

## Clinton, Campaigns, and Corporate Expenditures: The Supreme Court's Recent Decision in Citizen's United and Its Impact on Corporate Political Influence

Glen M. Vogel

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**CLINTON, CAMPAIGNS, AND CORPORATE  
EXPENDITURES:  
THE SUPREME COURT'S RECENT  
DECISION IN *CITIZEN'S UNITED* AND ITS  
IMPACT ON CORPORATE POLITICAL  
INFLUENCE**

GLEN M. VOGEL, P.E., ESQ.<sup>†</sup>

INTRODUCTION<sup>1</sup>

*"I think we are at a very critical time in this country. I can tell you beyond a shadow of a doubt that uh, the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief."*<sup>2</sup>

The public's ability to discuss and debate the character and fitness of presidential candidates is at the core of the First Amendment's prohibition that "Congress shall make no law . . . abridging the freedom of speech."<sup>3</sup> Despite the existence of this fundamental right, articulated so eloquently in our founding document, in November 2002, Congress made political speech a felony for one class of speakers—corporations and unions.<sup>4</sup> Under the McCain-Feingold Campaign Finance Reform

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<sup>†</sup> Glen M. Vogel, Esq. is an Assistant Professor of Legal Studies in the Hofstra University Zarb School of Business. He would like to acknowledge and thank the Zarb School of Business for its generous grant to support the research efforts associated with this article. Gratitude also is extended to Jonathan Vecchi, Paul Johnson, and Eleanor Sharkey for their valuable research contributions.

<sup>1</sup> This Article previously appeared in the Spring 2012 edition of THE NORTH EAST JOURNAL OF LEGAL STUDIES, where it won the Best Paper award at the Annual Conference of the North East Academy of the Legal Studies of Business. See Glen M. Vogel, *Clinton, Campaigns, and Corporate Expenditures: The Supreme Court's Recent Decision in Citizen's United and its Impact on Corporate Political Influence*, 27 N.E. J. LEGAL STUD. 1 (2012).

<sup>2</sup> HILLARY: THE MOVIE (Citizens United 2008).

<sup>3</sup> U.S. CONST. amend I.

<sup>4</sup> Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, §§ 203–04, § 214(d), 116 Stat. 81, 91–92, 94–95 (2002) (codified as amended at 2 U.S.C. § 441b (2006)), *invalidated by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

Act (“McCain-Feingold Act”), corporations and unions faced monetary penalties and up to five years in prison for broadcasting candidate-related advocacy during federal elections.<sup>5</sup> Outlawing political speech based on the identity of the speaker appears to collide with the fundamental principles set forth in the First Amendment. On January 10, 2010, the United States Supreme Court addressed this collision in *Citizens United v. FEC*.<sup>6</sup>

In one of the most controversial decisions in decades, the Supreme Court, in *Citizens United*, invalidated the portions of the McCain-Feingold Act that dealt directly with corporate expenditures in support of political candidates.<sup>7</sup> This decision set off an eruption of political debate and fierce partisanship.<sup>8</sup> Some legal scholars and journalists called the decision “wrong-headed” and claimed the decision was made in “bad faith.”<sup>9</sup> Still others characterized Justice Kennedy’s majority opinion as “more like the rantings of a right-wing talk show host than the rational view of a justice with a sense of political realism.”<sup>10</sup> The *New York Times*, in several editorials, blasted the Court and called the decision “disastrous,”<sup>11</sup> “terrible,”<sup>12</sup> and “reckless[.]”<sup>13</sup> In fact, the decision sparked so much controversy that President Obama “called out” the Court and specifically referred to *Citizens United* during his State of the Union Address in January 2010.<sup>14</sup>

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<sup>5</sup> See § 312(a), § 315(a)–(b).

<sup>6</sup> 130 S. Ct. 876 (2010).

<sup>7</sup> *Id.* at 917.

<sup>8</sup> Discussing the President’s gratuitous remarks directed at the Supreme Court Justices and Justice Alito’s head-shaking response, legal experts have remarked that, “they had never seen anything quite like it, a rare and unvarnished showdown between two political branches during what is usually the careful choreography of the State of the Union address.” Robert Barnes, *In the Court of Public Opinion, No Clear Ruling*, WASH. POST, Jan. 29, 2010, at A01.

<sup>9</sup> See Floyd Abrams, *Citizens United and its Critics*, 120 YALE L.J. ONLINE 77, 78 (2010) (paraphrasing Ronald Dworkin, *The “Devastating” Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, at 39).

<sup>10</sup> Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010, 12:58 PM), <http://www.slate.com/id/2242209/pagenum/all>.

<sup>11</sup> Editorial, *The Court’s Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30.

<sup>12</sup> Editorial, *After Citizens United*, N.Y. TIMES, Apr. 20, 2010, at A20.

<sup>13</sup> Editorial, *The Court and Free Speech*, N.Y. TIMES, Apr. 24, 2010, at A18.

<sup>14</sup> See, e.g., Editorial, *Free Speech for Some*, WALL ST. J., May 3, 2010, at A20; see also Charlie Savage & Sheryl Gay Stolberg, *Obama Says Liberal Courts May Have Overreached*, N.Y. TIMES, Apr. 30, 2010, at A15; see also Address Before a

According to President Obama, “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.”<sup>15</sup>

The Court’s decision in *Citizens United* has unleashed a torrential wave of criticism from the media along with raising new questions and concerns from corporations who are unsure about how this decision impacts the rules governing the area of corporate expenditures, and it has left many companies afraid to run afoul of the law since there are criminal penalties at stake.<sup>16</sup> Even now, businesses are afraid to use their funds in support of candidates since they are unsure what, if anything, the Court invalidated and what restrictions remain in place when it comes to corporations expending their own funds in support of political parties and/or campaigns.

In order to effectively analyze the impact of the Court’s holding in this controversial 5-4 decision, this article will discuss the following: Part I will discuss the case law and regulatory history of campaign finance law in the United States over the past one-hundred years; Part II will look at the campaign finance law at issue in *Citizens United*—the McCain-Feingold Act—and some of its critical components; Part III will look at the background of the *Citizens United* case and the Court’s holding, along with some of its practical implications; Part IV will examine some lesser discussed aspects of the decision as well as the issues that have been misinterpreted by the media; and Part V will offer some conclusions.

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Joint Session of the Congress on the State of the Union, 2010 DAILY COMP. PRES. DOC. 55 (Jan. 27, 2010).

