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Citizens United: A World of Full Disclosure

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Citizens United: A World of Full Disclosure

By Maxfield Marquardt

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I. INTRODUCTION

An ode to the discerning citizen. The picture painted by the majority is glorious: a country where each citizen is able to weigh and evaluate every piece of information thrown in their direction during the modern world's twenty-four hour news cycle, and the people take their rightful place as the arbiters of corporate greed in the political arena.

In this vision, every citizen is armed with the ability and the means of discerning the identity of every organization that is spending money on every ad they see on television and determining whether those ads are accurate. Most importantly, each citizen is able to figure out if the politician, whose campaign is collaterally helped by those ads, is voting on legislation in support of or giving access to the corporations who wrote the checks for the ad.

While impressed with the faith the majority has in the ability of the people to police candidates and moneyed corporate interests and to perceive when a politician's influence is bought and paid for, the opacity of the campaign finance process, the limited nature of current disclosure requirements, and the limited time individual citizens have to investigate the reels of information presented to them during the short period leading up to important elections, paint a less glorious picture of confusion, disorientation, and the potential for deceit.

II. BACKGROUND TO CAMPAIGN FINANCE REGULATION

A. Legislative History

The first federal attempt at campaign financing reform was the Tillman Act of 1907 ("Tillman Act").¹ After years of complaints by Democrats and Republicans alike that corporate moneyed interests influenced federal, particularly presidential, elections, President Theodore Roosevelt in 1905 called for a prohibition on corporate campaign contributions:

¹ Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864-65 (1907) (current version at 2 U.S.C. § 441b (2006)).

All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.²

The result of this push was the Tillman Act, which prohibited direct contributions by corporations to candidates for federal office.³ Congress expanded this prohibition to unions in 1943 with the War Labor Disputes Act.⁴ To this day, the federal government, and most states, limit or prohibit corporate and union direct expenditures to candidate campaigns.⁵ However, the Tillman Act left independent corporate expenditures unregulated.⁶ This gap in regulation allowed corporations to continue to spend money in ways that directly benefited individual candidates without implicating the federal rules against expenditures.

² Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 953 (2010) (quoting 40 Cong. Rec. 96, 96 (1906)).

³ Tillman Act of 1907, 34 Stat. at 864-65. The Tillman Act only covered contributions to presidential, vice-presidential, Senate, House, and Electoral College elections. *Id.*

⁴ War Labor Disputes Act, 78 Pub. L. No. 89, 57 Stat. 163 (1943) (repealed 1945).

⁵ See 2 U.S.C. § 441b(a) (2006).

⁶ See Tillman Act, 34 Stat. at 864-65. There are three primary mechanisms through which organizations and individuals spend money to influence elections: (1) campaign contributions: either writing a check directly to the candidate, or following directions by the candidate on how to spend the money, (2) contributions to an aligned third party: giving money to a third party organization, such as a Political Action Committee, which is ideologically or directly involved with the candidate's campaign, (3) independent expenditures: spending money on activities that support or oppose a candidate's election without any previous agreement or direction from the candidate. See Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 95-97 (2009). See Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 95-97 (2009), for a more detailed analysis of these three means of spending money on campaigns.

Not until the Labor-Management Relations Act of 1947 (“Taft-Hartley Act”)⁷ did Congress first address the topic of independent expenditures. The Taft-Hartley Act prohibited independent expenditures by corporations and unions in federal elections,⁸ but the prohibitions in the Taft-Hartley Act were difficult to enforce as there were no disclosure and reporting requirements in the legislation.⁹ Congress closed that loophole in the Federal Election Campaign Act of 1971 (“FECA”).¹⁰ In addition to the individual disclosure requirements, FECA created extensive disclosure provisions for the political action committee (“PAC”) mechanism, which allowed corporations to pool resources and make direct political contributions to candidates.¹¹ Fueled by the Watergate Scandal, Congress amended FECA in 1974 to place limits on both direct and independent expenditures.¹² The 1974 amendments also established the Federal Election Commission (“FEC”).¹³ Congress amended

⁷ Labor-Management Relation (Taft-Hartley) Act, 80 Pub. L. No. 101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 185(a) (2006)).

⁸ *Id.*

⁹ *Id.* This is not to say that there were no disclosure requirements at all for Federal Elections. The first attempt at a disclosure statute came not long after the Tillman Act. In 1910 the Publicity of Political Contributions Act called for disclosure of receipts and expenditures in elections for the House of Representatives. Publicity of Political Contributions (Publicity) Act, ch. 392, 36 Stat. 822 (1910) (codified as amended at 2 U.S.C. §241 (2006)). In 1911, Congress added the Senate to the disclosure requirements, and in 1925, under the Federal Corrupt Practices Act, it increased the number of disclosure reports required. *See* Federal Corrupt Practices Act, ch. 368, art. III, 43 Stat. 1070 (1925) (repealed 1972). *See* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 274 (2010), for a more detailed discussion of the history of disclosure in federal elections

¹⁰ Federal Election Campaign Act, Pub. Law No. 92-225, §§ 301-310, 86 Stat. 3 11-19 (1972) (codified as amended at 2 U.S.C. § 431 (2006)).

¹¹ FECA §§ 302-303.

¹² Federal Election Campaign Act Amendments of 1974 § 101, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 (2006)) (hereinafter FECA 1974). FECA 1974 limited individual and corporate contributions to \$1,000 per candidate with a total limit of \$25,000 per calendar year. *Id.*

¹³ FECA 1974 at § 310 (codified as amended at 2 U.S.C. § 437c (1997)).

FECA again in 1976, after the Supreme Court declared certain contribution restrictions unconstitutional.¹⁴

In 2002, in response to extensive litigation and to shore up loopholes identified in FECA's regulatory scheme, Congress passed the Bipartisan Campaign Finance Reform Act ("BCRA").¹⁵ The BCRA targeted independent expenditures that fell outside of the express advocacy requirement that was read into FECA's regulations "relative to a clearly identified candidate" by the Supreme Court.¹⁶ To target these non-candidate specific expenditures, the BCRA rewrote FECA to cover independent expenditures it termed "electioneering communication."¹⁷ An electioneering communication is any "broadcast, cable, or satellite communication . . . [that] . . . refers to a clearly identifiable candidate for Federal Office" and occurs either sixty days before a general election or thirty days before a primary election.¹⁸ The BCRA then made it illegal for corporations and unions to use their general treasury funds to finance electioneering communication.¹⁹ It was over the legality of this BCRA provision that *Citizen's United v. FEC* was litigated.²⁰

B. Judicial History

In 1976, the Court heard the first major challenge to the new regulatory structure created by the FECA amendments of 1974. The Court, in *Buckley v. Valeo*, addressed challenges to FECA contribution limits and mandatory disclosure requirements. FECA

¹⁴ See *Buckley v. Valeo*, 424 U.S. 1 (1976). For a more detailed discussion of the Court's decision in *Buckley* see this article's Judicial History Section, *ante* at 5.

¹⁵ Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. § 431 (2006)).

¹⁶ *Id.* at § 203 (codified at 2 U.S.C. § 441b).

¹⁷ 2 U.S.C. § 434(f)(3). This was done in response to the narrow construction of the disclosure requirements and independent expenditure ban that were given by the Supreme Court in *Buckley*. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 189 (2003) ("The amendment coins a new term, 'electioneering communications,' to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*.").

¹⁸ 2 U.S.C. § 434(f)(3)(A).

¹⁹ 2 U.S.C. § 441b(c).

²⁰ *Citizens United*, 130 S. Ct. 876 (2010).

provided a statutory limit of \$1,000 on direct contributions and a statutory limit of \$1,000 on individual and group independent contributions “relative to a clearly identifiable candidate.”²¹ It also required detailed disclosures by candidates and political committees of funds contributed to those organizations.²² Several congressional and presidential candidates, minor political parties, and candidate committees soon brought suit in the district court of Washington D.C. for injunctive relief relating to the above provisions.²³ The candidates challenged the facial validity of the contribution and expenditure ceiling but made an as-applied challenge to the disclosure requirements.²⁴

In addressing the contribution and expenditure limits, the Court first noted that Congress spent a significant amount of time developing this new statutory scheme, and that it developed an extensive record of campaign abuses as justifications for its regulation.²⁵ At the same time, the Court noted the incredibly important role political speech played in the United States.²⁶

Despite the importance of political speech, citing the State’s compelling interest to “limit the actuality and appearance of

²¹ *Buckley*, 424 U.S. at 24; FECA 1974 at § 101. The \$1,000 direct contribution limit applies to all contributions by “individual[s], partnership[s], committee[s], association[s], corporation[s] or any other organization or group of persons.” *Id.* at 23.

²² FECA 1974 at § 204.

²³ *Buckley*, 424 U.S. at 7-8.

²⁴ *Id.* A significant aspect of the candidates’ argument was that disclosure was the more appropriate way for the legislature to address campaign finance reform. They simply argued that since they were independent and minority candidates, as it applied to them, it was too restrictive. *Id.* at 8-9.

²⁵ *Id.*

²⁶ *Id.* at 18. It is worth noting that previous to *Buckley*, contributions did not necessarily equal speech. *Id.* at 17. The Appellate Court had ruled that contributions were not speech but conduct, and that any effect they had on speech was incidental. *Id.* The *Buckley* Court held that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Id.* at 19. This view of an expenditure limitation as a limitation on the amount of available speech becomes an important theme in the majority opinion in *Citizens United*. See *Citizens United*, 130 S. Ct. at 896.

corruption resulting from large individual financial contributions,”²⁷ the Court upheld the limits on individual direct campaign contributions.²⁸

The Court did not find that same interest as compelling when addressing the \$1,000 limit on independent expenditures.²⁹ It noted that, “[u]nlike contributions, such independent expenditures may provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”³⁰ The Court specifically found that the “absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”³¹

In addition to a weaker governmental interest, the Court found that the definition required of the statutory language to avoid unconstitutional vagueness limited the effectiveness of the statute as a loop-hole closing provision for those who sought to circumvent the individual contribution limit.³² The Government countered that there was a First Amendment interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates.”³³ The Court found that concept “wholly foreign to the First Amendment, which was designed ‘to secure the widest possible dissemination of information from diverse and antagonistic

²⁷ *Buckley*, 424 U.S. at 26.

²⁸ *Id.*

²⁹ *Id.* at 45.

³⁰ *Id.* at 47.

³¹ *Id.*

³² *Id.* at 44.

“[I]n order to preserve the provision against invalidation on vagueness grounds, . . . [the independent expenditure limit] . . . must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation’s effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder.”

Id. at 44-45.

