in *McConnell*, in which he argued that should a corporation take advantage of the PAC option, the corporation “as a corporation” would still be prohibited from speaking.<sup>74</sup>

Justice Kennedy’s majority opinion in *Citizens United* then detailed, albeit in dicta, some of the regulatory burdens of establishing and administering a PAC.<sup>75</sup> His dissent in *McConnell* proceeded in the same manner, declining to characterize these reporting and administrative requirements as merely “clerical,” and instead arguing that they “create major disincentives for speech, with the effect falling most heav-

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70. 494 U.S. 652 (1990). *Austin* held that there was a compelling government interest in preventing “the corrosive and distorting effects of immense aggregations for 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.” *Id.* at 660.

71. *Citizens United*, 130 S. Ct. at 891–92.

72. *Id.* at 893–94. The issue of whether the Court should have entertained a facial challenge was a source of considerable division within the Court. Justice Stevens devoted a significant portion of his dissent to the issue, arguing that the case could have been decided on one of the narrower grounds suggested by Citizens United and concluding that the issue of section 203’s facial validity was not properly before the Court. *See id.* at 931–41 (Stevens, J., dissenting). Justice Kennedy likewise spent much of his majority opinion arguing that *Austin* (and by extension, section 203’s facial validity) had to be reconsidered, primarily because of the “chill” on political speech that would result should corporations have to either seek advisory opinions from the FEC or engage in protracted litigation before financing political speech from their general treasuries. *See id.* at 888–96. Finally, Chief Justice Roberts devoted virtually all of his concurring opinion to the issue, concluding that “[t]he First Amendment theory underlying *Austin*’s holding is extraordinarily broad,” and that “the costs of giving [*Austin*] *stare decisis* effect are unusually high” because *Austin* “is so difficult to confine to its facts.” *Id.* at 922–23 (Roberts, C.J., concurring).

73. *Id.* at 897.

74. *McConnell v. FEC*, 540 U.S. 93, 330 (2003) (Kennedy, J., dissenting) (quoting *Austin*, 494 U.S. at 681 (Scalia, J., dissenting)).

75. *See Citizens United*, 130 S. Ct. at 897 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253–54 (1986)).

ily on smaller entities that often have the most difficulty bearing the costs of compliance.”<sup>76</sup> In his *McConnell* dissent, Justice Kennedy gave an example of what might happen to a corporation that had yet to set up a PAC—it would not be able to engage in “spontaneous speech” that identifies a candidate, even if its “vital interests are threatened” by pending legislation.<sup>77</sup> This theme was repeated in his *Citizens United* majority opinion, when he warned that the burdens of establishing and administering a PAC might preclude a corporation from establishing it “in time to make its views known regarding candidates and issues in a current campaign.”<sup>78</sup> And while Justice Scalia’s opinion in *WRTL II* cited Justice Kennedy’s *McConnell* dissent for the proposition that the PAC option was insufficient, Justice Kennedy’s reiteration of the argument in his *Citizens United* opinion represents its unequivocal adoption by a majority of the Court.

Whether the regulation at issue is viewed as a ban or a mere burden, the Court explained that “[l]aws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”<sup>79</sup> The Court applied strict scrutiny even though the speech could be seen as coming from corporations rather than from natural persons, noting that restrictions on speech that distinguish between speakers are prohibited by the First Amendment.<sup>80</sup> Having set the framework for a traditional First Amendment analysis, the Court took aim at *Austin* and its recognition of a compelling state interest in preventing the “distorting effects” of wealth on elections. Before examining the Court’s treatment of that now-discredited state interest, however, it is useful to assess the propriety of applying traditional First Amendment analysis to the political speech of corporations.

#### IV. FIRST AMENDMENT FRAMEWORK

It is often argued that money is not speech,<sup>81</sup> the implication being

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76. *McConnell*, 540 U.S. at 332 (Kennedy, J., dissenting).

77. *Id.*

78. *Citizens United*, 130 S. Ct. at 898.

79. *Id.* (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.)).

80. *Id.* (citing *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)). See Part IV, *infra*, for a discussion of why the application of strict scrutiny was appropriate.

81. See, e.g., J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976) (arguing that “[m]oney . . . may be related to speech, but money itself is not speech,” and that “[c]ourts ought to judge restrictions on giving and spending accordingly.”); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398–99 (2000) (Stevens, J., concurring) (arguing that “[m]oney is property; it is not speech. . . . [and it is therefore] not entitled to the same protection as the right to say what one pleases”).

that a regulation of the money that is used to fund speech is not a regulation of speech itself. As a matter of semantics, it is clear that money is money and speech is speech. However, even a cursory review of the Court's First Amendment jurisprudence makes clear that strict scrutiny is triggered when protected speech is significantly *burdened*—and it is equally clear that speech can be burdened by financial restrictions.<sup>82</sup> Two of the Court's First Amendment opinions, one of which was authored by Justice Stevens and the other of which he joined, reveal that the Court has long considered financial burdens on speech to be sufficient to trigger strict scrutiny.