<sup>15</sup> Press Release, Office of the Press Sec’y, Remarks by the President in State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>. For the full text of President Obama’s speech, see Address Before a Joint Session of the Congress on the State of the Union, 2010 DAILY COMP. PRES. DOC. 55 (Jan. 27, 2010).

<sup>16</sup> Bipartisan Campaign Reform (McCain-Feingold) Act of 2002 §§ 312(a), 315(a)–(b), 2 U.S.C. § 437g(d) (2006 & Supp. II).

## I. A HISTORY OF CAMPAIGN FINANCE LAW

*Citizens United* was not the first time that the issue of corporate involvement in federal campaigns was debated by litigants or addressed by Congress.<sup>17</sup> Corporations and unions have long faced limits on direct contributions to political campaigns.<sup>18</sup> The first restrictions on corporate involvement in the political process goes back more than a century<sup>19</sup> and was enacted to limit what sponsors considered to be the corporate corrupting influence on the political marketplace.<sup>20</sup>

The start of the twentieth century, often identified as the Gilded Age,<sup>21</sup> is known as a period of enormous economic and industrial growth in America. The largest and most influential businesses at the time were railroads, banks, and steel companies owned by the super-rich industrialists and financiers such as Cornelius Vanderbilt, John D. Rockefeller, Andrew W. Mellon, Andrew Carnegie, Henry Flagler, and J.P. Morgan.<sup>22</sup> All of these men were attacked as “robber barons” by critics, who believed they cheated to get their money and that, because of their wealth, they were able to gain tremendous influence over politicians, Congress, and even the Presidency.<sup>23</sup>

The concept of having Congress address the problem of corporate political influence all started with President Theodore Roosevelt’s State of the Union address after the 1904 Election.<sup>24</sup>

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<sup>17</sup> See Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 *FORDHAM L. REV.* 53, 60–61 (1987) (describing the history of campaign finance regulation as a study in Congressional confusion).

<sup>18</sup> In February of 2010, while giving a speech at a Florida law school, Justice Clarence Thomas noted that Congressional regulation of the involvement of corporations in elections dates all the way back to 1907. See Adam Liptak, *A Justice Responds to Criticism from Obama*, *N.Y. TIMES*, Feb. 4, 2010, at A17.

<sup>19</sup> Tillman Act of 1907, ch. 420, 34 Stat. 864, 864–65 (1907).

<sup>20</sup> Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 *U. CHI. L. REV.* 1103, 1128 (2002).

<sup>21</sup> Mike McCabe, *It's No Wonder Ordinary Folks Are Anxious*, *CAP TIMES* (July 2, 2010, 4:40 AM), [http://host.madison.com/ct/news/opinion/column/article\\_9a23dbc6-3793-5255-b076-65f606688b79.html](http://host.madison.com/ct/news/opinion/column/article_9a23dbc6-3793-5255-b076-65f606688b79.html).

<sup>22</sup> See *id.* (quoting famed Cleveland industrialist Mark Hanna as having said, “There are two things that are important in politics. The first is money and I can’t remember what the second one is.”).

<sup>23</sup> *Id.*

<sup>24</sup> 40 *CONG. REC.* 91, 96 (1906) (statement of Charles G. Bennett, reading Theodore Roosevelt’s State of the Union Address).

Roosevelt was outspoken in his opposition to corporate influence on politics and suggested an outright ban on all contributions by corporations to avoid even the appearance of corruption or influence.<sup>25</sup> Two years later, in 1907, Congress passed the Tillman Act, which prohibited corporations from making any contributions for the purposes of influencing a federal election's outcome.<sup>26</sup> While banning political contributions to candidates, the Tillman Act was silent on the issue of corporations expending their funds on their own in support of or against a candidate.<sup>27</sup> An *independent* expenditure is money spent by a corporation or union in support of a candidate in a manner uncoordinated with any political party or the candidate himself.<sup>28</sup>

While direct contributions to candidates by corporations have been illegal since 1907, it was not until 1947 and the passage of the Taft-Hartley Act that Congress specifically prohibited independent expenditures made in support of a candidate by a corporation or labor union.<sup>29</sup> Immediately after Congress passed the Taft-Hartley Act, President Harry S. Truman questioned its constitutionality, particularly the independent contributions ban, when he vetoed the bill, stating that it was a "dangerous intrusion on free speech."<sup>30</sup> The bill eventually passed despite the President's opposition, and it did not take long for the Supreme Court to comment on the validity of the statute's new restrictions on corporate expenditures.<sup>31</sup> In 1948, in *United States v. Congress of Industrial Organizations*, the Court did not specifically address the constitutionality of the independent expenditure ban<sup>32</sup>; however, the majority did

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<sup>25</sup> See *id.* In his 1905 message to Congress, Roosevelt wrote, "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." *Id.*

<sup>26</sup> Tillman Act of 1907, ch. 420, 34 Stat. 864, 864–65 (1907).

<sup>27</sup> See *id.*

<sup>28</sup> 2 U.S.C. § 431(17)(B) (2006). Expenditures are: "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure." *Id.* § (9)(A).

<sup>29</sup> See Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 159–60 (codified as amended in scattered sections of 29 U.S.C.).

<sup>30</sup> Veto of the Taft-Hartley Labor Bill, PUB. PAPERS 288, 296 (June 20, 1947).

<sup>31</sup> See *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 107 (1948).

<sup>32</sup> *Id.* at 110.

remark that it had “the gravest doubt” about the constitutionality of the prohibition.<sup>33</sup> Almost a decade later, in *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, the Court would take a closer look at the constitutionality of the Taft-Hartley Act’s corporate expenditure ban.<sup>34</sup> Here, even though the court held that the expenditure ban, as applied to the specific facts of the case, appropriately prohibited a union television broadcast that specifically advocated for congressional candidates, the Court never specifically ruled on the constitutionality of the statute as a whole.<sup>35</sup> Again, in dissent, three justices argued that the Court should have addressed the constitutional question and, had it done so, they would have found the ban on independent expenditures unconstitutional.<sup>36</sup> Justice Douglas, in his dissent in the *Automobile Workers* case stated that:

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.<sup>37</sup>

Over the next two decades, the constitutionality of the ban on expenditures would get bantered about or commented upon in dicta, but it would never be fully addressed by the courts.<sup>38</sup>

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<sup>33</sup> *Id.* at 121. In this case, the Court did not look at the constitutionality of the statute as a whole because it held that the statute did not apply to the particular publication at issue—a labor union weekly periodical that endorsed a congressional candidate. *Id.* at 110.