³³ *Buckley*, 424 U.S. at 48.

sources.”³⁴ “First [Amendment] protection . . . cannot properly be made to depend on a person’s financial ability to engage in public discussion.”³⁵

While *Buckley* addressed independent expenditures generally, in *First National Bank v. Bellotti*,³⁶ the Court addressed the question of limitations to indirect expenditures where the statute’s scope was limited to corporations only.³⁷ Massachusetts enacted a statute prohibiting corporations from making expenditures on elections where the issues involved did not “materially affect any of the property, business or assets of the corporation.”³⁸ In addition, the statute explicitly stated that questions submitted to voters regarding individual income tax shall not be deemed to “materially affect [the] property, business or assets of the corporation.”³⁹

The corporations seeking to invalidate the statute wanted to advocate their views with respect to a proposed constitutional amendment that would permit the Massachusetts Legislature to impose a graduated income tax on individuals.⁴⁰ The Massachusetts Supreme Court found the corporations did not have the same breadth and scope of First Amendment rights guaranteed to natural persons.⁴¹ In assessing those limited First Amendment rights, the Massachusetts

³⁴ *Id.* at 49. This becomes the hallmark for the *Citizens United* majority’s reasoning for why identity based distinctions are impermissible under the First Amendment. See *Citizens United*, 130 S. Ct. at 888-89.

³⁵ *Buckley*, 424 U.S. at 49.

³⁶ *First National Bank v. Bellotti*, 435 U.S. 765, 765 (1977).

³⁷ Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp. 1977).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Bellotti*, 435 U.S. at 769. The Massachusetts general assembly had tried and failed to get this same amendment passed by the populace several times. *Id.* at 769 n.3. Many saw this measure as preemptively eliminating corporations from the conversation, to make it easier for the legislature to get the voting public to pass the amendment.

⁴¹ *Id.* at 778 (citing *First National Bank v. Attorney General*, 359 N.E.2d 1262 (Mass 1977)). The Massachusetts Court limited the scope of a corporation’s First Amendment rights, “seizing upon the observation that corporations ‘cannot claim for themselves the liberty which the Fourteenth Amendment guarantees.’ . . . [and] concluded that a corporation’s First Amendment rights must derive from its property rights under the Fourteenth.” *Id.* (quoting *First National Bank*, 359 N.E.2d at 1270).

Court determined that the corporate speech prohibited by the statute was not protected speech under the First Amendment.⁴² Since the speech was not protected, the Massachusetts Court did not address the issue of whether states had a compelling interest in inhibiting corporate speech.⁴³

In reversing, the Supreme Court stated first that the Massachusetts Court framed the wrong question and erred in not reaching the First Amendment issue.⁴⁴ According to the Court, the constitutional question was not whether corporations' First Amendment rights were "coextensive with those of natural persons."⁴⁵ The question is whether the statute "abridges expression that the First Amendment was meant to protect."⁴⁶ The Court found the answer to that question simple, as one of the primary purposes of the First Amendment is to afford the widest possible access to divergent viewpoints and ideas.⁴⁷ Viewed from this angle, as an individual's right to receive as much information as possible from different points of view, the Court did not see how corporate speech could not be protected by the First Amendment.⁴⁸

Once the Court determined that corporate speech was protected under the First Amendment, it then addressed the question

⁴² *Belloti*, 435 U.S. at 771.

⁴³ *First National Bank*, 359 N.E.2d at 1270-72; see *Belloti*, 435 U.S. at 787 (finding that the Massachusetts Supreme Court did not examine the regulation under the applicable strict scrutiny standards because it viewed the First Amendment as not applying to the speech in question).

⁴⁴ *Belloti*, 435 U.S. at 775-76.

⁴⁵ *Belloti*, 435 U.S. at 776.

⁴⁶ *Id.* This is read by commentators as giving birth to the notion of hearer's rights. See Daniel Winik, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 656 (2010). The Court goes on to say: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Belloti*, 435 U.S. at 777. "The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." *Id.* at 778. By framing the question in this way, the Court gets to lead with the protected nature of the speech instead of the possibly unprotected nature of the speaker.

⁴⁷ *Id.* at 783

⁴⁸ *Id.*

of whether this otherwise constitutionally permissible speech could be suppressed simply upon the corporate identity of the speaker.⁴⁹ The Government proffered two interests in support of its opinion that corporate speech could be singled out.⁵⁰ First, is the State's interest in protecting the role of the individual in the election process and maintaining the individual's confidence in government.⁵¹ Second, is the State's interest in protecting shareholder rights.⁵²

The Court rejects the shareholder argument because the statute is both underinclusive and overinclusive in its coverage.⁵³ In assessing the State's anti-corruption interest, the Court placed significant weight on the fact that the expenditure bar related to referenda and not to candidate elections.⁵⁴ The Court did not find the State's interests in limiting corporate speech in the referendum context to be sufficient in light of the First Amendment interest in "affording the public access to discussion, debate, and the dissemination of information and ideas."⁵⁵ The Court found the

⁴⁹ *Id.* at 778.

⁵⁰ *Id.* at 787.

⁵¹ *Bellotti*, 435 U.S. at 787. While the Court uses fancier words, it is referring to the anti-corruption interest that was offered in *Buckley*. *See id.* at 788-89 (citing *Buckley*'s anti-corruption interest).

⁵² *Id.* at 787.

⁵³ *Id.* at 793-95. The statute is underinclusive because it only relates to referendum and not to other legislative activities. *Id.* at 793. The statute is overinclusive because even if all shareholders unanimously authorized the expenditure, the corporation still could not contribute money. *Id.* at 795.

⁵⁴ *Id.* at 789-90. While part of this differentiation had to do with the intrinsic difference between referenda and elections; "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Id.* at 790. The Court did note that "[i]f appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration." *Id.* at 789.

⁵⁵ *Id.* at 783. The Court connects up its press cases to its general commercial cases in finding that it is not just the press corporations' unique position in stewarding information to the public but the general interest in a wide dissemination of the largest possible set of ideas. *Id.* at 798 (Burger, J., concurring).

legislature unqualified to “dictat[e] the subjects about which persons may speak and the speakers who may address a public issue.”⁵⁶

In *Austin v. Michigan Chamber of Commerce*,⁵⁷ the Court addressed an as-applied and facial challenge to the Michigan Campaign Finance Act of 1976 (“Michigan Act”).⁵⁸ Section 54(1) of the Michigan Act prohibited corporations from using general treasury funds for expenditures relating to any candidate for state office.⁵⁹ Corporations were allowed to make expenditures out of segregated funds raised solely for political purposes, similar to the PAC requirement under federal election law.⁶⁰ The Michigan State Chamber of Commerce, a non-profit corporation, brought the challenge to the statute on First Amendment grounds.⁶¹

Although the Court found that the statute’s requirements did not completely stifle corporate “expressive activity,”⁶² it recognized that the obstacles inherent in maintaining segregated funds did burden a corporation’s ability to engage in political discourse.⁶³

The Court did not address the issue of whether the State had a compelling interest in regulating against the danger of quid pro quo corruption.⁶⁴ It found, instead, that the Michigan Act’s regulation was aimed at 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

⁵⁶ *Id.* at 785 (quoting *Police Dep’t of Chicago v. Mosely*, 408 U.S. 92, 96 (1972)). The Court found this especially true “where, as here, the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.” *Id.* at 785-86.

⁵⁷ *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652 (1990).

⁵⁸ 1976 Mich. Pub. Acts. 388.

⁵⁹ Michigan Campaign Finance Act § 54(1), 1976 Mich. Pub. Acts. 388 (codified at Mich. Comp. Laws § 169.254(1) (1979)).

⁶⁰ 2 U.S.C. §§ 432-433, 441b(b) (2009).

⁶¹ *Austin*, 494 U.S. at 656.

⁶² *Id.* at 658.

⁶³ In *Fed. Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-65 (1986) (hereinafter *MCFL*), the Court had held that 2 U.S.C. § 441b, which requires corporations to segregate funds in a similar way to section 54(1) of the Michigan Campaign Finance Act, overly burdened corporate freedom of expression as applied to a small non-profit organization.

⁶⁴ *Austin*, 494 U.S. at 659.

support for the corporation's political ideas."⁶⁵ Since the state-conferred structure facilitated a corporation's ability to amass large quantities of wealth, it warranted the limits on expenditures.⁶⁶

In light of this compelling governmental interest, the Court assessed whether the Michigan Act was narrowly tailored or overinclusive in its scope.⁶⁷ The Court found that because the Michigan Act did not impose an absolute ban but allowed corporations to make expenditures through segregated funds, the statute was narrowly tailored to "precisely [target] . . . the distortion caused by corporate spending" ⁶⁸ In response to the overinclusive argument, the Court noted that it had already rejected a similar argument to a challenge to a federal statute because it is not only the actual influence of the vast sums of monies but the "potential for such influence that demands regulation."⁶⁹

Responding to the Michigan Chamber of Commerce's as-applied challenge, the Court noted that it had previously upheld the as-applied challenges of non-profit corporations where the corporation had "features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of [its] incorporated status."⁷⁰ The Court emphasized that this was not based exclusively on non-profit status, and that the Chamber was not the

⁶⁵ *Id.* at 659-60. While not exactly quid pro quo corruption, the Court recognized, and most commentators agreed, that this was merely an extension of the anti-corruption interest. *Id.* The majority opinion in *Citizens United* does not treat it as an extension of the anti-corruption interest but as its own discrete government interest. See *Citizens United*, 130 S. Ct. at 904.

⁶⁶ *Austin*, 494 U.S. at 658-59.

⁶⁷ *Id.* at 660-61.

⁶⁸ *Id.* at 660.

⁶⁹ *Id.* at 661 (original emphasis omitted).

⁷⁰ *Id.* (quoting *MCFL*, 479 U.S. at 263). The Court noted three characteristics that were integral to its holding in *MCFL*: "that the organization 'was formed for the express purpose of promoting political ideas, and cannot engage in business activities,'" "the absence of 'shareholders or other persons affiliated so as to have a claim on its assets or earnings,'" and "the organization's independence from the influence of business corporations." *Id.* at 662-64 (quoting *MCFL*, 479 U.S. at 264).

type of non-profit organization that is excluded from the types of expenditure restrictions contained in the Michigan Act.⁷¹

In *McConnell v. FEC*,⁷² the Court heard a challenge to a number of provisions of the newly enacted BCRA, including the first challenge to its disclosure requirements and restrictions on corporate independent expenditures as they related to “electioneering communication.”⁷³ In contrast to the language adopted in FECA,⁷⁴ the Court upheld the actual definition of “electioneering communication” against a challenge that it was unconstitutionally vague.⁷⁵

The Court upheld the disclosure provision, citing the anti-corruption interest noted in *Buckley* and the important function of “gathering the data necessary to enforce more substantive electioneering restrictions”⁷⁶ The Court specifically noted that it was disturbed by the fact that under then-current law, corporations were not only permitted to fund this type of advocacy through their

⁷¹ *Id.* at 664.

⁷² *McConnell*, 540 U.S. at 93.

⁷³ 2 U.S.C. § 441b (2009)); *McConnell*, 540 U.S. at 189-209. This was a consolidation of multiple actions challenging the constitutionality of the BCRA. *Id.* A summary of the challenges included challenges to: (1) the political party and candidate ‘soft money’ ban, (2) the ban on party donations to tax-exempt entities, (3) the ban on the use of ‘soft money’ for issue ads which clearly identified a candidate, (4) the statutory definition of “electioneering communication,” (5) the categorization of coordinated third-party issue ads as campaign contributions, (6) the PAC requirement for expenditures by unions and corporations, (7) the prohibition on political donations by minors, and (8) the broadcaster disclosure requirements. *Id.* at 114-22. Because the scope of the *Citizen’s United* challenge to the BCRA was limited to the disclosure and independent expenditure requirements of the statute, I will limit my discussion to those in this summary.