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Court applied strict scrutiny to a statute that required payment to the state of any proceeds due to a person, accused or convicted of a crime, for the production of a book or other work depicting the crime.<sup>83</sup> The Court began its analysis by noting that “[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”<sup>84</sup> Putting aside the argument that campaign finance regulations are by definition content-based (*i.e.*, they apply specifically to campaign-related speech), this is an example of the Court unambiguously treating a financial burden on speech as a regulation of speech itself, sufficient to trigger strict scrutiny. Nowhere did the Court suggest that the income produced by the speech was not speech itself—in other words, that “money is not speech,” and that the First Amendment was not implicated. The key point is that although the speaker in *Simon & Schuster* was not prevented from speaking as much as he wanted, the Court held that the financial disincentive of forfeiting the income created by speech was a sufficient burden to trigger strict scrutiny.<sup>85</sup> In other words, a financial burden constituted a burden on speech. It stands to reason that burdening one's ability to *pay* for speech would similarly constitute a burden on speech itself, particularly because that type of burden actually *does* reduce the amount of speech.<sup>86</sup> Under the Court's precedents, such a burden should suffice to trigger strict scrutiny as long as the speech itself is protected.

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82. See, e.g., *Bellotti*, 435 U.S. at 786 n.23 (“It is too late to suggest ‘that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 16 (1976))).

83. 502 U.S. 105, 109 (1991).

84. *Id.* at 116 (citing *Leathers v. Medlock*, 499 U.S. 439 (1991)).

85. *Id.* at 117.

86. Cf. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam) (expenditure limits “reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”).

The Court took the same approach in *United States v. National Treasury Employees Union*, finding that the First Amendment was violated by a statute that prohibited federal employees from receiving compensation for speeches or articles.<sup>87</sup> Writing for the Court, Justice Stevens explained that the prohibition “unquestionably impose[d] a significant burden on expressive activity” because it would reduce the incentive of federal employees to speak.<sup>88</sup> Tellingly, Justice Stevens did not write that money was not speech, and that a financial burden or disincentive did not constitute a burden on protected speech. In the campaign finance context, an expenditure limit is also a burden on speech in the sense that many forms of speech cost money.

As the preceding two cases illustrate, it is only necessary that speech be *burdened* (as distinct from banned) for strict scrutiny to apply, and financial burdens can constitute burdens on speech. If the Court has recognized that speech is burdened where the speaker is free to speak as much as he wants, with the caveat that he cannot receive compensation for it, then surely speech is burdened when the speaker is limited in how much money he can spend to disseminate his message. In other words, whether or not money is considered speech, for purposes of First Amendment analysis it matters only that a limitation on money is capable of burdening speech.<sup>89</sup>

Another issue implicated by restrictions on corporate speech is whether corporations’ rights to speech are commensurate with those possessed by natural persons.<sup>90</sup> Justice Stevens noted in his *Citizens United* dissent that “the constitutional rights of certain categories of speakers, in certain contexts, are not automatically coextensive with the rights that are normally accorded to members of our society.”<sup>91</sup> The majority, in turn, relied on *First National Bank of Boston v. Bellotti*, which it read to prohibit the government from “restrict[ing] political speech based on the speaker’s corporate identity.”<sup>92</sup> This reading was based on broad language in that opinion that there was “no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a

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87. 513 U.S. 454, 457 (1995).

88. *Id.* at 468–69.

89. *Cf. McConnell v. FEC*, 540 U.S. 93, 252 (2003) (Scalia, J., dissenting in relevant part) (“[W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.”).

90. *See Hill*, *supra* note 5, at 292.

91. *Citizens United*, 130 S. Ct. at 946 (Stevens, J., dissenting) (quoting *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007)) (internal quotation marks omitted).

92. *Id.* at 902 (opinion of the Court).

material effect on its business or property.”<sup>93</sup>

Justice Stevens’ dissent in *Citizens United* further complicates the issue. He concedes that the mere fact that speech comes from a corporation does not suffice to remove it from the protection of the First Amendment.<sup>94</sup> On the other hand, he details the obvious differences between legal entities and natural persons, concluding that section 203 “impose[s] only a limited burden on First Amendment freedoms . . . because [it] leave[s] untouched the speech of natural persons.”<sup>95</sup> It is not clear whether the purpose of distinguishing between corporate entities and natural persons is to suggest some lower level of protection for corporations, or to remove them from the ambit of the First Amendment altogether (which Justice Stevens professes not to do). However, whatever the free speech rights of corporations may be, the corresponding First Amendment right to listen<sup>96</sup> must still be considered. The Court’s commercial speech cases are instructive in that regard.

The Court has recognized that even speech that does “no more than propose a commercial transaction” is at least somewhat protected by the First Amendment.<sup>97</sup> Protection of commercial speech stems from both the particular consumer’s and society’s interest “in the free flow of commercial information.”<sup>98</sup> Although restrictions on commercial speech are subjected only to intermediate scrutiny,<sup>99</sup> Justice Stevens himself has proposed that “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to

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93. *Id.* (quoting *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)). The Court in *Bellotti* addressed a corporate expenditure limitation that related specifically to referendum issues rather than to the support of candidates. 435 U.S. at 767. The Court in *Bellotti* did note that its “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.” *Id.* at 788 n.26. However, the Court in *Citizens United* believed that *Bellotti*’s “central principle”—a prohibition of identity-based restrictions—would have led to the same result had the limitation restricted a corporation’s ability to spend in support of candidates. *Citizens United*, 130 S. Ct. at 903.