<sup>34</sup> *See* 352 U.S. 567, 568 (1957).

<sup>35</sup> *See id.* at 591.

<sup>36</sup> *See id.* at 593 (Douglas, J., dissenting). The dissent stated that the ban on expenditures based on the belief that corporations and unions were “too powerful” was not sufficient grounds for denying “First Amendment rights from any group.” *Id.* at 597.

<sup>37</sup> *Id.* at 597 (Douglas, J., dissenting) (citations omitted).

<sup>38</sup> *See, e.g.,* *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 399–400 (1972) (failing to address the constitutionality of the ban while simultaneously reversing a conviction for the expenditure of union funds for political speech).

After the Watergate scandal in the early 1970s, Congress took another look at the myriad of issues surrounding the federal campaign finance system and attempted to resolve those issues with the passage of several amendments to the Federal Election Campaign Act of 1971 (“FECA”).<sup>39</sup> FECA, originally passed in 1971, along with its 1974 Amendments, is essentially the foundation upon which the most recent campaign finance laws were built.<sup>40</sup> FECA, among other things, established new contribution limits for individuals, political parties, and political action committees (“PACs”) and established filing requirements for both contributions and expenditures.<sup>41</sup> While controversial,<sup>42</sup> the 1974 Amendments to FECA were Congress’s attempt to restore the public’s confidence in the integrity of the electoral system and to remedy the loopholes and problems that were identified after the Watergate scandal.<sup>43</sup> Essentially, FECA imposed three different restrictions on corporations’ and labor unions’ efforts to influence elections.<sup>44</sup> They imposed contribution limitations and banned independent expenditures,<sup>45</sup> they imposed fundraising restrictions, and they limited the contributions to political committees and PACs.<sup>46</sup> They also imposed disclosure requirements on PACs for contributions based on the amount contributed, the nature of the contributor, and the contribution’s proximity to an election.<sup>47</sup>

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<sup>39</sup> Trevor Potter, *Campaign Finance Reform: Relevant Constitutional Issues*, 34 ARIZ. ST. L.J. 1123, 1124 (2002).

<sup>40</sup> Kevin J. Madden, Comment, *Turning the Faucet Back On: The Future of McCain-Feingold’s Soft-Money Ban After Davis v. Federal Election Commission*, 59 AM. U. L. REV. 385, 391 (2009) (discussing the history of modern campaign finance law).

<sup>41</sup> See *id.* at 391–93; see also, Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263 (repealed 1976).

<sup>42</sup> See MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 49 (2005).

<sup>43</sup> See Joseph E. Cantor, *Campaign Financing in Federal Elections: A Guide to the Law and its Operation*, in CAMPAIGN FINANCING IN THE UNITED STATES: ISSUES AND LAWS 55, 63 (Auguste V. Anschutz ed. 2002).

<sup>44</sup> § 101, 88 Stat. at 1263–64.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* § 204.

## A. Buckley v. Valeo

Shortly after FECA was amended, the Supreme Court reviewed the constitutionality of the new statutory limitations on campaign contributions and expenditures in *Buckley v. Valeo*.<sup>48</sup> In *Buckley*, the Court was asked to address three major issues: the constitutionality of the limits on direct contributions to candidates, the constitutionality of the independent expenditure ban, and the constitutionality of the disclosure requirements.<sup>49</sup> When the Court examined the provision limiting the amount an individual may expend in support or defeat of a particular candidate, it held that “the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the statute’s] ceiling on independent expenditures.”<sup>50</sup> The Court remarked, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>51</sup> Based upon this First Amendment analysis, the Court applied the strict scrutiny test and held that the limitation on independent expenditures was unconstitutional.<sup>52</sup> The Court pointed out that “the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.”<sup>53</sup> Oddly, even though the Court invalidated the independent expenditure limitation provision for individuals, it did not consider the constitutionality of the separate ban on corporate and union independent expenditures.<sup>54</sup>

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<sup>48</sup> 424 U.S. 1 (1976) (consolidating a number of cases brought by various challengers to the FECA Amendments).

<sup>49</sup> *See id.* at 13–14 (stating that the critical constitutional questions presented are whether the specific legislative bans on contributions and expenditures interfere with First Amendment freedoms or violates the Fifth Amendment because it discriminates against non-incumbent candidates’ and minor parties’ ability to raise funds).

<sup>50</sup> *Id.* at 45.

<sup>51</sup> *Id.* at 48–49 (stating that the First Amendment was designed “to secure the widest possible dissemination of information from diverse and antagonistic sources,” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964)) (internal quotation marks omitted)); *see* *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>52</sup> *See Buckley*, 424 U.S. at 51.

<sup>53</sup> *Id.* at 47–48.

<sup>54</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 902 (2010).

### B. First National Bank of Boston v. Bellotti

Less than two years after *Buckley*, the Court struck down a state-law prohibition on corporate independent expenditures related to referendum issues in the case of *First National Bank of Boston v. Bellotti*.<sup>55</sup> In *Bellotti*, two national banking associations and three business corporations wanted to spend money to publicize their position on a proposed state constitutional amendment that would have permitted the legislature to impose a graduated individual income tax.<sup>56</sup> The statute at issue prohibited the corporations from making contributions or expenditures “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters.”<sup>57</sup> Any corporation or corporate officer, director, or agent who violated the statute could be subject to a monetary fine and up to a year of imprisonment.<sup>58</sup> The Supreme Court rejected the state statute’s prohibition of corporate expenditures related to issue advocacy on the principle that the legislature does not have the power to ban corporations from speaking on political issues.<sup>59</sup> While the *Bellotti* decision did not address the constitutionality of the State’s ban on corporate independent expenditures in support of individual candidates, the Supreme Court has offered that had it analyzed the issue, the Court would have invalidated the ban on the premise that the First Amendment does not permit restrictions on political speech merely because the speaker is a corporation.<sup>60</sup>

### C. Austin v. Michigan Chamber of Commerce

It was not until 1990, in *Austin v. Michigan Chamber of Commerce*,<sup>61</sup> that the Court finally addressed the issue of corporate independent expenditures head-on. In *Austin*, the

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<sup>55</sup> 435 U.S. 765, 795 (1978).

<sup>56</sup> *Id.* at 768–69.