⁷⁴ See *Buckley*, 424 U.S. at 44 (construing “relative to a clearly identifiable candidate” as only applying to express advocacy for election or defeat).

⁷⁵ *McConnell*, 540 U.S. at 194. The Court made it clear that the “express advocacy” construction adopted in *Buckley* “was the product of statutory interpretation rather than a constitutional command.” *Id.* at 192. Nothing in the First Amendment required that a regulation of independent expenditures relate only to “express advocacy.” *Id.* at 193.

⁷⁶ *Id.* at 196.

general funds but that the law “permit[ed] them to do so while concealing their identities from the public.”⁷⁷

With respect to BCRA’s regulation of the use of general treasury funds for independent expenditures, the Court found that issue ads,⁷⁸ broadcast during the thirty and sixty day windows as prohibited by BCRA § 203, “are the functional equivalent of express advocacy.”⁷⁹ As such, the same interest identified in *Austin*, to limit “the corrosive and distorting effects of immense aggregations of wealth,” applied, and the regulation was held valid.⁸⁰

BCRA’s regulation of corporate independent expenditures was challenged again in 2007. In *Fed. Election Comm’n v. Wisconsin Right to Life*,⁸¹ the Court heard an as-applied challenge brought to BCRA section 203’s independent expenditure ban.⁸² *Wisconsin Right to Life* was a non-profit organization that, as part of its activities, aired ads in 2004 leading up to the primary election.⁸³

⁷⁷ *Id.* at 196. In its general discussion on issue advertising, the Court noted some egregious examples of companies using misleading names. *Id.* at 126-29 (citing a pharmaceutical company calling itself “Citizens for Better Medicare” for the purpose of an issue ad).

⁷⁸ The Court used the term “issue advocacy” to refer to this type of corporate independent expenditure throughout its opinion. (CITE???)

⁷⁹ *McConnell*, 540 U.S. at 206.

⁸⁰ *Id.* at 205. In sustaining this interest, the Court noted a number of post-*Austin* decisions that re-affirmed the *Austin* anti-distortion interest. See e.g., *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 154 (2003); *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982).

⁸¹ *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449 (2007) (hereinafter *WRTL II*). In *Wis. Right to Life v. Fed. Election Comm’n*, 546 U.S. 410 (2006) (hereinafter *WRTL I*), the Court heard a challenge brought as to whether the Court’s jurisprudence precluded as-applied challenges to BCRA §section 203. *Id.* at 411. After determining that *Austin* and *McConnell* explicitly left open the door to the appropriate as-applied challenge, the Court remanded the parties back down to the trial court. *Id.* at 412. The trial court then found that BCRA section 203 did not apply to Wisconsin Right to Life’s proposed ads because the ads were truly issue ads instead of the functional equivalent of express advocacy. *Wis. Right to life v. Fed. Election Comm’n*, 466 F.Supp.2d 195, 207-208 (D.D.C. 2006).

⁸² *WRTL II*, U.S. 551 U.S. at 456. For the sake of this litigation Wisconsin Right to Life conceded that their ads were prohibited by BCRA section 203. *Id.* at 464.

⁸³ *Id.* at 458-59.

In addressing the challenge, the Court reviewed its decision in *McConnell* to determine the scope of indirect expenditures that would be considered the functional equivalent of express advocacy.⁸⁴ After noting the potential for chilling political speech that was issue advocacy and not candidate advocacy, the Court determined 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.”⁸⁵

III. ANALYSIS

In addition to the background, procedural history, and analysis of the two sections of the majority opinion, this article — partly because of the five-four nature of the primary holding and to give a more rounded view of the issues presented — will analyze separately Justice Stevens’s dissent and the concurring opinions of Chief Justice Roberts and Justice Scalia. While the concurrences are published in front of the dissent in the opinion, this article reverses the order here, as the concurrences are a direct response to arguments raised in Stevens’s dissent.

A. Background of the Case

1. Facts

In 2008, Citizens United, a non-profit corporation, brought a challenge to the BCRA’s prohibition against “electioneering

⁸⁴ *Id.* at 456.

⁸⁵ *Id.* at 469-70. The FEC had proposed a subjective intent-based test. *Id.* at 468. The Court rejected the intent-based approach and adopted an objective standard because it felt that:

Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. *Id.*

communication.”⁸⁶ Citizens United desired to distribute a film entitled *Hillary: The Movie* (“*Hillary*”) through a digital cable video-on-demand service.⁸⁷ To promote the video-on-demand release, Citizens United produced three commercial ads regarding *Hillary*.⁸⁸ Citizens United wished to finance the release and commercials through funds in its general treasury, and sought declaratory and injunctive relief, arguing that BCRA’s ban on expenditures was unconstitutional as-applied to *Hillary*, and that BCRA’s disclaimer and disclosure requirements were unconstitutional as-applied to *Hillary* and the three commercials.⁸⁹

2. Procedural History

The D.C. District Court denied the injunctive relief, both on facial constitutional grounds and as-applied to *Hillary*.⁹⁰ It also rejected the challenge to the disclaimer and disclosure requirements, noting that “the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.”⁹¹

⁸⁶ 2 U.S.C. § 441b (2009). FEC regulation further defines the distribution requirements of an “electioneering communication.” 11 CFR § 100.29(a)(2) (2009). See 11 CFR § 100.29(b)(3)(ii) (2009) (defining public distribution with respect to presidential candidates as any communication that “[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days”).

⁸⁷ *Citizens United*, 130 S. Ct. at 887. The film was already available through theaters and on DVD. *Id.* These distribution methods were not considered to be in violation of the statute either by the government or Citizens United. *Id.* at 888.

⁸⁸ *Id.* at 887. The Court specifically noted that all three of the proposed ads contained a “pejorative” statement regarding then-Senator Clinton. *Id.*

⁸⁹ *Id.* at 888.

⁹⁰ *Citizens United v. Fed. Election Comm’n*, 530 F. Supp. 2d 274, 279 (D.D.C. 2008).

⁹¹ *Id.* at 281.

B. Majority

The Court's opinion in *Citizens United v. Federal Election Commission*⁹² is appropriately split into two parts. First is the five-four split decision invalidating the corporate independent expenditures ban.⁹³ Second is the eight-one decision upholding the mandatory disclaimer and disclosure requirements.⁹⁴

1. The Corporate Independent Expenditures Ban

Justice Kennedy first addressed whether the case could or should be resolved on narrow statutory interpretation grounds.⁹⁵ Specifically, *Citizens United* raised four different grounds for finding *Hillary* outside the regulatory authority of federal election statutes: (1) that *Hillary* did not qualify as "electioneering communication" under section 441b, (2) that, under the approach taken in WRTL II section 441b could not be applied to *Hillary*, (3) that ads delivered through video-on-demand services in general should be exempted from the definition of "electioneering communication," and (4) that an exception should be carved out from section 441b's regulatory scope for non-profit organizations overwhelmingly funded by individuals.⁹⁶

Principally, Kennedy looked at whether the content of *Hillary* qualified as "electioneering communication."⁹⁷ *Citizens United*'s major contention was that *Hillary* was not publicly distributed under the requirements of FEC regulations because each purchase through

⁹² *Citizens United*, 130 S. Ct. 876 (2010).

⁹³ Justice Kennedy's opinion was joined by Chief Justice Roberts and Justices Scalia and Alito. Justice Thomas joined all but Part IV of the opinion. Justices Stevens, Breyer, Ginsberg, and Sotomayor joined Part IV of the majority opinion. Justice Scalia wrote a concurring opinion, which Justice Alito joined in full and Justice Thomas joined in part. Chief Justice Roberts wrote a concurrence joined by Justice Alito. Justice Stevens wrote a concurring and dissenting opinion joined by Justices Ginsberg, Breyer, and Sotomayor. Justice Thomas wrote a concurring and dissenting opinion. *Id.* at 886.

⁹⁴ Justice Thomas was the sole dissenting voice for this section of the opinion. *Id.*

⁹⁵ *Id.* at 888-96.

⁹⁶ *Id.*

⁹⁷ *Id.* at 888.

the video-on-demand service would be a separate, distinct individual purchase.⁹⁸ The Court found this statutory interpretation implausible because the regulation itself instructs that it is not the nature of who receives the transmission, but the number of cable subscribers in the relevant area.⁹⁹

Second, Citizens United argued that the ban could not be applied to *Hillary* under the “express advocacy” approach taken in *WRTL II*.¹⁰⁰ As previously mentioned, in *WRTL II*, the Court determined that 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.”¹⁰¹ In deciding that *Hillary* is the equivalent of express advocacy, the Court noted that the movie was essentially an extended negative advertisement against Clinton’s presidential campaign.¹⁰²

Thirdly, Citizens United argued that video-on-demand, as a particular delivery vehicle for content, did not pose the same level of distortion risk as broadcast television, and therefore, should be treated differently.¹⁰³ The Court discards this argument as outside the purview of judicial review.¹⁰⁴

⁹⁸ *Id.* See *supra* text accompanying note 86 for a description of the FEC’s regulatory requirements regarding whether a communication is “publicly distributed,” and therefore falls within the scope of communication regulated by section 441b.

⁹⁹ 11 CFR §§ 100.29(b)(7)(i)(G)(ii).

¹⁰⁰ *Citizens United*, 130 S. Ct. at 889-90.

¹⁰¹ *WRTL II*, U.S. 551 at 469-70.

¹⁰² *Citizens United*, 130 S. Ct. at 890. Citizens United contended that the movie was merely a historical documentary. *Id.* The Court noted that throughout the movie, the commentators referred to Senator Hillary’s potential candidacy, including discussing policies they predicted she would pursue. *Id.*

¹⁰³ *Id.* The basis for this argument was the voluntary nature of the video-on-demand service. A viewer is subjected to commercials not because of personal choice but because they are attached to a particular program the viewer likes. *Id.* On the other hand, video-on-demand only reaches an audience that actively chooses to access and view the material. *Id.*

¹⁰⁴ *Id.* Specifically, the Court says that “[w]hile some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts’ own lawful authority.” *Id.*

Finally, Citizens United requested that the Court carve out an exception to the BCRA's ban on corporate "electioneering communications" where the corporation funding the speech is a non-profit and the speech is predominantly funded by individuals.¹⁰⁵ In finding this solution distasteful, the Court emphasized that for the extensive judicial revision necessary, case-by-case determinations that would need to be made, resulting in the chilling of "archetypical political speech."¹⁰⁶

In addition to the insufficiencies the Court found in Citizens United's arguments for a narrow ruling, the Court supplied three reasons for deciding to resolve the dispute on the grounds of a facial challenge to the statute.¹⁰⁷ First, the Court cited its ambiguous litigation position of the government.¹⁰⁸ Second, the Court argued that the substantial time necessary to clarify the statute, if it were to take a judicial scalpel to it, would chill too much speech.¹⁰⁹ Third, the Court reemphasized the importance of "speech itself to the integrity of the election process."¹¹⁰ As a result of these considerations, the Court found it necessary to examine a facial attack on section 441b's ban on political speech, and, as a result, its own decision in *Austin*.¹¹¹

¹⁰⁵ *Id.* In MCFL, the Court carved out an exception to restrictions on corporate independent expenditures as applied to non-profit corporations that did not accept donations from for-profit corporations and labor unions, and only engaged in the promotion of political ideas. The *McConnell* court recognized an extension of that principle to BCRA's Wellstone Amendment. *McConnell*, 540 U.S. at 209; 2 U.S.C. § 441b(c)(6). Citizens United essentially asks for the Court to expand the definition of a qualifying MCFL non-profit entity and create a *de minimis* application of the MCFL rule. See *Citizens United*, 130 S. Ct. at 891.