94. *Id.* at 960 (Stevens, J., dissenting).

95. *Id.* at 973 (Stevens, J., dissenting).

96. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). *Cf. Bellotti*, 435 U.S. at 775–76 (noting that the First Amendment “serves significant societal interests” and framing the question at hand not as “whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons,” but rather as whether protected expression was abridged).

97. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

98. *Id.* at 763–64.

99. *See Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

depart from the rigorous review that the First Amendment generally demands.”<sup>100</sup> This language seems to call for strict scrutiny to be applied to purely commercial speech, much of which comes from corporations.<sup>101</sup> If nothing else, even Justice Stevens has not taken the stance that the speech of corporations is not within the protection of the First Amendment. Indeed, it would be a bizarre result to conclude that corporate speech is protected by the First Amendment when it merely proposes a commercial transaction, but not when it contributes to the political debate.<sup>102</sup>

The purpose of the foregoing discussion is merely to show that political speech should be protected by the First Amendment even when funded by corporations. Concerns about the effects of corporate spending on the electoral process are properly addressed at the strict scrutiny stage, after recognizing that the First Amendment applies.<sup>103</sup> As a compelling state interest is required in order for a statute to survive strict scrutiny, it is now appropriate to address the Court’s recent treatment of the various asserted state interests, beginning with the anti-distortion interest announced in *Austin* and rejected in *Citizens United*.

## V. NARROWING THE SCOPE OF ALLOWABLE STATE INTERESTS

### A. *The Anti-Distortion Interest*

At its essence, *Citizens United* is about the Court’s rejection of the idea that the government has a compelling interest in preventing the “distorting effects” that corporate wealth might have on the political discourse. Although it might be argued that such an interest is not really

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100. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (principal opinion).

101. While one might point out that Justice Stevens qualified his statement with the word “non-misleading,” thus implying that in a campaign finance context he might not subscribe to strict scrutiny when “misleading” comments are made, the point of reproducing the statement here is to show that Justices on both sides of the issue in *Citizens United* have expressed a willingness to subject restrictions of corporate speech to strict scrutiny.

102. *Cf. Va. State Bd. of Pharmacy*, 425 U.S. at 787 (Rehnquist, J., dissenting) (arguing that the view of the First Amendment as a tool for informing public decision-making relates to political and social issues “rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo”).

103. Content-based regulations of protected speech are allowed under the First Amendment only if they survive strict scrutiny, i.e., only if they are “necessary to serve a compelling state interest” and “narrowly drawn to achieve that end.” *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). “[T]he First Amendment’s hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.” *Burson v. Freeman*, 504 U.S. 191, 197 (1992). A regulation of political discussion is therefore a regulation based on content, and is subject to strict scrutiny, which requires that the regulation be narrowly drawn to achieve a compelling state interest.



different from an interest in preventing corruption,<sup>104</sup> the Justices in the new majority have long considered it to be a wholly different (and illegitimate) interest.<sup>105</sup> In particular, Justices Scalia, Kennedy, and Thomas had consistently called for *Austin* to be overruled because of its recognition of the anti-distortion interest.<sup>106</sup> The rejection of this interest in *Citizens United* was based on several considerations, one of which is the idea that government regulation of political discourse *itself* distorts such discourse.

Justice Kennedy had hinted at this idea in several of his earlier dissents. In *Austin*, he characterized the anti-distortion interest as “the impermissible one of altering political debate by muting the impact of certain speakers.”<sup>107</sup> Under this view, once the government inhibits the free flow of information based on the financial resources of the speaker, it has distorted the political debate. A decade later, Justice Kennedy took aim at the Court’s decision in *Buckley v. Valeo*, which had established a two-tiered framework under which contribution limits were subjected to lower scrutiny than were expenditure limits.<sup>108</sup> Dissenting in *Nixon v. Shrink Missouri Government PAC*, Justice Kennedy argued that *Buckley* had led to a proliferation of “covert speech” and had “forced a substantial amount of political speech underground,” as would-be contributors became more sophisticated in avoiding contribution limits.<sup>109</sup> Justice Kennedy concluded that “this new evil is itself a distortion of speech.”<sup>110</sup>

Writing for the Court in *Citizens United*, Justice Kennedy implicitly resurrected these dissents, arguing that a ban on corporate expenditures “prevent[s] corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public,” thereby “mak[ing] *Austin*’s antidistortion rationale all the more an aber-

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104. *Citizens United v. FEC*, 130 S. Ct. 876, 970 (2010) (Stevens, J., dissenting) (arguing that “*Austin*’s antidistortion rationale is itself an anticorruption rationale.”).

105. This view is likely borne of their narrow view of what the government may properly regulate even under the anticorruption interest. See Part V-B, *infra*.

106. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., dissenting in relevant part) (arguing that *Austin* should be overruled because, particularly when disclosure requirements are in place, the assertion that “amassed wealth” distorts elections undermines the First Amendment premise that “the American people are neither sheep nor fools”); see also *id.* at 274 (Thomas, J., dissenting in relevant part) (arguing that *Austin* should be overruled because its definition of corruption is “incompatible with the First Amendment”).

107. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 703–04 (1990) (Kennedy, J., dissenting).

108. See *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (per curiam).

109. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 406–07 (2000) (Kennedy, J., dissenting). Note that the purpose of BCRA, which was enacted after this case was decided, was to put a stop to the use of soft money as a means of circumventing contribution limits.

110. *Id.* at 408.

ration.”<sup>111</sup> This also ties into the Court’s rejection of the PAC as a constitutionally sufficient alternative. Long before *Citizens United*, Justice Kennedy argued in his *Austin* dissent that requiring a corporation to utilize a PAC was a “diffusion of the corporate message,” and that the public interest was in knowing what a corporation (rather than its PAC) had to say.<sup>112</sup> In sum, Justice Kennedy’s position, now adopted by a majority of the Court, is that governmental interference with a corporation’s ability to disseminate its own message constitutes a distortion of the public discourse in violation of the First Amendment.<sup>113</sup> Accordingly, *Austin* (and its recognition of a compelling government interest in eliminating the “distorting effects” of too much money in politics) had to be overruled.

The rejection in *Citizens United* of *Austin*’s anti-distortion rationale was also based on the implications of such a rationale as it might pertain to regulation of the media. BCRA carved out an exemption for media corporations.<sup>114</sup> However, while Justice Stevens argued in dissent that it was improper to consider the issue of media corporations absent a facial challenge,<sup>115</sup> the Court’s purpose in discussing the media was geared less toward a consideration of the statute itself as it was toward the propriety of recognizing an anti-distortion interest.

Reiterating Justice Thomas’s previous warning of a “chilling endpoint” of “outright regulation of the press,”<sup>116</sup> the Court in *Citizens United* pointed out that an anti-distortion interest would permit regulation of media corporations.<sup>117</sup> Indeed, nothing in *Austin*’s articulation of the anti-distortion interest—prevention of “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>118</sup>—suggests that such an interest *could* not be applied to media corporations, regardless of whether it actually *is* so extended. Thus, the Court noted that “media corporations accumulate wealth with the help of the corporate form, the largest media corporations have ‘immense aggregations of wealth,’ and

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111. *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010).

112. *Austin*, 494 U.S. at 708–09 (Kennedy, J., dissenting).

113. Cf. Wright, *supra* note 81, at 1006 (“Nothing distorts the truth-seeking process so much as prior restraint or government censorship.”) (emphasis added).

114. See 2 U.S.C. 434(f)(3)(B)(i) (2006) (“electioneering communication” definition excludes any “communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate”).

115. *Citizens United*, 130 S. Ct. at 976 (Stevens, J., dissenting).

116. *McConnell v. FEC*, 540 U.S. 93, 283 (2003) (Thomas, J., dissenting in relevant part).

117. *Citizens United*, 130 S. Ct. at 906.

118. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

the views expressed by media corporations often 'have little or no correlation to the public's support' for those views."<sup>119</sup> Justices Scalia and Thomas had both advanced such an argument long before *Citizens United*.

In his *Austin* dissent, Justice Scalia argued that the majority's reliance (in holding that a media exemption did not render a corporate expenditure limitation unconstitutional) on the media's "unique role" in informing the public was completely backward.<sup>120</sup> To the contrary, the argument went, the "unique role" of the press would actually be *more* of a reason to regulate the press if an anti-distortion interest were recognized as compelling, the reason being that media corporations have even greater power and opportunity to "distort" the public discourse.<sup>121</sup> Justice Scalia further noted that the Court had "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."<sup>122</sup> Similarly, Justice Thomas argued in his *McConnell* dissent that "there is no distinction between a media corporation and a nonmedia corporation" when it comes to the anti-distortion rationale because "[m]edia corporations are influential."<sup>123</sup>

Writing for the Court in *Citizens United*, Justice Kennedy noted that the media exemption also "applies to media corporations owned or controlled by corporations that . . . participate in endeavors other than news."<sup>124</sup> This "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."<sup>125</sup> To illustrate, NBC (a longstanding and influential member of the media) is owned by General Electric, one of the largest corporations in the world.<sup>126</sup> Given the media exemption, General Electric would be allowed to "advance its overall business interest. . . . [while] 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."<sup>127</sup> Whether *Citizens United* involved a facial or as-applied challenge to section 203 of BCRA, this sort of disparate treatment served to undermine

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119. *Citizens United*, 130 S. Ct. at 905 (quoting *Austin*, 494 U.S. at 660).

120. *Austin*, 494 U.S. at 690–91 (Scalia, J., dissenting).

121. *Id.* at 691 (Scalia, J., dissenting).

122. *Id.* (citing *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 (1978)).