<sup>57</sup> *Id.* at 768 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

<sup>58</sup> *Id.* at 768.

<sup>59</sup> *See id.* at 784–85 (“We thus find 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 . . .” (emphasis added)).

<sup>60</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 903 (2010).

<sup>61</sup> 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

Michigan Chamber of Commerce sought to use its general treasury funds to run an advertisement in a local newspaper in support of a candidate who was attempting to fill a vacancy in the Michigan House of Representatives.<sup>62</sup> However, under Section 54(1) of the Michigan Campaign Finance Act, corporations were prohibited “from making contributions and independent expenditures in connection with state candidate elections.”<sup>63</sup> Worse yet, any violation of the prohibition on corporate independent expenditures was punishable as a felony.<sup>64</sup> The Chamber of Commerce initiated an action seeking injunctive relief against enforcement of the Act, claiming the prohibition on corporate independent expenditures was unconstitutional and violated the First and Fourteenth Amendments.<sup>65</sup>

While the *Buckley* and *Bellotti* cases were not controlling—because neither case directly addressed the constitutionality of prohibiting corporate independent expenditures in support of a candidate—the *Austin* Court circumvented the traditional First Amendment analysis utilized in those cases and identified a new governmental interest in limiting political speech: an anti-distortion interest.<sup>66</sup> The Court posited that the Michigan statute at issue was “aim[ed] at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . . .”<sup>67</sup> The Court held that corporate wealth could unfairly influence elections when it is used in the form of independent expenditures and, as such, the State had a “sufficiently compelling rationale to support its restriction.”<sup>68</sup>

Before *Austin*, the Supreme Court had never held that Congress could prohibit independent expenditures for political speech based on the speaker’s corporate identity.<sup>69</sup> Thus, the Court’s decision in *Austin* was at odds with the longstanding

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<sup>62</sup> *Id.* at 656.

<sup>63</sup> *Id.* at 655 (citing MICH. COMP. LAWS § 169.254(1) (1979)).

<sup>64</sup> *Id.* at 656 (citing MICH. COMP. LAWS § 169.254(5) (1979)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 659–60. The court stated that it was upholding the restriction on independent expenditures by corporations, regardless of “whether [the] danger of ‘financial *quid pro quo*’ corruption . . . may be sufficient” to warrant such a ban, because corporate wealth can unfairly influence elections. *Id.*

<sup>67</sup> *Id.* at 660.

<sup>68</sup> *Id.*

<sup>69</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 903 (2010).

position that believing a particular group is “too powerful” is not a basis upon which to deny or withhold First Amendment rights, even if that group is corporate or labor union in form.<sup>70</sup> *Austin* was a notable diversion from the Court’s recognition that First Amendment rights and protections extend to everyone, even corporations.<sup>71</sup> Shortly after *Austin*, Congress took advantage of the judicial support for banning corporate and union independent expenditures and enacted the McCain-Feingold Act.

D. *McConnell v. FEC and FEC v. Wisconsin Right to Life, Inc.*

Immediately after the McCain-Feingold Act was enacted, it faced its first challenge in the courts in *McConnell v. Federal Election Commission*.<sup>72</sup> In *McConnell*, multiple plaintiffs asserted that section 203 of the McCain-Feingold Act was an unconstitutional restriction on free speech because the statute’s prohibition of “electioneering communications” was applied to more than just express advocacy.<sup>73</sup> The Court rejected this argument and held that section 203 was facially constitutional because the rationale for regulating corporate independent expenditures that were express advocacy could also be applied to ads that are “*the functional equivalent of express advocacy*.”<sup>74</sup> The Court based its holding in *McConnell* on the presumption that these types of expenditures could have the same kind of “corrosive and distorting effects” on the electorate as the expenditures specifically prohibited under *Austin*, and extending that restriction would serve the government’s compelling interest in countering those effects.<sup>75</sup> Even though the Supreme Court did not elaborate on the definition of “functional equivalent,” they based their opinion on the district court’s determination that the

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<sup>70</sup> *Id.* at 901 (citing *United States v. UAW-CIO*, 352 U.S. 567, 597 (1957)).

<sup>71</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (citing eleven prior Supreme Court decisions which held state laws invalid under the Fourteenth Amendment when the laws infringed on protected speech by corporate bodies); *see also, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997). This protection has been extended by explicit holdings to the context of political speech. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 428–29 (1963); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

<sup>72</sup> 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>73</sup> *See id.* at 205–06.

<sup>74</sup> *Id.* at 206 (emphasis added).

<sup>75</sup> *Id.* at 205.

McCain-Feingold Act targeted only broadcast ads because those ads are the most effective form of communicating an electioneering message and therefore posed the greatest risk of corruption.<sup>76</sup>

Even though the Court declared section 203 to be facially constitutional with regard to the *McConnell* ads, it opened the door to future “as-applied” challenges and remarked that such challenges could be successful on a case-by-case basis.<sup>77</sup> The first successful as-applied challenge came four years later in *Federal Election Commission v. Wisconsin Right to Life, Inc.*<sup>78</sup> Wisconsin Right to Life (“WRTL”), a non-profit corporation, wished to use its general treasury funds to pay for television advertisements on the issue of the US Senate filibuster of Bush administration judicial nominees.<sup>79</sup> The ads were to be broadcast during the period prohibited by the McCain-Feingold Act<sup>80</sup>—the period immediately preceding the re-election of Wisconsin Senator Russ Feingold. WRTL admitted that some of the funds to be used for the ads had come from corporate donors.<sup>81</sup>

The Supreme Court did not issue a majority opinion in *WRTL*. Rather, the Court splintered into three lines of reasoning. The opinion that is considered the lead opinion, written by Chief Justice Roberts and joined by Justice Alito, provided that the determination in *McConnell*—that section 203 could constitutionally prohibit ads that were the “functional equivalent” of express advocacy—was still valid.<sup>82</sup> However, Justice Roberts elaborated on that interpretation by stating that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable

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<sup>76</sup> See *McConnell v. FEC*, 251 F. Supp. 2d 176, 569–71 (D.D.C. 2003). The district court noted that forms of media that required viewers to “opt-in” or “make a choice to . . . watch the program” would mostly reach voters already predisposed to those views and would reach far fewer undecided voters than a broadcast ad. See *id.* at 571, 646. For the *McConnell* district court, this was a “critical distinction” that separated communications that posed a great risk of corruption—broadcast ads—from those that did not—viewer choice media. *Id.* at 571.