¹⁰⁶ *Id.* at 892.

¹⁰⁷ *Id.* at 894-96.

¹⁰⁸ *Citizens United*, 130 S. Ct. at 894. Specifically, the Court cites the fact that the government argued that one of Citizens United's applied challenges might have merit. It seems questionable though to punish the government from utilizing their right to argue a case in the alternative.

¹⁰⁹ *Id.* at 895.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 896. Citizens United never actually asked the court to review the facial constitutionality of section 441b. Instead, after oral arguments, the Court, *sua sponte*, asked the parties to brief the question of facial validity; specifically whether it should overrule its own precedent in *Austin* and *McConnell*.

Before dissecting the validity of its decision in *Austin*, the Court examined the scope of speech chilled by section 441b's ban.¹¹² This examination was twofold; including looking at whether the PAC exemption was relevant to its examination of First Amendment concerns and whether the regulation could be characterized as one of time, place, and manner instead of an outright ban.¹¹³

While noting that PAC's were designed as a vehicle for the speech of members of the corporate apparatus and were exempt from the speech ban under section 441b, the Court decided that this exception did not alleviate any First Amendment concerns regarding the chilling of corporate speech because of the burdensome requirements to create a PAC.¹¹⁴ Specifically, the Court notes the expense of creating a PAC and the extensive government regulation involved in administering them.¹¹⁵ Further, the Court dismisses any time, place, and manner argument for the regulation on the grounds that "[i]f [section] 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech."¹¹⁶

After resolving concerns regarding the scope and level of review, as well as the breadth of the statutes' ban, the Court addressed the state of its own precedent with regard to a fundamental feature of the statute, namely, the relationship Citizens United's corporate status had on its First Amendment rights to free speech.¹¹⁷

The Majority is adamant, and the dissent does not disagree, that First Amendment considerations do not disappear when the

¹¹² *Id.* at 897. The Court gives some highly provocative examples of potentially chilled speech including Sierra Club, NRA, and American Civil Liberties Union ads. *Id.*

¹¹³ *Id.* The Court feels it necessary to throw into its argument that, if section 441b applied to individuals, that "no

¹¹⁴ *Citizens United*, 130 S. Ct. at 897. A multitude of previous cases noted that the PAC exception created an avenue for corporations and Unions to make independent expenditures from their general treasuries that were otherwise restricted by federal regulations. See *Austin*, 494 U.S. at 660; *McConnell*, 540 U.S. at 203-04; *Beaumont*, 539 U.S. at 162-63. The purpose of this inquiry into the nature of the PAC's was to allow the Court to conclude that section 441b was an outright ban on corporate political speech. *Citizens United*, 130 S. Ct. at 897.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 898.

¹¹⁷ *Id.* at 899-900.

speaker is a corporation.¹¹⁸ The Court's precedent is clear in that respect.¹¹⁹ The first question then is whether the First Amendment protection afforded corporations is coexistent with that afforded individuals.¹²⁰ On this question, the Court notes a split in authority between its decisions in *Buckley* and *Austin*.¹²¹

As noted, the *Buckley* Court upheld FECA's ban on direct contributions but invalidated its ceiling on independent expenditures.¹²² *Buckley's* direct progeny extended that analysis to conclude that there is "no support in the First . . . Amendment, or in the decisions of this Court, 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 . . ."¹²³

In contrast, the *Austin* Court, after recognizing a new compelling government interest in preventing "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," found valid the restrictions on independent expenditures based upon a speaker's corporate identity.¹²⁴

As the anti-distortion rationale was the major distinguishing factor between the two lines of authority, it was the first issue addressed by the majority in reviewing its precedent and attacking

¹¹⁸ *Id.* at 899; *id.* at 951-52 (Stevens, J., dissenting).

¹¹⁹ *Id.* at 899 (citing *Bellotti*, 435 U.S. at 778 n. 14).

¹²⁰ See *Citizens United*, 130 S. Ct. at 900 (discussing the background of the court's precedent regarding the extent of a corporation's right to speak, but also the right of individuals to hear that speech).

¹²¹ *Id.* at 903.

¹²² See *supra* pp. 4-5, for the detailed analysis of the *Buckley* court's reasoning for the distinction between the different types of expenditures.

¹²³ *Citizens United*, 130 S. Ct. at 902. (quoting *Bellotti*, 435 U.S. at 798). The majority here does recognize that there is a narrow class of speech restrictions based upon speaker identity that were upheld by the Court, but it emphasized that those restrictions were based upon an "interest in allowing governmental entities to perform their functions." See *id.* at 899 (recognizing the public function exception with respect to; public schools, penitentiaries, military, and government employees).

¹²⁴ *Id.* at 903 (quoting *Austin*, 494 U.S. at 660).

the validity of the statute.¹²⁵ It then addressed the other three grounds proposed by the government, namely: the anti-corruption interest as identified in *Buckley*, a proposed dissenting shareholder interest, and a proposed interest in “preventing foreign individuals or associations from influencing our Nation’s political process.”¹²⁶

The anti-distortion rationale is premised on the theory that a corporation’s superior spending power and potential immortality give it an advantage with regard to political funding, such that they can distort the presentation of issues to the public.¹²⁷ The Court wasted no time in rejecting the theory that a corporation’s wealth, amassed in the economic market place, gives it an unfair advantage with regard to expression in the political marketplace.¹²⁸ Further, the Court said that, even if it did recognize such an advantage, the government has no interest at all in equalizing the ability of individuals and groups to influence elections.¹²⁹ It also concluded that, “[t]he rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”¹³⁰

The Court further analogizes the *Austin* rule to media corporations and argues that (1) under *Austin*’s framework wealthy media conglomerates would have their voices diminished relative to other media conglomerates and (2) that conglomerates that owned a

¹²⁵ *Id.* at 904-08.

¹²⁶ *Id.* at 911.

¹²⁷ *Id.* at 904 (citing *Austin*, 494 U.S. at 659). For a more detailed discussion of *Austin* and the anti-distortion rationale, *See supra* pp. 10-11.

¹²⁸ *Id.* The Court again argues that, because the Government argued all of the rationales in the alternative, that someone’s argument for the continued use of *Austin*’s anti-distortion rationale was weakened. *Id.* (citing Tr. Of Oral Arg. 45-48 (Sept. 9, 2009)).

¹²⁹ *Citizens United*, 130 S. Ct. at 904. The equalization interest was first proposed and rejected in *Buckley*.

¹³⁰ *Id.* at 905. *See supra* text accompanying note 123, for the public function exception to the general identity-based ban on speech regulations. The Court also rejected the skyrocketing costs of political campaigns as either a ground for the government’s interest or a result of the distortion in the political arena. *Citizens United*, 130 S. Ct. at 904.

media business would have an advantage with respect to conglomerates that did not own a media business.¹³¹

Even if the Court had agreed with the anti-distortion argument, it found that the current statute did not actually address the issue of amassed wealth, as it subjected all corporations of any size to the same restrictions.¹³² The Court ends its lambasting of the anti-distortion rationale in *Austin* by concluding that any situation where the government uses its power to control an individual's source of information is illegal censorship to control thought.¹³³

After failing to find the anti-distortion rationale to substantiate any governmental interest, let alone a substantial one, the Court examined whether section 441b could be supported by the corruption interest noted in *Buckley*.¹³⁴ While the Court questioned the necessity of the regulation of direct expenditures because bribery

¹³¹ *Id.* at 905-06. The Majority seems to argue in the same breadth that it is unfair that the Media Corporation Exception treats media corporations differently than other corporations, and that the framers would never allow restrictions on media corporations because of the unique position occupied by those same corporations. *Id.* at 905. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). The strength of this assertion is further diminished as it is drawn from a dissenting opinion, which itself, cites other dissenting opinions as its source. *Id.* at 905 (citing *Austin*, 494 U.S. at 691 (Scalia, J., dissenting)). See *id.* at 707 (Kennedy, J., dissenting). This lends credence to Justice Stevens's complaint that the Majority's opinion is simply based upon a long line of dissents explicitly rejected by the Court. *Id.* at 962.

¹³² *Id.* at 906-07. The Court notes that a vast majority of corporations are small (fewer than 100 employees). *Id.* at 907. The Court attempts to analogize this ban to the government banning the speech of associations of citizens. *Id.* at 908. This seems a bit of a stretch as aliens can and do own shares of corporations, and those same individuals associated with the corporation are free to create a PAC for the expression of their political goals and are free to petition to the legislature and administrative agencies. See *id.* at 907. The court also uses this fact as a reason for why the anti-distortion interest itself is aberrant, which seems to be misplaced. Just because a statute does not protect a proposed interest, does not make the interest itself non-existent. See *id.* at 907 (calling the anti-distortion interest aberrant because it does not limit *all* avenues of corporate political expression). The Court attempts to further justify its stance by pointing out that large corporations routinely counsel members of congress in private, which means that the corporate ban will have a further disproportionate effect in that large corporations still have an avenue for expression that small corporations are shut out from. *Id.* at 907-08.

¹³³ *Id.* at 908.

¹³⁴ *Id.*

laws already covered the *quid pro quo* activity in question, it recognized that the appearance of corruption was a sufficient interest to support the government's regulation of direct expenditures.¹³⁵

When turning to the independent expenditure ban under section 441b, the Court agreed with the analysis in *Buckley* that “[t]he absence of prearrangement and coordination of an expenditure with a candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”¹³⁶ For that reason, the Court found that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”¹³⁷

With respect to the final two proposed interests, shareholder protection and foreign influence, the Court quickly swept them aside.¹³⁸ It found that the Shareholder Protection interest, like the anti-distortion interest, would ban too much speech.¹³⁹ It also found internal corporate governance sufficient to protect shareholders that may dissent from the corporation's choice of political expenditures.¹⁴⁰ Because of the broad scope of the section 441 ban, the Court found that even if it did recognize an interest in preventing foreign influence in the national political process, the current statute would be overbroad.¹⁴¹

¹³⁵ *Id.*

¹³⁶ *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47).

¹³⁷ *Id.* The majority attempts to draw a distinction between the permissible government interest “appearance of corruption” and what it terms as the “appearance of influence.” *Id.* at 909-910. While correctly noting that “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt,” this seems to be simply shades of gray from the appearance of corruption as described in *Buckley*, which the Court relies upon. See *Buckley*, 424 U.S. at 26. The Court also chooses to ignore extensive legislative history and proceedings by noting the similarities between independent and direct expenditures that Congress based FECA, and then the BCRA, on. See *McConnell*, 540 U.S. at 126-127.