123. *McConnell v. FEC*, 540 U.S. 93, 283–84 (2003) (Thomas, J., dissenting in relevant part).

124. *Citizens United*, 130 S. Ct. at 906.

125. *Id.*

126. PEW PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2009), [http://www.stateofthemediamedia.org/2009/narrative\\_networktv\\_ownership.php?cat=5&media=6](http://www.stateofthemediamedia.org/2009/narrative_networktv_ownership.php?cat=5&media=6).

127. *Citizens United*, 130 S. Ct. at 906.

the legitimacy of an anti-distortion interest altogether in the eyes of the Court.

Finally, there may be another reason why the Court in *Citizens United* felt compelled to overrule *Austin*. Several prominent politicians have recently expressed a desire to reinstate the Fairness Doctrine,<sup>128</sup> a fact that likely was not lost on the Court (even though it made no mention of the Fairness Doctrine in *Citizens United*). The policy, adopted by the Federal Communications Commission and repealed in 1987,<sup>129</sup> “imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.”<sup>130</sup> Perhaps surprisingly, Justice Thomas is the only one to have even hinted at the connection between the anti-distortion interest and the Fairness Doctrine.

In his *McConnell* dissent, Justice Thomas predicted that the Court’s rationale for upholding section 203 (a rationale based in large part on the anti-distortion interest) would allow Congress to enact the Fairness Doctrine.<sup>131</sup> Justice Thomas’s one-sentence warning represents the only time in the Court’s campaign finance decisions that a Justice made the connection between that regulatory policy and the anti-distortion rationale,<sup>132</sup> but the connection is an important one. Under the *Austin* regime, the compelling government interest of preventing distortion of the political discourse could (at least theoretically) be applied quite easily to the regulation of political broadcasts. In rejecting the anti-distortion interest entirely, the Court’s decision in *Citizens United* suggests that it would be exceedingly unlikely for the Fairness Doctrine to survive a First Amendment challenge going forward.

### B. *Corruption and the Appearance of Corruption*

The interest in preventing corruption, or the appearance thereof, is the most longstanding<sup>133</sup> and widely accepted government interest in

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128. See, e.g., Michael W. Chapman, *Democratic Senator Schumer Defends Fairness Doctrine to Regulate Talk-Radio Speech*, CNSNews.com, Nov. 4, 2008, <http://www.cnsnews.com/news/article/38785> (relating statements made by Senators Charles Schumer and John Kerry, as well as Speaker of the House Nancy Pelosi, in support of the Fairness Doctrine).

129. Robert Zelnick, *Politics and the Fairness Doctrine*, THE BOSTON GLOBE, Mar. 7, 2009, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/03/07/politics\\_and\\_the\\_fairness\\_doctrine/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/03/07/politics_and_the_fairness_doctrine/).

130. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969).

131. *McConnell v. FEC*, 540 U.S. 93, 285 (2003) (Thomas, J., dissenting in relevant part).

132. The connection was based on both the anti-distortion interest and the interest in preventing the appearance of corruption.

133. See *United States v. Auto. Workers*, 352 U.S. 567, 570 (1957) (noting the perception common during the late 19th century that “aggregated capital unduly influenced politics, an influence not stopping short of corruption”).

campaign finance regulation. Yet even where such an interest is recognized, there is considerable debate over its application. There is, of course, no uniform definition of “corruption,” and the “appearance” of corruption may often be in the eye of the beholder.<sup>134</sup> Moreover, even when such an interest is invoked, a regulation that is subjected to strict (or even intermediate) scrutiny must meet a tailoring test. Given these two factors, the new majority has employed two lines of attack: one based on the proper scope of the “anticorruption” interest, and another based on the application of strict scrutiny.

It seems clear that the presence of actual, quid pro quo arrangements between officeholders (or candidates) and contributors would qualify as corruption under any accepted definition.<sup>135</sup> The Court in *Buckley* recognized that “[t]o the extent that large contributions are given to secure political quid pro quo’s from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>136</sup> As the regulated activity moves away from contributions and towards expenditures, however, and as it thereby represents less clear a danger of quid pro quo, the Justices who comprise the new majority take a far less deferential stance when the anticorruption interest is invoked.

For example, in his *McConnell* dissent, Justice Kennedy characterized *Buckley* as based on “the principle that campaign finance regulation that restricts speech without requiring proof of particular corrupt action withstands constitutional challenge only if it regulates conduct posing a demonstrable quid pro quo danger.”<sup>137</sup> Accordingly, he viewed the “rule” of *Buckley* to require the Court to invalidate regulations not targeted to “actual or apparent quid pro quo arrangements.”<sup>138</sup> Moreover, it is not enough under Justice Kennedy’s standard to simply assert that an “appearance of corruption” exists. Rather, Congress must “establish[ ] that the regulated conduct has inherent corruption potential, thus justifying the inference that regulating the conduct will stem the appear-

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134. Cf. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 495 (2007) (opinion of Scalia, J.) (an effort to distinguish between express and issue advocacy based on an “effect on the listener” test would be too vague because it would “pu[t] the speaker . . . wholly at the mercy of the varied understanding of his hearers” (quoting *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam))).