<sup>77</sup> See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 460 (2007) (noting that the holding in *McConnell* left the door open for future “as applied” challenges to the constitutionality of section 203).

<sup>78</sup> 551 U.S. 449 (2007).

<sup>79</sup> *Id.* at 458–59.

<sup>80</sup> See *id.* at 460.

<sup>81</sup> See *id.* at 522 (Souter, J., dissenting).

<sup>82</sup> *Id.* at 465 (Roberts, C.J., plurality opinion).

interpretation other than as an appeal to vote for or against a specific candidate.”<sup>83</sup> When this new test was applied to the ads to be broadcast by WRTL, the Court found that they were not the functional equivalent of express advocacy because they took a position on a legislative issue and urged the public to contact their representatives, rather than specifically advocating for or against a candidate.<sup>84</sup> Importantly, the ads did not “mention an election, candidacy, political party, or challenger” or “take a position on a candidate’s character, qualifications, or fitness for office.”<sup>85</sup> Justices Scalia, Thomas, and Kennedy disagreed with the functional equivalency test utilized by Justice Roberts, but concurred with Roberts’ determination that section 203 was unconstitutional as applied to WRTL’s ads.<sup>86</sup> As a result of their concurrence, Justice Roberts’ test was identified as the holding in the case.<sup>87</sup> Shortly after the *WRTL* case was decided, the FEC promulgated federal regulations to codify Justice Roberts’ rationale.<sup>88</sup>

As a result of the Court’s holdings in *Austin*, *McConnell*, and *WRTL*, when the Court was asked to evaluate the validity of a statutory restriction on corporate speech in *Citizens United*, it was faced with two separate but conflicting lines of precedent: the pre-*Austin* line that repeatedly struck down restrictions on free speech based on the speaker’s corporate identity and a post-*Austin* line that said it would be acceptable to limit the speech of corporations and unions in certain circumstances. Before looking

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<sup>83</sup> *Id.* at 469–70 (reasoning that this must be an objective test that focuses on the substance of the advertisement and not on “amorphous considerations of intent and effect,” or other contextual factors that might illustrate the corporation’s reasons for running the ad).

<sup>84</sup> *Id.* at 476; see also *Citizens United v. FEC*, 130 S. Ct. 876, 889–90 (2010).

<sup>85</sup> *Wis. Right to Life, Inc.*, 551 U.S. at 470.

<sup>86</sup> *Id.* at 493, 504 (Scalia, J., concurring in part and concurring in the judgment).

<sup>87</sup> See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278 n.10 (D.D.C. 2008). The parties in the *Citizens United* case agreed in the district court that Justice Roberts’s rationale was the “governing test for the functional equivalent of express advocacy.” *Id.* This gave authoritative weight to Justice Roberts’s test based on the principle that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

<sup>88</sup> See 11 C.F.R. § 114.15 (2007).

at how the Court resolved this dilemma, it is important to review the specific sections of the McCain-Feingold Act that were at issue.

## II. THE MCCAIN-FEINGOLD CAMPAIGN FINANCE REFORM ACT

In 2002, Congress passed the Bipartisan Campaign Reform Act,<sup>89</sup> otherwise known as the McCain-Feingold Act. The McCain-Feingold Act was one of the most far-reaching overhauls of campaign finance law since the 1970s and, in broad terms, banned unlimited corporate donations to national political party committees, put limitations on advertising by organizations not affiliated with parties, and banned the use of corporate and union money for “electioneering communication[s]”—ads that name a federal candidate—within thirty days of a primary election or sixty days of a general election.<sup>90</sup> The sponsor of the bill, John McCain, stated that the McCain-Feingold Act,

[S]eeks to reform the way we finance campaigns for federal office in three major ways. First, BCRA prohibits the national political parties from raising or spending “soft money” (large contributions, often from corporations or labor unions, not permitted in federal elections), and it generally bans state parties from using soft money to finance federal election campaign activity. Second, it increases the hard money contribution limits set by the 1974 amendments to the Federal Election Campaign Act (“FECA”). Finally, the new law prohibits corporations and unions from using soft money to finance broadcast campaign ads close to federal elections (though corporations and unions can finance these ads with hard money through their political action committees), and it requires individuals and unincorporated groups to disclose their spending on these ads. The law represents the most comprehensive congressional reform of our federal campaign finance system since FECA was enacted and amended in the 1970s.<sup>91</sup>

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<sup>89</sup> Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

<sup>90</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010).

<sup>91</sup> John McCain, *Introduction: Symposium on Campaign Finance Reform*, 34 ARIZ. ST. L.J. 1017, 1017 (2002).

By passing the McCain-Feingold Act, Congress was hoping to stop the unregulated flow of soft money and return the world of campaign finance regulation to its pre-Watergate position where there were defined prohibitions and limits on contributions to political parties.<sup>92</sup> The McCain-Feingold Act was the end result of “a protracted six-year legislative and political struggle”; however, as President Bush was signing the bill into law, the first wave of more than a dozen lawsuits challenging its constitutionality was already crashing upon the Supreme Court’s shores.<sup>93</sup> Since the McCain-Feingold Act’s enactment, the Supreme Court has heard several cases addressing various campaign finance issues regulated therein, but none of these cases has been as controversial or had such a significant impact on campaign finance law as *Citizens United*.

The specific McCain-Feingold Act provisions at issue in *Citizens United* were sections 201, 203 and 311,<sup>94</sup> all of which served as amendments to the Federal Election Campaign Act of 1971 (“FECA”).<sup>95</sup> Section 203 of the McCain-Feingold Act regulates using corporate funds for “electioneering communication[s].”<sup>96</sup> In general, an electioneering communication was identified as a “broadcast, cable, or satellite” communication made within sixty days of a general election or thirty days of a primary election.<sup>97</sup> Section 203 continues by restricting corporations and labor unions from funding electioneering communications from their general funds except under certain specific circumstances, such as get-out-the-vote campaigns.<sup>98</sup> Even though certain types of “electioneering communications” are permissible, they are subject to the McCain-Feingold Act’s disclosure and disclaimer requirements that are delineated under sections 201 and 311.

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<sup>92</sup> See Madden, *supra* note 39, at 387; see also 2 U.S.C. § 441i(a)(1).

<sup>93</sup> Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1180–81 (2002) (noting that not only did the new act face constitutional challenges, but it also was under attack and being marginalized by rules adopted by the FEC that could ultimately lead to further lawsuits).