¹³⁸ *Citizens United*, 130 S. Ct. at 911.

¹³⁹ *Id.* (noting that recognizing this interest would allow the government to ban the speech of media corporations).

¹⁴⁰ *Id.* “There is . . . little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’” *Id.* (quoting *Bellotti*, 435 U.S. at 794).

¹⁴¹ *Id.* at 911.

The majority found all four proposed interests, including *Austin's* anti-corruption interest, to be insufficient to support the restrictions that section 441b imposed on core political speech. As such, it expressly rejected *Austin* and overruled the part of *McConnell* that followed *Austin's* analysis.¹⁴²

2. Disclaimer and Disclosure Provisions

Citizens United's second challenge in the case was to the disclaimer and disclosure provisions in BCRA sections 311 and 201.¹⁴³ Citizens United objected to the application of the provisions as applied to *Hillary* and its advertisements.¹⁴⁴

As previously noted, in *Buckley*, the Court recognized a "governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending."¹⁴⁵ But while the statutes were facially upheld in *Buckley* and *McConnell*, the

¹⁴² *Id.* at 913. The Majority ends its argument for overruling *Austin* in a confusing way. It implies that since speakers continue to find inventive ways to circumvent campaign finance laws, regulations are impotent and should be abandoned. *See id.* at 912 ("*Austin* is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws.").

¹⁴³ *Id.* at 913. The disclaimer provision requires that any electioneering communication funded by someone other than the candidate, shown on television, must include a disclaimer indicating who is responsible for the ad. 2 U.S.C. § 441d(d)(2). Additionally the ad must be displayed for at least four seconds, in a clearly readable and spoken manner, indicate that it is not authorized by the candidate, and indicate the website of the authorizing party. 2 U.S.C. § 441d(a)(3). The Disclosure provision requires that, where a person spends more than \$10,000 on electioneering communication within a calendar year, they must disclose that spending to the FEC indicating who made the expenditure, the amount of the expenditure, the election the expenditure was directed at and the names of contributors. 2 U.S.C. §§ 434(f)(1)-(2).

¹⁴⁴ Citizens United aired two ten second ads and one thirty second ad to promote *Hillary*. *Citizens United* 130 S. Ct. at 914.

¹⁴⁵ *Id.* at 914 (quoting *Buckley*, 424 U.S. at 66). The standard of review employed for the disclaimer and disclosure requirements is lower than that applied to the independent expenditure ban. Because disclaimer and disclosure requirements "impose no ceiling on campaign-related activities," *Citizens United* 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64), the government need only supply a sufficiently important governmental interest, which substantially relates to the government's end. *Citizens United* 130 S. Ct. at 914.

Court left open the possibility of a successful as-applied challenge “if a group could show a ‘reasonable probability’ that disclosure of its contributors’ names ‘will subject them to threats, harassment, or reprisals from either Government officials or private parties.’”¹⁴⁶

Citizens United objected to the application of the BCRA’s disclaimer and disclosure requirements for the *Hillary* advertisements, and to *Hillary* itself, on six grounds: (1) that the disclaimer requirements for “electioneering communication” did not apply to a commercial advertisement;¹⁴⁷ (2) that section 311 of the *BCRA* is under inclusive in scope because its coverage does not extend to print or internet advertising;¹⁴⁸ (3) that the effectiveness of its speech is diminished by the loss of four seconds in each advertisement dedicated to disclaimers;¹⁴⁹ (4) that the disclosure requirements in section 201 should be “confined to speech that is the functional equivalent of express advocacy;”¹⁵⁰ (5) that the disclosure of the funding sources of the ads themselves would not help viewers make an informed choice as to watching *Hillary* itself, as the funding for *Hillary* is not disclosed;¹⁵¹ and (6) “that disclosure requirements can chill donations [to an organization] by exposing donors to retaliation.”¹⁵²

Addressing these arguments in turn, the Court immediately rejected the contention that commercial advertisements necessarily fall outside the definition of an “electioneering communication.”¹⁵³ Citing the repeated direct references to then-Senator Clinton in the

¹⁴⁶ *Id.* (quoting *McConnell*, 540 U.S. at 198).

¹⁴⁷ *Citizens United* 130 S. Ct. at 914-15.

¹⁴⁸ *Id.* at 915.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 885.

¹⁵³ *Citizens United* 130 S. Ct. at 885. The Court notes that there is a difference between the scope of the disclaimer and disclosure requirements and the independent expenditure ban. *Id.* Under FEC regulation, ads that “propose a commercial transaction” are not subject to the expenditure ban under section 441b but are subject to the disclaimer and disclosure requirements of sections 441d(2), 441d(a)(3), and 434(f)(1)-(2). *Id.*

advertisement itself, the Court found that the ads fell within the definition of “electioneering communication.”¹⁵⁴

The Court noted that the under-inclusive and effectiveness arguments of the disclaimer, provisions were already tendered to the Court in *McConnell*.¹⁵⁵ The Court in *McConnell* rejected the argument on the grounds that the government has an important interest in “shedding the light of publicity on campaign financing.”¹⁵⁶ The Court here extends that rejection to include the pertinence of those arguments to the disclosure provisions in the BCRA.¹⁵⁷

The Court immediately rejected any argument that the requirements of section 201 be construed as narrowly as Citizens United requested.¹⁵⁸ The Court emphasized that disclosure is “a less restrictive alternative to more comprehensive regulations” and that it has upheld disclosure requirements on a broad range of activities, including those of lobbyists.¹⁵⁹

The Court found the argument that the public’s interest in the funding for the ads themselves was somehow diminished because of their commercial nature, or the fact that their funding was separate from the movie itself, to be similar to Citizen United’s first argument regarding “electioneering communications.”¹⁶⁰ Citizen United’s first argument emphasized that even if the ads themselves “only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.”¹⁶¹

While Citizens United’s contention of potentially chilled speech raised concerns for the Court, it found no facts that indicated that, as-applied to Citizens United’s activities, the disclosure requirements have or will cause its members to face threats or otherwise be put in danger.¹⁶² Thus, despite the existence of some

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *McConnell*, 540 U.S. at 93 (quoting *Buckley*, 424 U.S. at 81).

¹⁵⁷ *Citizens United*, 130 S. Ct. at 915.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 916. As a matter of fact, the Court indicates that the facts showed that Citizens United had been disclosing its donors for years without a single instance of harassment or threats. *Id.* This concern is the primary thrust of Justice

amici briefs that indicated the existence of harassment and threats to the donors of some organizations, the Court determined that the disclosure requirements did not have a chilling effect on Citizens United's potential political speech.¹⁶³

In closing, in consideration of Citizens United's arguments against the disclosure and disclaimer requirements of the BCRA, the Court emphasized how critical those requirements were to its vision of First Amendment protections of political discourse:

A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today . . . [w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interest The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.¹⁶⁴

Thomas's lone dissent from the Court's decision regarding the disclosure and disclaimer requirements. *Id.* at 980-82. Justice Thomas cites to the recent activities surrounding a constitutional amendment passed in California that outlawed gay marriage. *Id.* Several high profile donors to the amendment's campaign were forced to resign from their work after artists who opposed the act threatened to boycott their employers. *Id.* at 981. To Justice Thomas, "[t]he success of such intimidation tactics has . . . spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights." *Id.*

¹⁶³ *Citizens United* 130 S. Ct. at 916.

¹⁶⁴ *Id.*

C. Dissent

Justice Stevens's dissent attacks the majority opinion on multiple grounds: the scope of the Court's own authorized review, the ability to decide the case on narrow grounds, the appropriate weight to give the doctrine of *stare decisis*, whether BCRA's regulation of corporate spending amounted to a "ban" of the political speech in question, the permissibility of identity based distinctions in First Amendment jurisprudence, and "ancient First Amendment principles."¹⁶⁵

After analyzing the weaknesses Stevens saw in those principles, he revisits the government's interests in upholding the BCRA's regulation of corporate expenditures and finds the Anticorruption Interest, Antidistortion Interest, and Shareholder Protection Interests to all be viable bases for upholding the regulation.¹⁶⁶ The dissent's primary position is simple, they believe that "[t]he conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case."¹⁶⁷

1. Narrow Grounds for Review

Before reaching the interests of the case, Stevens attacked the majority's decision on a procedural ground. Under Supreme Court Rule 14.1(a) "only questions set forth in the petition, or fairly included therein, will be considered by the Court."¹⁶⁸ Citizens United never requested a facial review of section 203.¹⁶⁹ The question presented to the Court was whether, as-applied to *Hillary*, section 203 applied.¹⁷⁰ Besides the philosophical view that by resorting to a facial challenge "[t]he Court operates with a sledge

¹⁶⁵ *Id.* at 929-52 (Stevens, J., dissenting).

¹⁶⁶ *Id.* at 952-79.

¹⁶⁷ *Id.* at 930.

¹⁶⁸ *Id.* at 931 n. 2.

¹⁶⁹ *Citizens United* 130 S. Ct. at 931 n. 2 (Stevens, J., dissenting).

¹⁷⁰ *Id.* As previously mentioned, the Court itself requested that the parties submit briefs on the facial constitutionality of the regulations. *See supra* note 11 and accompanying text.

hammer rather than a scalpel.”¹⁷¹ The root of Justice Stevens’s objection to the Court considering a facial challenge to the statute at such a late date lies in the lack of relevant evidence to make any credible determination regarding the statute’s affect on corporate and union political speech.¹⁷² Contra “Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert.”¹⁷³ Stevens does acquiesce that in some limited circumstances the court may turn an as-applied challenge into a facial challenge when there “is a judicial determination that the legislature acted with an impermissible purpose in enacting a provision, as this carries the necessary implication that all future as-applied challenges to the provision must prevail.”¹⁷⁴

In addition, Stevens argues that the narrow grounds proposed by both the government and Citizens United are not only viable options but are more appropriate than reaching the constitutional issue at all.¹⁷⁵

Because video-on-demand services were in their infancy when the BCRA was crafted by Congress, it is reasonable to presume that they did not intend to qualify this type of service as “electioneering communication” under the statute.¹⁷⁶ This is an argument that gains traction based upon the legislation sponsors’ own confusion

¹⁷¹ *Citizens United* 130 S. Ct. at 933 (Stevens, J., dissenting).

¹⁷² *Id.* “Had Citizens United maintained a facial challenge . . . the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual burdens and its actual benefits, on *all* manner of corporations and unions.” *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 935-36.

¹⁷⁵ *Id.* at 937. “[I]f it is not necessary to decide more, it is necessary not to decide more.” *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (C.A.D.C. 2004).