135. The more difficult question lies in the fact that the concept of an “actual, quid pro quo arrangement” has not been defined. While an outright promise of a specific favor by a candidate or officeholder to a donor would certainly be characterized as quid pro quo, it is unclear how specific the promise or favor would have to be, particularly in light of the Court’s admonition that access alone does not constitute corruption. See *infra* note 143.

136. *Buckley*, 424 U.S. at 26–27.

137. *McConnell v. FEC*, 540 U.S. 93, 292 (2003) (Kennedy, J., dissenting in relevant part).

138. *Id.* at 294 (quoting *Buckley*, 424 U.S. at 45).

ance of real corruption.”<sup>139</sup> Accordingly, Justice Kennedy articulated his desired inquiry as whether the conduct “inherently poses a real or substantive quid pro quo danger.”<sup>140</sup> Chief Justice Roberts picked up on this theme in his *WRTL II* opinion, stating that “[i]ssue ads like WRTL’s are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them.”<sup>141</sup> The Court in *Citizens United* solidified this narrow characterization of the anticorruption interest.

Under this new approach, there is no such thing as an amorphous interest in preventing an “appearance of corruption.” An asserted government interest would have to be well-defined in order to be recognized.<sup>142</sup> Thus, the Court in *Citizens United* noted that “[i]ngratiation and access,” by themselves, “are not corruption.”<sup>143</sup> The Court elaborated on that point, stating that “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”<sup>144</sup> Justice Kennedy cited his own *McConnell* dissent for support, explaining that “[i]t 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>145</sup> Thus, the Court concluded that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>146</sup> In adopting the narrow view that the anticorruption interest is limited to the prevention of quid pro quo corruption, the Court implicitly adopted Justice Kennedy’s perspective that “[t]he generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”<sup>147</sup>

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139. *Id.* at 297–98.

140. *Id.* at 298.

141. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478–79 (2007) (opinion of Roberts, C.J.).

142. Chief Justice Rehnquist made this point in his *McConnell* dissent as well, in the context of contribution limits. He rejected the argument that a “close relationship between federal officeholders and the national parties” would necessarily make all donations to such parties suspect. Noting that “a close association with others . . . is not a surrogate for corruption,” he would have held that a relationship between officeholder and organization is “irrelevant” when a donation to an organization has “no potential to corrupt.” *McConnell*, 540 U.S. at 351–52 (2003) (Rehnquist, C.J., dissenting in relevant part).

143. *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010); *cf. McConnell*, 540 U.S. at 296 (Kennedy, J., dissenting in relevant part) (“By equating vague and generic claims of favoritism or influence with actual or apparent corruption, the Court adopts a definition of corruption that dismantles basic First Amendment rules [and] permits Congress to suppress speech in the absence of a quid pro quo threat . . .”).

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

145. *Id.* (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting in relevant part)).

146. *Id.* at 909.

147. *McConnell*, 540 U.S. at 296 (Kennedy, J., dissenting in relevant part).

This concern with limiting principles also informs the new majority's application of strict scrutiny. In particular, regulations that have been asserted to be anti-circumvention measures have been treated as antithetical to strict scrutiny. Although the Court in *Citizens United* did not explicitly address the anti-circumvention rationale underpinning many campaign finance regulations, its opinion (particularly its willingness to limit a valid anticorruption interest to quid pro quo corruption) was undoubtedly influenced by its previous treatment of anti-circumvention measures in *WRTL II*. That treatment was itself informed by previous dissents.

For example, in his *McConnell* dissent, Chief Justice Rehnquist began with the premise that all unregulated political speech may be said to circumvent a regulatory scheme to some degree.<sup>148</sup> Under this view, "a rationale dependent on circumvention alone" would not suffice to justify regulations limiting the funding of speech.<sup>149</sup> Instead, "any circumvention rationale ultimately must rest on the circumvention itself leading to the corruption of federal candidates and officeholders."<sup>150</sup> Chief Justice Rehnquist accused the Court in *McConnell* of "untethering its inquiry from corruption or the appearance of corruption," thereby "remov[ing] the touchstone" of campaign finance jurisprudence without "replac[ing] it with any logical limiting principle."<sup>151</sup> *WRTL II* could be seen as an effort to replace that touchstone.

In *WRTL II*, Chief Justice Roberts addressed an argument by the FEC that "an expansive definition of [the] 'functional equivalent' [of express advocacy] is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions."<sup>152</sup> He denounced "such a prophylaxis-upon-prophylaxis approach to regulating expression" as inconsistent with strict scrutiny.<sup>153</sup> Recalling the Rehnquist rule that the circumvention interest is only legitimate if the circumvention *itself* leads to corruption, the Roberts formulation would seem to adopt as a limiting principle the idea that regulation of only the first level of circumvention is allowable. In other words, the consideration of whether there is a compelling government interest stops after the first level of the anti-circumvention analysis.

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148. *McConnell*, 540 U.S. at 356 (Rehnquist, C.J., dissenting in relevant part).

149. *Id.*

150. *Id.* at 355.