<sup>94</sup> Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107–155, §§ 201, 203, 311, 116 Stat. 81, 88–89, 91–92, 105–06 (2002).

<sup>95</sup> McCain-Feingold Act § 101.

<sup>96</sup> See 2 U.S.C. § 434(f)(3)(A)(i) (2006 & Supp. I).

<sup>97</sup> *Id.*

<sup>98</sup> See 2 U.S.C. § 441b(b)(2) (2006).

Section 201 of the McCain-Feingold Act contains a donor disclosure provision for electioneering communications.<sup>99</sup> Persons who disburse an aggregate of \$10,000 or more a year for the production and airing of electioneering communications are required to file a statement with the Federal Election Commission ("FEC").<sup>100</sup> The statement must include the names and addresses of persons who have contributed in excess of \$1,000 to accounts funding the communication.<sup>101</sup>

The McCain-Feingold Act's section 311 contains a disclaimer provision for electioneering communications.<sup>102</sup> If the candidate or the candidate's political committee did not authorize the electioneering communication at issue, then the organization responsible for the communication must disclose that the organization "is responsible for the content of this advertising."<sup>103</sup>

### III. *CITIZENS UNITED & HILLARY: THE MOVIE*

Citizens United is a non-profit corporation with an annual budget of about \$12 million.<sup>104</sup> The corporation acquires the majority of these funds via donations from individuals; however, it receives donations from for-profit corporations as well.<sup>105</sup> In January 2008, Citizens United released a ninety-minute documentary examining the record, policies, and character of then-Presidential Democratic primary candidate Hillary Clinton.<sup>106</sup> The documentary, called *Hillary: The Movie*, "examine[d] Hillary Clinton's political background in a critical light,"<sup>107</sup> and mainly focused on

five aspects of Hillary's political career: firing of certain White House staff during her husband's presidency, retaliation against a woman who accused her husband of sexual harassment,

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<sup>99</sup> 2 U.S.C. § 434(f)(1)-(2) (2006 & Supp. I).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 2 U.S.C. § 441d (2006).

<sup>103</sup> *Id.* § 441d(d)(2).

<sup>104</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 886-87 (2010).

<sup>105</sup> *Id.* at 887.

<sup>106</sup> *Id.*

<sup>107</sup> Aaron Harmon, Comment, *Hillary: The Movie: Corporate Free Speech or Campaign Finance Corruption?*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 331, 333 (2009).

violations of finance restrictions during her Senate campaign, her husband's abuse of the presidential pardon power, and her record on various political issues.<sup>108</sup>

The film was to be released in theaters and on DVD; however, Citizens United desired a broader distribution and arranged to have the movie broadcast on cable through video-on-demand.<sup>109</sup>

Since the documentary was to be broadcast during Clinton's presidential primary campaign, Citizens United was aware that its movie and advertising might be considered electioneering communications and would be subject to the McCain-Feingold Act's sections 201, 203 and 311.<sup>110</sup> As a preemptive strike, Citizens United sought an injunction to block the FEC from enforcing those sections on the grounds that they violated the First Amendment to the U.S. Constitution.<sup>111</sup> To Citizens United's disappointment, the broadcast was banned when the FEC declared that the broadcast would violate various provisions of the McCain-Feingold Act.<sup>112</sup> Since the McCain-Feingold Act's drafters anticipated the likelihood of lawsuits questioning its validity,<sup>113</sup> it contains a provision that specifically addresses constitutional challenges to its various prohibitions.<sup>114</sup> This provision requires that these claims be brought before a three-judge panel of the United States District Court for the District of Columbia.<sup>115</sup> Appeals from this court go directly to the United States Supreme Court.<sup>116</sup> As a result of these jurisdictional restrictions, Citizens United went to the District Court for injunctive relief but its application was denied.<sup>117</sup> Citizens United immediately appealed to the Supreme Court.

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<sup>108</sup> *Id.*

<sup>109</sup> *Citizens United*, 130 S. Ct. at 887.

<sup>110</sup> *See id.* at 888.

<sup>111</sup> *Id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See McCain, supra* note 90, at 1018 (noting that “[f]ortunately, the law ultimately provides for expedited review in the Supreme Court”).

<sup>114</sup> Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81, 113–14.

<sup>115</sup> *Id.* § 403(a)(1).

<sup>116</sup> *Id.* § 403(a)(3).

<sup>117</sup> *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008).

A. *The Supreme Court Elects To Examine the McCain-Feingold Act on Its Face*

When analyzing the numerous arguments presented in *Citizens United*, the Court determined that “[i]n the exercise of its judicial responsibility,” it needed to examine the validity of the McCain-Feingold Act on its face and not on the narrower grounds suggested by the litigants and the holdings of earlier decisions, because deciding the case on such narrower grounds would lead to further litigation and, in the interim, political speech would be chilled.<sup>118</sup> The Court rejected *Citizens United*’s as-applied challenges based on the finding that the documentary, *Hillary: The Movie*, was the functional equivalent of express advocacy because it was essentially a “feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.”<sup>119</sup> The Court further rejected the contention that it should create an as-applied exception for videos on-demand because to do so would require it to redraw constitutional lines for different types of media,<sup>120</sup> which could have the unintended result of chilling political speech.<sup>121</sup>

The Court correctly noted that if it applied the test established in *Austin*—the anti-distortion test—instead of examining the statute on its face, it could “produce the dangerous, and unacceptable, consequence” of banning political speech emanating from media corporations.<sup>122</sup> While noting that media corporations were technically exempt from the corporate expenditure ban set forth in section 441b,<sup>123</sup> the Court observed that media corporations also accumulate immense wealth with the help of the corporate form and that “the views expressed by

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<sup>118</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 894 (2010).

<sup>119</sup> *Id.* at 890.

<sup>120</sup> *See id.* at 890–91. The Court also reasoned that an as-applied analysis would result in other types of media running to the courts to determine if § 441b’s restrictions applied to their activities and would “chill[] political speech” until such determinations would be made. *See id.* at 891. The Court also elected not to extend the holding in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (“MCFL”), which exempted non-profit corporations that receive minimal funding from for-profit corporations, because it would require the Court to sever a portion of the BCRA and it would result in future case-by-case determinations. *See id.* at 891–92.

<sup>121</sup> *See Citizens United*, 130 S. Ct. at 892.

<sup>122</sup> *See id.* at 905.