¹⁷⁶ *Citizens United*, 130 S. Ct. at 937 (Stevens, J., dissenting). Stevens further notes that the congressional record developed for *McConnell* was squarely focused on ads that appeared on television, which is a very different type of forced presentation than video-on-demand, which requires the proactive step of program selection. *Id.* (citing *McConnell*, 540 U.S. at 207).

regarding the scope of BCRA's coverage and where video-on-demand services fall.¹⁷⁷

Citizens United requested that the Court rule that non-profits, such as itself, that "accept only a *de minimis* amount of money from for-profit corporations," be exempted from the BCRA's coverage by expanding the non-profit exception under *MCFL*.¹⁷⁸

Finally, if the Court insisted on reaching the constitutional issue, the Court could have simply upheld Citizen United's as-applied challenge.¹⁷⁹

As outraged as the dissent was regarding the Court's insistence on reaching the facial constitutional issue, Justice Stevens could not understand why, in this particular circumstance, the Court chose to directly overrule *Austin*.¹⁸⁰ While Stevens admits that he is "not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other,"¹⁸¹ he does feel that "if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine."¹⁸²

Particular to Stevens's objection is the Court's disregard of standard principles for determining the continued validity of precedent, namely, "the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake."¹⁸³

In addressing the reliance interests at stake here, Stevens notes that legislatures, both federal and state, have relied on the Court's

¹⁷⁷ *Citizens United*, 130 S. Ct. at 937 (Stevens, J., dissenting) (citing Amici Curiae Brief for Senator John McCain et al. at 17-19).

¹⁷⁸ *Citizens United*, 130 S. Ct. at 937 (Stevens, J., dissenting). The dissent notes that a number of lower courts had already "held that *de minimis* business support does not, in itself, remove an otherwise qualifying organization from the ambit of *MCFL*." See *id.* at 937 n. 14 (citing Colorado Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1148 (C.A. 2007)).

¹⁷⁹ *Citizens United*, 130 S. Ct. at 937-38 (Stevens, J., dissenting).

¹⁸⁰ *Id.* at 938. The dissent's suspicion was that "[t]he only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*." *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 940. The majority does mention the traditional concerns for *stare decisis*; however, as the dissent alleges, it does not use them in any real way to discuss whether it should address overturning this decision. See *id.* at 912.

decision in *Austin* for the past two decades to shape campaign finance reform.¹⁸⁴ To throw out the decision in *Austin* now throws the entire campaign finance reform field in disarray, and hampers “the ability of the elected branches to shape their laws in an effective and coherent fashion.”¹⁸⁵

Interconnected with the legislatures’ past reliance on the precedent is the fact that *Austin* has been on the books for over two decades with no intervening changes in condition that signal either its unconstitutionality or unworkability.¹⁸⁶ As a point of emphasis, Stevens reminds the majority that merely two terms previously, the *WRTL II* court, in an opinion drafted by Chief Justice Roberts, upheld *Austin*.¹⁸⁷

As a further comment on the workability of the legal rule espoused, Justice Stevens notes that the Chief Justice’s opinion in *WRTL* crafted a rule “with the express goal of maximizing clarity and administrability” of BCRA’s regulatory impact.¹⁸⁸

Stevens concedes that the majority bases its own *stare decisis* argument on the belief that *Austin* departs dramatically from First Amendment precedent.¹⁸⁹ This departure, if Stevens agreed with their argument, would be a compelling reason to depart from *Austin*’s reasoning.¹⁹⁰ Stevens is disconcerted though by the majority’s failure to consider the traditional factors for determining the weight given to precedential authority.¹⁹¹ This, coupled with the pejorative stigma

¹⁸⁴ *Id.* at 940. The dissent frames the reliance interest well, “[s]tare decisis has special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.’” *Id.* at 940 (quoting *Hubbard v. United States*, 514 U.S. 695, 714 (1995)).

¹⁸⁵ *Citizens United* 130 S. Ct. at 940 (Stevens, J., dissenting).

¹⁸⁶ *Id.* at 940-41.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 941 n. 28.

¹⁹⁰ *See id.* at 939.

¹⁹¹ *See supra* text accompanying note 183.

the majority attaches to the *Austin* opinion itself,¹⁹² leads Stevens to claim that:

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling this strikes at the vitals of *stare decisis*
.....¹⁹³

Thus Stevens raises the specter of the primary public policy behind the *stare decisis* rule, the destabilizing effect a rapidly changing composition on the court can have on settled precedent.¹⁹⁴

2. The Facial Challenge to *Austin* and *McConnell*

The first aspect of the Court's challenge to the continued validity of *Austin* and *McConnell* is its premise that the *BCRA* regulation amounts to an outright ban on corporate independent expenditures.¹⁹⁵ Stevens attacks this premise on multiple grounds. First, the dissent believes the *PAC* mechanism is a sufficient avenue for corporations and unions to fund their legitimate electioneering communication.¹⁹⁶ Second, the *MCFL* exception has created an

¹⁹² The majority continually says that *Austin* "was not well reasoned" and that the government's lack of reliance on the precedent diminishes "the principle of adhering to that precedent." See *Citizens United*, 130 S. Ct. at 912.

¹⁹³ *Id.* at 941-42 (Stevens, J., dissenting).

¹⁹⁴ *Id.* at 942. "[T]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion' that 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.'" *Id.* (quoting *Vasquez v. Hillary*, 474 U.S. 254, 265 (1986)).

¹⁹⁵ *Citizens United*, 130 S. Ct. at 942 (Stevens, J., dissenting).

¹⁹⁶ *Id.* at 942-43. While recognizing that PACs are separate organizations, a major point in the majority's argument that PAC speech could not be equated to corporate speech, the dissent argues that that was the entire point of creating the PAC. *Id.* at 942. It provides corporations an avenue for raising funds and engaging

additional avenue through which ideologically minded individuals can pool their efforts through the corporate form.¹⁹⁷ Third, the narrow scope of the statute with regard to the type of corporate communication covered did not prevent or exclude corporations from entering the general public dialogue in a meaningful way.¹⁹⁸

Next Stevens challenges the Court's contention that identity-based distinctions were impermissible under First Amendment jurisprudence.¹⁹⁹ While recognizing that certain identity-based distinctions are "frowned on," Stevens notes that the Court upheld distinctions in a number of contexts including students, prisoners, the Armed Forces, foreigners, and federal employees.²⁰⁰

In the context of campaign finance reform, the "legislatures are entitled to decide 'that the special characteristics of the corporate structure require particularly careful regulation' in an electoral context."²⁰¹ In addition, "[c]ampaign finance distinctions based on corporate identity tend to be less worrisome . . . because the 'speakers' are not natural persons . . . and the governmental interests are of the highest order."²⁰²

in advocacy, while maintaining a separateness that keeps the PAC from implicating the corruption concerns. *See id.* at 942 ("The ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view." *McConnell*, 540 U.S. at 203).

¹⁹⁷ *Citizens United*, 130 S. Ct. at 943 (Stevens, J., dissenting) (citing *MCFL*, 479 U.S. at 263-264).

¹⁹⁸ *Citizens United*, 130 S. Ct. at 943-44 (Stevens, J., dissenting). Specifically, the dissent notes that the scope was narrowly drawn around a particular type of media that was identified by Congress to be particularly troublesome, the thirty and sixty day windows reflected a minimal intrusion into the time frame of unregulated advocacy, and the exception for true issue advocacy under *WRTL II*. *Id.* at 943-944.

¹⁹⁹ *Id.* at 945-948.

²⁰⁰ *Id.* at 945 nn. 41-45. The majority did identify the same list of appropriate identity based restrictions. *See, supra* note 123. They also tied that short list to a public function exception to the identity based restriction ban. *See supra* note 123.

²⁰¹ *Citizens United*, 130 S. Ct. at 947 (Stevens, J., dissenting) (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 206 (1982)).

²⁰² *Citizens United*, 130 S. Ct. at 947 (Stevens, J., dissenting). The dissent takes its criticism of the majority's identity based regulation ban a step further by noting that, at its extreme, such a ban would prevent restrictions of the speech of

3. The Court's First Amendment Jurisprudence

This leads to Stevens's criticism of another pillar of the majority opinion, namely that *Austin* and *McConnell* were "radical outliers" in the Court's First Amendment jurisprudence.²⁰³ In examining the Court's First Amendment jurisprudence, Stevens discusses the original understanding of the First Amendment as it applied to Corporations, the judicial and legislative history of restrictions based upon the Corporate identity in Campaign Finance law, and the background and effect of the Court's decisions in *Buckley* and *Bellotti*.²⁰⁴

Stevens first attacks the Court's invocation of "ancient First Amendment principles."²⁰⁵ The thrust of the dissent's argument is that, at the time of the First Amendment's passage, "Corporations were created, supervised, and conceptualized as quasi-public entities, 'designed to serve a social function for the state.'"²⁰⁶ "Even 'the notion that business corporations could invoke the First Amendment would probably have been quite a novelty,' given that 'at the time the legitimacy of every corporate activity was thought to rest entirely on a concession of the sovereign.'"²⁰⁷

Furthermore, Stevens notes that several of the framers carried an intense distrust of the corporate form.²⁰⁸ Viewing the First

foreign and multi-national corporations, or even war time propagandists such as the infamous "Tokyo Rose" during World War II. *Id.* at 947-948.

²⁰³ *Id.* at 948.

²⁰⁴ *Id.* at 948-52.

²⁰⁵ *Id.* at 948.

²⁰⁶ *Id.* at 949.

²⁰⁷ *Citizens United*, 130 S. Ct. at 950 (Stevens, J., dissenting) (quoting Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 578 (1991)). Justice Scalia's concurrence directly attacks Stevens's interpretation of original First Amendment ideals. While Stevens himself concedes that "we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment," he rejects the notion that simply because corporations are now created by individuals, "it follows . . . that their electioneering must be equally protected by the First Amendment and equally immunized from expenditure limits." *Citizens United*, 130 S. Ct. at 952 (Stevens, J., dissenting).

²⁰⁸ *See id.* at 949 n. 54.

Amendment in light of how corporations were created and treated at the time of the Bill of Rights passage, Stevens concludes, “it seems to me implausible that the Framers believed ‘the freedom of speech’ would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.”²⁰⁹

As already noted in the legislative history section of this article, the general trend of campaign finance reform in the United States is to restrict the manner and means with which Corporations could make candidate contributions.²¹⁰ In fact, the second prong of Stevens’s argument against the majority’s interpretation of First Amendment principles to the corporate form hinges on this restrictive trend.²¹¹ Stevens notes that by the time the Court decided *Buckley* in 1976, “the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation . . . no one even bothered to argue that the bar as such was unconstitutional.”²¹² As a matter of fact, because of the careful balance the legislature sought to maintain between allowing a free flow of information and protecting against the inherent dangers corporations posed to the election process, the Court traditionally gave tremendous deference to the incremental regulatory approach taken in the campaign finance reform arena.²¹³

Stevens takes particular ire with the Court’s interpretations of *Buckley* and *Bellotti*.²¹⁴ While both cases seemingly struck down

²⁰⁹ *Id.* at 952. While Stevens makes this argument, he does it only for the purpose of rebutting the majority’s efforts “to cast itself as a guardian of ancient values.” *Id.* Stevens directly concedes that particularly in the field of campaign finance jurisprudence the modern Court has not followed the views of the framers very closely as their “political universe differed profoundly from that of today.” *Id.*

²¹⁰ *Id.* at 952-953 (tracing the development of corporate contribution regulation).

²¹¹ *Id.* at 955.