151. *Id.* at 356.

152. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (opinion of Roberts, C.J.).

153. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam) (expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations"))).

Applying this framework to the FEC's argument in *WRTL II*, an expansive definition of the "functional equivalent" of express advocacy was requested as an anti-circumvention measure to ensure that issue advocacy did not circumvent the rule against express advocacy. This represents the first level of the anti-circumvention rationale. Under the Rehnquist-Roberts approach, the Court would then ask whether this first level of circumvention leads to corruption—i.e., whether express advocacy *itself* leads to corruption. But when the rule against express advocacy is itself seen as an anti-circumvention measure,<sup>154</sup> a second level of anti-circumvention rationale is introduced, and no compelling state interest is recognized under the Rehnquist-Roberts test.

Justice Thomas has also warned of the dangers of an unchecked anti-circumvention rationale, expressing concern in his *McConnell* dissent about "expanding the anti-circumvention rationale beyond reason."<sup>155</sup> He characterized *Buckley*'s approval of a contribution limit as being based on a concern that bribery laws "could not effectively be enforced to prevent quid pro quos between donors and officeholders."<sup>156</sup> Justice Thomas then characterized *Buckley*'s approval of a second contribution limitation as being justified on the improper basis of preventing circumvention of the first limitation.<sup>157</sup> Turning to the part of *McConnell* which upheld section 323(f) of BCRA, Justice Thomas argued that the Court was upholding "a third-order anticircumvention measure based on Congress' anticipation of circumvention of these second-order anticircumvention measures that might possibly, at some point in the future, pose some problem."<sup>158</sup> Justice Thomas articulated the concern with recognizing a compelling government interest in anti-circumvention, arguing that there will always be behavior that can be characterized as circumventing a law's prohibition.<sup>159</sup> He foretold a regulatory regime in which "speech regulation will again expand to cover new forms of 'circumvention,' only to spur supposed circumvention of the new regulations, and so forth."<sup>160</sup> Such a "never-ending and self-justifying process"<sup>161</sup> was emphatically rejected by Chief Justice Roberts' controlling opinion in *WRTL II*, thereby setting the stage for the Court in *Citizens United* to conclude that the anticorruption interest cannot justify

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154. *Id.*

155. *McConnell*, 540 U.S. at 266 (2003) (Thomas, J., dissenting in relevant part).

156. *Id.* at 267. Justice Thomas does not share the concern that bribery laws would be ineffective in preventing quid pro quo corruption. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting).

157. *McConnell*, 540 U.S. at 267.

158. *Id.* at 268.

159. *Id.*

160. *Id.* at 268–69.

161. *Id.* at 269.



limitations on independent corporate expenditures—the circumvention of which, according to the majority, would not lead directly to quid pro quo corruption.<sup>162</sup>

### C. Shareholder Protection

*Citizens United* also marked an unequivocal rejection of the asserted government interest in “protecting dissenting shareholders from being compelled to fund corporate political speech.”<sup>163</sup> The rejection of such an interest was a foreseeable corollary of the Court’s treatment of both the anti-distortion interest and the anticorruption interest. The Court likened the shareholder-protection interest to the anti-distortion interest in that it would allow for government regulation of media corporations.<sup>164</sup> Such regulation would be prohibited under the First Amendment, reasoned the Court, regardless of whether “a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses.”<sup>165</sup> Justices Scalia and Thomas had previously rejected the shareholder-protection interest in their *Austin* and *McConnell* dissents, respectively.

Justice Scalia has previously argued that a shareholder of a business corporation invests with the understanding that he “exposes himself . . . [to] many things that he may find politically or ideologically uncongenial.”<sup>166</sup> Such corporate actions might include “operation of an abortion clinic, publication of a pornographic magazine, or even publication of a newspaper that adopts absurd political views and makes catastrophic political endorsements.”<sup>167</sup> Under this view, an offended investor’s recourse would be to “persuade a majority . . . of his fellow shareholders that the action should not be taken,” or to sell the stock.<sup>168</sup>

Justice Thomas took up this line of argument in his *McConnell* dissent, relying on *First National Bank of Boston v. Bellotti* for the proposition that there is no compelling interest in protecting shareholders in this manner.<sup>169</sup> The Court in *Bellotti* had questioned “why the dissenting shareholder’s wishes [should be] entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined

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

163. *Id.* at 911.

164. *Id.*

165. *Id.* (citing *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 687 (1990) (Scalia, J., dissenting)).

166. *Austin*, 494 U.S. at 686–87 (Scalia, J., dissenting).

167. *Id.* at 687.