<sup>123</sup> *See* 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i) (2006 & Supp. I).

media corporations often ‘have little or no correlation to the public’s support’ for those views.”<sup>124</sup> As the Court went on to observe, the “line between the media and others who wish to comment on political and social issues [has become] far more blurred” with the “advent of the Internet,” blogs, and cable television, and the decline of traditional print and broadcast media.<sup>125</sup> Within the context of this dilemma, the Court recognized that making distinctions between media corporations and non-media corporations would be difficult at best.<sup>126</sup> Analyzing the statute on a case-by-case basis could have the unfortunate result of exempting a corporation that owns both media and non-media businesses, while simultaneously, a wholly non-media corporation could be forbidden to speak even though it may have the same interests.<sup>127</sup> Such a result “cannot be squared with the First Amendment.”<sup>128</sup>

Last, after the Court examined the morass of existing legislation, FEC advisory opinions, explanations and justifications, and FEC regulations governing the universe of campaign finance, it concluded that the existing complicated regulatory scheme acted as a prior restraint on speech in the harshest of terms.<sup>129</sup> As such, the Court determined that the proper adjudication required it to finally consider the facial validity of section 441b of the McCain-Feingold Act, and whether courts should continue to adhere to *Austin* and the relevant portion of *McConnell*.<sup>130</sup>

### B. Justice Kennedy’s First Amendment Analysis

The First Amendment provides that, “Congress shall make no law . . . abridging the freedom of speech.”<sup>131</sup> It is undisputable that free speech is an “essential mechanism of democracy”

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<sup>124</sup> *Citizens United*, 130 S. Ct. at 905 (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>125</sup> *See id.* at 905–06.

<sup>126</sup> *See id.* at 906.

<sup>127</sup> *See id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 895–96 (pointing out that there are unique and complex campaign finance rules for 71 distinct entities, subject to 33 different types of political speech, with 568 pages of FEC regulations and 1,278 pages of explanations and justifications for the regulations, followed by 1,771 advisory opinions).

<sup>130</sup> *Id.* at 891–94.

<sup>131</sup> U.S. CONST. amend. I.

because one of its many benefits is that it affords citizens the opportunity to hold their elected officials accountable.<sup>132</sup> As such, the “*First Amendment* ‘has its fullest and most urgent application to speech uttered during a campaign for political office.’”<sup>133</sup> The Supreme Court has already recognized that the “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”<sup>134</sup> Thus, in this context, if the First Amendment is to mean anything, it must mean that the government is not permitted to fine or imprison citizens or associations of citizens merely for engaging in political speech.<sup>135</sup>

Recognizing the above to be true, it is a natural progression to hold that political speech must be protected from laws that are designed to either intentionally suppress it, or do so inadvertently.<sup>136</sup> For it is political speech, emanating from diverse sources, that provides the voters with some of the information necessary to decide which candidates to support.<sup>137</sup> Every first-year law student learns that laws that burden speech, even political speech, will be subject to “strict scrutiny” review by the Court.<sup>138</sup> In order to successfully make it past this review, the government will be required to demonstrate that the law “furthers a compelling interest and is narrowly tailored” to promote that interest.<sup>139</sup> In *Citizens United*, the Supreme Court recognized that on rare occasions it has upheld a “narrow class of speech restrictions” that do infringe on a speaker’s First Amendment rights; however, in all these cases, the Court found a compelling governmental interest.<sup>140</sup>

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<sup>132</sup> *Citizens United*, 130 S. Ct. at 898; see also *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976).

<sup>133</sup> *Citizens United*, 130 S. Ct. at 898 (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (emphasis added) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (internal quotation marks omitted)).

<sup>134</sup> *Buckley*, 424 U.S. at 14.

<sup>135</sup> *Citizens United*, 130 S. Ct. at 904.

<sup>136</sup> *Id.* at 898.

<sup>137</sup> *Id.* at 899.

<sup>138</sup> *Id.* at 898.

<sup>139</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

<sup>140</sup> *Citizens United*, 130 S. Ct. at 899 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)) (“protecting the ‘function of public school education’ ”); see also *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (furthering “the legitimate penological objectives of the corrections system”); *Parker v. Levy*, 417 U.S. 733, 759 (1974) (ensuring “the capacity of the Government to discharge its

The Court did not find a compelling interest in *Citizens United*.<sup>141</sup> Justice Kennedy observed that the Court has a long history of holding that corporations are entitled to the rights recognized under the First Amendment.<sup>142</sup> These rights include political speech.<sup>143</sup> First Amendment protections do not vanish merely because the speaker is a corporation. As the Court correctly recognized, “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>144</sup> The Court went on to note that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>145</sup> Here, the Court recognized that the FEC set in place a complicated process whereby it, and it alone, would select what political speech is safe for dissemination to the public, and in so deciding, it employed a series of subjective and ambiguous tests.<sup>146</sup> Such a scheme would act as a prior restraint and an unprecedented governmental intrusion on the right to speak, the likes of which could not be sustained.<sup>147</sup>

As the Court noted, “[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”<sup>148</sup> The Court went on to say, “[t]he Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”<sup>149</sup> Moreover, the Court recognized that upholding the statute and allowing the government to ban corporations from engaging in political speech could result in suppression of speech in other media such as books,<sup>150</sup> blogs, or social

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[military] responsibilities”); U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers AFL-CIO, 413 U.S. 548, 557 (1973) (“[F]ederal service should depend upon meritorious performance rather than political service.”).

<sup>141</sup> See *Citizens United*, 130 S. Ct. at 899.

<sup>142</sup> *Id.* at 899–900.

<sup>143</sup> *Id.* at 900.

<sup>144</sup> *Id.* at 899.

<sup>145</sup> *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)

<sup>146</sup> *Citizens United*, 130 S. Ct. at 896.

<sup>147</sup> *Id.* at 895–96.

<sup>148</sup> *Id.* at 899.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 904.

networking websites.<sup>151</sup> The government's interest in leveling the political-influence playing field between individuals and corporations was unconvincing when one considers that a "mere 24 individuals contributed an astounding total of \$142 million" during the 2004 election.<sup>152</sup> Simultaneously, other like-minded citizens who have organized under the corporate form were prohibited from having their voices heard. The Court rightly concluded that the First Amendment is part of the foundation for the freedom to exchange ideas, and the public must be able to use all kinds of forums to share those ideas without fear of governmental reprisal.<sup>153</sup>

#### IV. WHAT DOES THE CAMPAIGN FINANCE LEGAL LANDSCAPE LOOK LIKE POST-*CITIZENS UNITED*?

As mentioned at the outset of this article, *Citizens United* caused an eruption of criticism about the holding's impact on the world of campaign finance and the potential corruptive influence of corporations and unions on the political process.<sup>154</sup> Critics of the decision should take some comfort in the reality that *Citizens United* will likely have less of a negative impact, if at all, than originally feared.