²¹² *Id.*

²¹³ *Citizens United*, 130 S. Ct. at 955 (Stevens, J., dissenting). (“Congress’ ‘careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations... warrants considerable deference,’ and ‘reflects a permissible assessment of the dangers posed by those entities to the electoral process.’” (quoting *NRWC*, 459 U.S. at 209 (Rehnquist, C.J.) (unanimous opinion)).

²¹⁴ *Citizen’s United*, 130 S. Ct. at 957 (Stevens, J., dissenting).

restrictions on corporate spending, Stevens would read them less as generally overruling corporate restrictions on campaign financing, but rather as limited exceptions to the general ban on the use of corporate general treasury funds to finance “electioneering communication.”²¹⁵

First, Stevens sees reliance on *Buckley* as mistaken because *Buckley* was balancing First Amendment protection against “the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”²¹⁶ As the dissent aptly points out, relative voice equalization was not an interest either proffered by the government or evaluated by the Court.²¹⁷ This argument is even more compelling since the *Austin* court actually evaluated and dismissed the relative voice equalization interest when it held that the government interest in preventing potentially distorting effects of large amounts of wealth was strong enough to uphold the restrictions on corporate spending.²¹⁸

Second, Stevens finds the majority’s position that, whatever the ambiguities in *Buckley*, *Bellotti* “forbade distinctions between corporate and individual expenditures,” to be outright wrong.²¹⁹ Stevens argues that *Bellotti* placed “an explicit limitation on the scope of its holding, that ‘our 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.’”²²⁰

²¹⁵ *Id.* at 958-60.

²¹⁶ *Id.* at 958.

²¹⁷ *Id.*

²¹⁸ *Id.* (citing *Austin*, 494 U.S. at 660).

²¹⁹ *Citizens United*, 130 S. Ct. at 958 (Stevens, J., dissenting).

²²⁰ *Id.* Steven also argues that *Bellotti* dealt with a very different factual situation than the one at bar; namely that the regulation at issue was passed specifically to mute the voice of corporations so the legislature could try to push through a new state constitutional amendment authorizing a graduated income tax, an amendment that the people had previously rejected. *Id.* at 959 (citing *Bellotti*, 435 U.S. at 768). “Where, as here, the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.” *Bellotti*, 435 U.S. at 769-70. But even the *Bellotti* court acknowledged that the outcome may have been different if there was a “record or legislative findings that

Since Buckley evaluated a different governmental interest than that proposed in either *Austin* or *McConnell*, and *Bellotti* explicitly limited its reach to matters of ‘general public interest’ excluding issues related to the funding of political campaigns, it is inapposite to apply the reasoning and conclusions of those cases to that of *Austin* and *McConnell*, and disingenuous to argue that the reasoning of the four cases cannot be reconciled with each other.²²¹

4. The Compelling Government Interests

After dispelling the majority’s arguments that *Austin* and *McConnell* sit inapposite to the Court’s line of First Amendment jurisprudence as it relates to Campaign Finance Reform, the dissenters next examined the three compelling state interests defended in *Austin* and *McConnell* that they find equally applicable here: anticorruption, antidistortion, and shareholder protection.²²²

The dissent’s arguments against the majority’s interpretation of the Anticorruption interest are two-fold. First, they believe that that the majority’s limited view of the Government’s anticorruption interest is misguided and irreconcilable with past precedent.²²³ Second, even using the majority’s own limited view of the government’s legitimate concern of quid pro quo corruption, the evidence on the record satisfies that interest.²²⁴

The dissent sees the government’s legitimate anticorruption interest as “encompass[ing] the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”²²⁵ Citing the extensive findings made by the district court judge in *McConnell*, when the Court heard the first challenge to *BCRA* section 203, the dissent notes that not only were there ample examples of actual corruption, but at least 80% of the population are of the view that

corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests . . .” *Id.* at 789.

²²¹ *Citizens United*, 130 S. Ct. at 960.

²²² *Id.* at 960-82.

²²³ *Id.* at 960.

²²⁴ *Id.* at 964-67.

²²⁵ *Id.* at 964.

“[c]orporations and other organizations that engage in electioneering communications, which benefit specific elected officials, received special consideration from those officials when matters arise that affect these corporations and organizations.”²²⁶

In framing the scope of these myriad interests, the Court “recognized Congress’ legitimate interest in preventing the money that is spent on elections from exerting an ‘undue influence on an officeholder’s judgment.’”²²⁷ While bribery, or other such obvious examples of quid pro quo corruption, may be the prototypical examples, the record developed by Congress eschews the creation or maintenance of any such bright line definition for corruption as it pertains to corporate spending on political campaigns.²²⁸

While the majority argues that, despite this lack of a bright line, *Buckley* clearly states that the anticorruption interest is inadequate to justify a regulation of independent expenditures, the dissent distinguishes *Buckley*’s holding on the ground that the *FECA* regulation struck down in *Buckley* applied to all independent expenditures not corporate expenditures specifically.²²⁹ Also, *Buckley* “expressly contemplated that an anticorruption rationale might justify restrictions on independent expenditures at a later date,”²³⁰ because corporate independent expenditures may “pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions.”²³¹

In addition, the majority recognizes that the anti-corruption interest is not limited to actual quid pro quo corruption but to the appearance of that same corruption.²³² The dissent notes that in just the previous term the same Court, in *Caperton v. A.T. Massey Coal*

²²⁶ *Id.* at 962 (quoting *McConnell*, 251 F. Supp. 2d. at 555-560).

²²⁷ *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting) (quoting *McConnell*, 540 U.S. at 152)

²²⁸ *Citizens United*, 130 S. Ct. at 962 (Stevens, J., dissenting).

²²⁹ *See supra*, note 21.

²³⁰ *Citizens United*, 130 S. Ct. at 964-65 (Stevens, J., dissenting).

²³¹ *Id.* at 965 (quoting *WRTL II*, 551 U.S. at 478).

²³² *Citizens United*, 130 S. Ct. at 964 (Stevens, J., dissenting). While the majority accepts that there is a legitimate interest in preventing the appearance of corruption, they argue that the interest is very narrow, refusing to see “ingratiation and access” as evidence of corruption. *Id.* at 909-10.

Co.,²³³ found independent expenditures made during the campaign of a West Virginia high court judge to present such a worry of the appearance of corruption to require the forced recusal of the judge from hearing a case involving a party who made over three million dollars in independent expenditures in support of his election campaign.²³⁴ Under the Court's analysis in *Caperton*, the dissent easily finds a legitimate government concern regarding the appearance of corruption presented by large independent expenditures.²³⁵

Turning to the Antidistortion Interest, the dissent emphasizes that the monies in corporate treasuries do not represent in any way individual support for their political ideas.²³⁶ Instead, they reflect the economic decisions of investors and customers.²³⁷ Also, the dissent notes that “[c]orporate speech . . . is derivative speech, speech by proxy.”²³⁸ A regulation of that speech only “affect[s] the way in which individuals disseminate certain messages . . . but it does not prevent anyone from speaking in his or her own voice.”²³⁹ Because of these facts, *Austin* and *McConnell* recognized that the large masses of wealth aggregated by corporations could “distort public debate in ways that undermine rather than advance the interests of listeners.”²⁴⁰

As a final note, the dissent discusses the Shareholder Protection Interest.²⁴¹ By allowing corporations to use general treasury funds, the Court allows corporate management to hand the bill for the corporation's political agenda to its shareholders.²⁴² The

²³³ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

²³⁴ *Id.* at 2263 (noting “[t]he difficulties of inquiring into actual bias”).

²³⁵ *Citizens United*, 130 S. Ct. at 968 (Stevens, J., dissenting)

²³⁶ *Id.* at 971.

²³⁷ *Id.* As such, the “corporation must engage the electoral process with the aim ‘to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities . . . ’” *Id.* at 974 (quoting Brief for American Independent Business Alliance as *Amicus Curiae* 11).

²³⁸ *Citizens United*, 130 S. Ct. at 972 (Stevens, J., dissenting).

²³⁹ *Id.* at 972.

²⁴⁰ *Id.* at 974.

²⁴¹ *Id.* at 977.

²⁴² *Id.* at 977. While the majority argues that corporate governance is sufficient to protect this interest. *Id.* at 911. Minority shareholders do not have a cause of action against management or the directors if the spending supported a

dissent proposes that the use of PACs, disdained by the majority, fulfills the ultimate purpose of allowing ideologically like-minded shareholders to pool their resources for political spending without implicating the resources of all.²⁴³

D. Concurring Opinions

The concurrences by Chief Justice Roberts and Justice Scalia directly address some of the challenges made by Justice Stevens's dissent. Chief Justice Roberts writes to refute Justice Stevens's contention that the majority has engaged in judicial activism with its abandonment of *stare decisis*.²⁴⁴ Justice Scalia's opinion addresses Justice Stevens's contention that, under "ancient First Amendment principles," corporations did not have the free speech rights that the majority gives them in *Citizens United*.²⁴⁵

Chief Justice Roberts contends that *Austin* should be overruled for four primary reasons: the decision departed from the robust protection afforded political speech in *Buckley* and *Bellotti*, *Austin* has been continually criticized by the members of the Court, *Austin* rationale threatens speech outside the political sphere, and because the Government was not spirited in its defense of the precedent.²⁴⁶ Most of Chief Justice Roberts's contentions merely rehash issues already raised by Justice Kennedy's majority opinion. As such, the fundamental difference between their views lies not in their adherence to *stare decisis* principles, but in their disagreement over whether *Austin* was decided incorrectly.²⁴⁷

Scalia argues that the Founders' distrust of corporations had less to do with the corporate form and more to do with the "state-granted monopoly privileges that individually chartered corporations

legitimate economic goal of the company, despite the fact that it may be counter to an ideological goal of the individual shareholder. *See id.* at 978.

²⁴³ *Id.* at 977.

²⁴⁴ *Citizens United*, 130 S. Ct. at 917 (Roberts, C.J., concurring).

²⁴⁵ *Id.* at 925 (Scalia, J., concurring).

²⁴⁶ *Id.* at 921-24.

²⁴⁷ *See id.* at 920 ("[w]hen considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." (emphasis in original)).

enjoyed.”²⁴⁸ He further contends that the “true progenitors” of corporations – the small associations, colleges, towns, religious institutions and guilds – all “actively petitioned the Government and expressed their views in newspapers and pamphlets.”²⁴⁹ Because the Government viewed them as having robust free speech rights, it is only logical that modern corporations have the same rights.²⁵⁰

IV. THE FUTURE OF CAMPAIGN FINANCE REFORM

To say that the Court’s decision in *Citizens United* caused tremendous upheaval in the realm of campaign finance reform is to understate the significance of the opinion. Since its publication in January of 2010, *Citizens United* has created an academic fury as liberals and conservatives seek to defend the opinions of their respective factions.²⁵¹ In examining the manner in which *Citizens United* will affect the future of campaign finance reform, this article will look at how the case fits into a vision of First Amendment free speech rights, the likely legislative reaction to the opinion, and the judicial interpretation of the decision’s scope.