168. *Id.*

169. *McConnell v. FEC*, 540 U.S. 93, 275 (2003) (Thomas, J., dissenting in relevant part).

percentage of the shareholders.”<sup>170</sup> Similarly, in rejecting the shareholder-protection interest, the Court in *Citizens United* suggested that any problems relating to disaffected shareholders should be “corrected by shareholders ‘through the procedures of corporate democracy.’”<sup>171</sup>

The new majority’s insistence upon limiting principles also factors into its stance on shareholder protection. As the Court’s aforementioned rhetorical question in *Bellotti* suggests, a compelling interest in shareholder protection might theoretically be extended to entirely unreasonable lengths. Could the government intervene to protect a corporate shareholder’s sensibilities in the event that the corporation decided to enter the pornography business? If not, then there must be something unique about the attack on an investor’s sensibilities that might occur when the corporation makes a decision to take a certain political stance, or to back a certain politician. What is less clear is why that should be constitutionally significant. While the investor might feel that the corporation is compelling him to speak in support of the candidate it supports, any compulsion would be attributable to the corporation rather than to the government.<sup>172</sup> As no government actor would be involved, there would be no colorable First Amendment claim based on compelled speech.<sup>173</sup> Thus, the issue simply comes down to a policy decision of whether protecting shareholders from collectively funding political speech with which they disagree is compelling to the point where the government can prevent the corporation from using its general treasury to fund such speech. The Court in *Citizens United* has answered that question with a resounding “no.”

#### D. *The Level Playing Field*

Finally, if there is a single, overarching theme to the new campaign finance jurisprudence, it is that the government does not have a compelling interest in altering the political discourse in order to “level the playing field” so that all speakers have an equal voice. *Citizens United* implicitly adopts as its guiding principle what Justice Scalia once wrote was “the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the ‘fairness’ of

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170. *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

171. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010) (quoting *Bellotti*, 435 U.S. at 794).

172. Although Justice Stevens describes this scenario as an “injury to the shareholders’ expressive rights,” *id.* at 978, it is unclear what “rights” are being referenced. It would be a dubious proposition to suggest that First Amendment rights are implicated.

173. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

political debate.”<sup>174</sup> In his *Austin* dissent, Justice Kennedy argued that “the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment.”<sup>175</sup> The Court adopted this position in *Davis v. FEC* (the most recent campaign finance case before *Citizens United*), stating that “[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election.”<sup>176</sup> This was said to interfere with the ability of the voters to decide for themselves whom to elect.<sup>177</sup>

*Citizens United* solidifies the new majority’s rejection of the “level playing field” interest. The Court explained that “[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”<sup>178</sup> The Court also tied together the anti-distortion rationale and the equality rationale, warning that under the former, “wealthy media corporations could have their voices diminished to put them on par with other media entities.”<sup>179</sup> These considerations led to the Court’s conclusion that the government “may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>180</sup> To the Justices who formed the majority in *Citizens United*, governmental efforts to level the playing field interfere with the “marketplace of ideas” protected by the First Amendment.<sup>181</sup> Just as one would expect to find disparities in the resources of participants in an economic marketplace, similar disparities can be found in the marketplace of ideas—the gap between the financial resources of corporations and those of the average individual being the most obvious example. Yet under the conception of the First Amendment that now controls, this is preferable to a regime in which the government decides when someone (or some corporation) has spoken too much.<sup>182</sup>

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174. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

175. *Id.* at 705 (Kennedy, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam)).

176. *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008).

177. *Id.* at 2773–74.

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

179. *Id.* at 905.

180. *Id.* at 913.

181. *Id.* at 906 (citing *McConnell v. FEC*, 540 U.S. 93, 274 (2003) (Thomas, J., dissenting in relevant part)).

182. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting) (“[T]here is no such thing as too much speech . . .”).

## VI. CONCLUSION

*Citizens United* leaves an indelible impression on the campaign finance landscape. Although the full ramifications of the decision will likely not be known until some time passes, the Court at least somewhat clarified the permissible scope of regulation. The messy distinction between express advocacy and issue advocacy no longer matters in the context of independent expenditures made by corporations, as the Court characterized its decision to overrule *Austin* as also invalidating the prohibition of the use of corporate treasury funds for express advocacy.<sup>183</sup> Perhaps more importantly, the distinction between individuals and corporations has been eliminated for purposes of independent expenditures, in accordance with the Court's political speech framework. As a corollary, a corporation cannot be required to filter its speech through a political action committee. Reliance on the anticorruption interest will be accepted only to the extent that the corruption is defined as quid pro quo. The interest in preventing quid pro quo corruption would now seem to be the only compelling government interest sufficient to uphold restrictions on corporate independent expenditures. On a broader scale, any government regulation of speech will have to be premised on a government interest other than ensuring that public discourse is "undistorted" or "fair." At the same time, the Court's decision to uphold BCRA's disclosure provisions was in keeping with its conception of a system in which citizens have full access to information and then use that information to make decisions for themselves.<sup>184</sup>

Given this conception, the Court does not see corporate expenditures as interfering (at least not directly) with the right to vote. Even Justice Scalia has taken the position that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."<sup>185</sup> Similarly, Justice Kennedy, in upholding a statute that prohibited the solicitation of votes and the display of campaign materials within 100 feet of the entrance to a polling place, wrote that "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right"—the right to vote.<sup>186</sup> However, under the conception of the First Amendment that is articulated in *Citizens United*, the Court may see the

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

184. *Id.* at 914–15.

185. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

186. *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in judgment)).

right to vote as being protected simply by the fact that voters will have access to as much information as they choose to receive.