This split along ideological lines can also be characterized as the expression of two distinct views of First Amendment speech protection.²⁵² The first view, as expressed by Justice Kennedy’s majority opinion, “sees free speech as serving the interest of political liberty.”²⁵³ The second view, as expressed by Justice Stevens’s dissent, sees “free speech [rights] as serv[ing] the interest of political

²⁴⁸ *Id.* at 926.

²⁴⁹ *Id.* at 927.

²⁵⁰ *Citizens United*, 130 S. Ct. at 927.

²⁵¹ See *Is the Supreme Court’s Citizens United Decision Hurting Democracy?*, USNEWS.COM POLITICAL OPINION (Sept. 24, 2010), <http://www.usnews.com/opinion/articles/2010/09/24/Is-the-Supreme-Courts-Citizens-United-Hurting-Democracy> (providing parallel discussions of the pro and con views of *Citizens United*).

²⁵² See Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

²⁵³ *Id.* at 144. Under this view, speech as liberty, the primary purpose of the First Amendment is the “checking of government overreaching into the private order.” *Id.* at 155.

equality.”²⁵⁴ While there is a tremendous overlap between these two visions of speech rights, where they conflict the Court will likely be split in the same way as it was in *Citizens United*.

The legislative response has been acute as a panoply of bills was proposed to strengthen the disclosure and disclaimer provisions that the Court left intact.²⁵⁵ President Obama even felt it necessary to condemn the Court’s opinion in his State of the Union Address:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests — including foreign corporations — to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities.²⁵⁶

While the immediate effect of the opinion is quite clear, legislatures, both federal and state, can no longer prohibit the use of corporate general treasury funds for independent expenditures.

²⁵⁴ *Id.* Under this view, the proper speech to place the most protection on is that of dissidents and dissenters, the minority of speakers whose voices might otherwise be drowned out. *Id.* at 150. In a manner similar to equal protection laws it would strike down laws that discriminate against the minority or “exact orthodoxy from speech interests that are subordinate or disadvantaged in the private order.” *Id.* at 155.

²⁵⁵ *See, e.g.*, Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010); Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010); Prevent Foreign Influence in our Elections Act, H.R. 4540, 111th Cong. (2010); Corporate and Labor Electioneering Advertisement Reform Act, H.R. 4527, 111th Cong. (2010); Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, 111th Cong. (2010); Prohibiting Foreign Influence in American Elections Act, H.R. 4522, 111th Cong. (2010); Freedom from Foreign-Based Manipulation in American Elections Act of 2010, H.R. 4517, 111th Cong. (2010); Pick Your Poison Act of 2010, H.R. 4511, 111th Cong. (2010); End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. (2010).

²⁵⁶ *Remarks by the President in State of the Union Address*, WHITEHOUSE.GOV (Jan. 27, 2010, 9:11PM), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

There is significant uncertainty as to what the future holds for campaign finance reform.

There are some indications that *Citizens United* may be just the tip of the deregulation iceberg, with the new conservative majority dictating the future lines of permissible regulation.²⁵⁷ Kennedy's influence in *Citizens United*, as the drafter of the opinion, is pronounced, but it was the steady work of previous and current members pointed dissents that espoused this narrower view of the governmental anticorruption interest – a view adopted by the Court in *Citizens United*.²⁵⁸

The primary legislative response to *Citizens United* is the Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act).²⁵⁹ The DISCLOSE Act would ban independent expenditures by foreign corporations and government contractors and tighten the disclosure requirements for the electioneering communication now allowed under *Citizens United*.²⁶⁰

Specifically, the DISCLOSE Act seeks to expand the timeframe for qualifying speech under electioneering communication from sixty days to one hundred and twenty days.²⁶¹ It also increases the number and detail required from disclosure reports.²⁶²

²⁵⁷ See Lloyd Hitoshi Mayer, *Breaching a Leaking Dam: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 146 (2009).

Up until now, the addition of Chief Justice Roberts and Justice Alito to the Supreme Court has led to what, at least on their face, were only marginal changes in the Court's campaign finance jurisprudence. The explicit request by the Court for the parties in this case to address the continued viability of two precedents, when the Court could easily have disposed of the case on relatively narrow grounds, appears to signal a more radical shift, especially when combined with statements of both Chief Justice Roberts and Justice Alito in earlier campaign finance cases. *Id.* at 146.

²⁵⁸ See David Axelman, *Citizens United: How the New Campaign Finance Jurisprudence has Been Shaped by Previous Dissents*, 65 U. MIAMI L. REV. 293, 294 (2010).

²⁵⁹ H.R. 5175, 111th Cong. (2010).

²⁶⁰ DISCLOSE Act, H.R. 5175, 111th Cong. §§101-102, 201-203 (2010).

²⁶¹ *Id.* at § 202.

²⁶² *Id.* at § 203.

This focus on strengthening disclosure requirements has received strong criticism.²⁶³ There is also precedent for the protection for anonymous speech, especially in the political speech realm.²⁶⁴

As for the potential judicial response, the two changes that cause the most concern and speculation are: (1) the narrow view of the government's legitimate anticorruption interest, and (2) the blanket view that identity-based restrictions are impermissible under the First Amendment.

For decades the Rehnquist Court expanded the permissible scope of the governmental anticorruption interest; from quid pro quo corruption and the appearance thereof to the antidistortion interest introduced in *Austin*. The replacement of Rehnquist and O'Connor with Roberts and Alito created a new majority that had a narrower view of corruption. While exactly how far the Court takes this new interpretation of corruption will depend on the factual scenarios that come before it, early ramifications of this narrow interpretation of the anticorruption interest have already been felt.²⁶⁵

In *SpeechNow.org v. Federal Election Commission*,²⁶⁶ the D.C. Circuit interpreted the limited scope of the government's anti-corruption interest, as defined in *Citizens United*, to not apply to non-corporations that only raised money for the purpose of independent

²⁶³ See Bopp, James and Jared Haynie, *The Tyranny of "Reform and Transparency": A Plea to the Supreme Court to Revisit and Overturn Citizens United's "Disclaimer and Disclosure" Holding*, 16 NEXUS: CHAP. J. L. & POL'Y 3 (2011). The authors argue that potential for backlash against those speaking in the political arena militates in favor of more First Amendment protection and less stringent disclosure requirements. Specifically they cite the example of Prop 8 fundraising in California where the disclosure of the names of those who funded the Yes on Prop 8 Campaign were disclosed and resulted in angry phone calls and other harassment. *Id.* at 22. See also *supra* note 162. Justice Thomas echoes these same arguments.

²⁶⁴ See Daryll R. Wold, *Tell Us Who You Are- Maybe: Speaker Disclaimers After Citizens United*, 16 NEXUS: CHAP. J. L. & POL'Y 171 (2011). The author questions the continued validity of Court precedent which found First Amendment protection for anonymous speech in the political arena such as *Talley v. California*, 362 U.S. 60 (1960) and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1994).

²⁶⁵ See Mayer, *supra* note 257.

²⁶⁶ *SpeechNow.org v. Federal Election Comm'n.*, 599 F.3d 686 (D.C. Cir. 2010).

expenditures.²⁶⁷ *SpeechNow* was a nonprofit association that intended to engage in advocacy for candidates that supported its views of free speech and assembly rights.²⁶⁸ The *SpeechNow.org* court reasoned that such organizations are incapable of implicating the government's only permissible regulatory purpose: preventing both the appearance of and actual quid pro quo corruption.²⁶⁹

SpeechNow.org may overshadow the future of campaign finance, with the trend already set for individuals and corporations to incorporate and use the structure of a 501(c)(4) organization to distribute their funds instead of a PAC.²⁷⁰ While 501(c)(4) organizations and their ilk are subject to disclosure requirements, they are not nearly as onerous as the dollar in-dollar out reporting that is required for PACs.²⁷¹

So far the judicial response to *Citizens United* is more acute at the local level rather than the national. Numerous state and local campaign finance laws are now under attack as violative of free speech rights.²⁷² There is currently no available statistical evidence

²⁶⁷ *Id.* at 694. The D.C. Circuit actually went further and interpreted *Citizens United* as saying that in no circumstances does the government ever have a legitimate anti-corruption interest to regulate independent expenditures, and the anti-corruption interest is the only governmental interest sufficient for a contribution or expenditure limitation. *Id.*

²⁶⁸ *Id.* at 688.

²⁶⁹ *Id.* at 694-695. "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *Id.* (italics in original). This statement is reminiscent of Stevens's prediction in his dissent that if the majority followed its logic all the way through, it would not allow government regulations of independent expenditures in any context, including where foreign nationals and corporations seek to influence our elections.

²⁷⁰ See Micheal Kanga, *After Citizens United*, 44 IND. L. REV. 243, 252 (2010).

²⁷¹ See 2 U.S.C. § 431.

²⁷² *Thalheimer v. San Diego*, 645 F.3d 1109 (9th Cir. 2011) (holding anti-corruption interest did not support San Diego's contribution limitation on independent expenditures); *Long Beach Area Chamber of Commerce v. Long Beach*, 603 F.3d 684 (9th Cir. 2010) (holding that independent contribution limitations to PAC's violated the First Amendment). For a summary of state legislative and judicial responses to *Citizens United*, see <http://www.ncsl.org/default.aspx?tabid=19607> (last visited Sept. 11, 2011).

as to whether this will result in more dollars spent in local election campaigns or how the increasing use of disclosure requirements as a means of regulation will potentially limit the ability for fundraising for contentious social issues.²⁷³

Overall, this ideological split among the members of the Court brings a lack of cohesion and utter incoherence to the campaign finance regulation.²⁷⁴ Richard Hasen, in his article *Citizens United and the Illusion of Coherence*, argued that for the Court's majority to stick to their guns and truly apply their statement that the identity of the speaker has no relevance to the government's interests they would be forced to allow unlimited foreign expenditures.²⁷⁵

Despite many of the bold predictions regarding the effects *Citizens United* will have on election spending and the costs of campaigns in general, the fact is that prior to the decision, it was expected that the presidential nominees for 2012 would each have to raise one billion dollars to mount an effective campaign. During the 2008 election cycle, moneyed interests dominated and controlled the access and range of issues presented to the voting public. Despite repeated attempts at better and more effective regulation, the money spent on general elections, specifically by corporations and unions, increases every year. Perhaps a better disclosure system is not only the right move, but the only move to potentially curb the abuses that can and do occur with money in elections.

²⁷³ See *supra* note 273. See also *supra* note 264. While the article contends that disclosure requirements will limit fundraising for social issues, it provides examples of harassment but no hard statistics as to the limiting effect it will actually have on fundraising dollars.

²⁷⁴ See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011). In Hasen's article, he argues that *Citizens United* did nothing to remove the internal incoherence of Campaign Finance jurisprudence, and has simply raised the specter of some difficult potentially contradictory opinions in the future with respect to foreign contributions and even previously settled issues such as direct expenditures. See, DISCLOSE Act, *supra* note 202.

²⁷⁵ Hasen, *supra*, note 275 at 605. The DISCLOSE Act would potentially close this loophole in regulation, but it remains to be seen whether it will pass, and whether the current Court would allow its ban on foreign independent expenditures, especially in light of the interpretation taken by the D.C. Circuit court in *SpeechNow.org*. See *supra* note 267.