First, while some early supporters of the McCain-Feingold Act touted that its provisions barred corporations and unions from funding political ads,<sup>155</sup> in reality, the McCain-Feingold Act merely required that corporations and unions finance the ads through their PAC's or similar voluntarily financed segregated funds.<sup>156</sup> PAC's were exempted under the McCain-Feingold Act

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<sup>151</sup> *Id.* at 913.

<sup>152</sup> *Id.* at 908 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 503–04 (2007)).

<sup>153</sup> *Id.* at 917.

<sup>154</sup> See *supra* notes 8–13.

<sup>155</sup> See, e.g., George Will, *Political Ads a Freedom of Speech*, *TIMES UNION* (Albany), Dec. 21, 2002, at B5.

<sup>156</sup> See Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155 § 203(a), 116 Stat. 81, 91 (codified as amended at 2 U.S.C. § 441b(b)(2)) (prohibiting corporations and unions from financing electioneering communications outside of PACs); § 201(a), 116 Stat. at 88–90 (defining "electioneering communication"); see also Trevor Potter, *Campaign Finance Reform: Relevant Constitutional Issues*, 34 *ARIZ. ST. L.J.* 1123, 1131 (2002) (noting that corporations and unions could still run campaign ads as long as they were funded by voluntary contributions from employees, shareholders, or union members instead of using the corporation's general funds).

and, even though they were complicated to create and manage, they did afford corporations a forum to participate in the political process.<sup>157</sup> So, as long as corporations and unions collected campaign funds from their members with each member's informed consent, these entities could continue to influence elections and some experts even expected the number of ads to increase after the passage of the McCain-Feingold Act.<sup>158</sup> Moreover, even though corporations and unions are no longer prohibited from engaging in independent expenditures in support of or against political candidates, their participation in elections remains highly regulated. For example, direct contributions by corporations and unions are still prohibited under federal law and under the laws of twenty-four states.<sup>159</sup> A corporation or union still cannot donate corporate money directly to, or coordinate their political spending with, candidates for political office.<sup>160</sup> The laws requiring specific notices or disclaimers on political advertising remain untouched by *Citizens United*.<sup>161</sup> There is still a myriad of disclosure laws governing independent expenditures and electioneering communications on the part of corporations and unions.<sup>162</sup> Thus, even if a corporation or union were to independently expend funds in support of a candidate, money that is donated to the corporation for the purpose of financing said expenditures would be subject to the disclosure

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<sup>157</sup> *Citizens United*, 130 S. Ct. at 897 (acknowledging that PACs were a separate association from the corporation but pointing out that they were “burdensome alternatives” that were expensive to operate and were still subject to extensive regulation).

<sup>158</sup> See *New Campaign Finance Law Expected to Enhance Role, Challenges of PACs New Contribution Limits Provisions Affecting PACs*, 70 U.S.L.W. 2684 (2002) (discussing how corporate and union attempts at electoral influence will not be stopped by the BCRA but merely re-routed through their PACs); see generally, Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (recognizing the inevitable flow of political money to channels that remain open after regulation).

<sup>159</sup> *Life After Citizens United*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=19607> (last updated Jan. 4, 2011) (noting that “[o]ne state bans political activity by unions, nine ban corporate political activity, and 14 ban political activity by both corporations and unions”).

<sup>160</sup> See *Citizens United*, 130 S. Ct. at 909 (noting that Court did not overrule the ban on contributions).

<sup>161</sup> Jan Baran, *Citizens United v. FEC: Independent Political Advertising by Corporations*, 2010 LEXIS EMERGING ISSUES 4875 (February 22, 2010).

<sup>162</sup> See *Citizens United*, 130 S. Ct. at 915–17.

laws.<sup>163</sup> And last, despite President Obama's declaration that foreign entities will now have greater influence on American elections, foreign corporations and their subsidiaries are still subject to the existing spending bans.<sup>164</sup>

What has not been widely discussed is that *Citizens United* has spawned a new wave of litigation concerning several other aspects of the McCain-Feingold Act. For example, two federal courts issued campaign finance law decisions in the spring of 2010 that can trace their origins back to *Citizens United*. In *SpeechNow.Org v. FEC*, the United States Circuit Court of Appeals for the District of Columbia was asked to weigh in on the constitutionality of the McCain-Feingold Act's contribution limitations and disclosure requirements as applied to contributions to a PAC.<sup>165</sup> The court held that, since the expenditures themselves do not corrupt, it should follow that contributions to groups that plan only to make those expenditures will not lead to corruption either.<sup>166</sup> But this unfettered right to donate to a group like SpeechNow does not extend to the right to donate to an actual political party. As such, "[u]nder current law, outside groups—unlike candidates and political parties—may receive unlimited donations both to advocate in favor of federal candidates and to sponsor issue ads."<sup>167</sup> This particular dilemma was raised in the second case—*Republican National Committee v. FEC*.<sup>168</sup> In the *Republican National Committee* case, the RNC challenged the McCain-Feingold Act's soft-money ban claiming that it had the right to raise and spend unlimited amounts of money on all kinds

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<sup>163</sup> See *id.* (finding no constitutional impediment to the application of the disclosure laws set forth in the BCRA).

<sup>164</sup> See 2 U.S.C. § 441e(a) (2006) (providing that foreign nationals are banned from contributing to or expending funds in support of political candidates or parties); see also Randy E. Barnett, *Obama Owes the High Court an Apology*, WALL ST. J., Jan. 29, 2010, at A13.

<sup>165</sup> *SpeechNow.Org v. FEC*, 599 F.3d 686, 690–91 (D.C. Cir. 2010), *cert. denied sub nom. Keating v. FEC*, 131 S. Ct. 553 (2010).

<sup>166</sup> See *id.* at 694; see also Adam Liptak, *On Campaign Finance, Rulings for Advocacy Groups and Against Parties*, N.Y. TIMES, Mar. 27, 2010, at A13.

<sup>167</sup> *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 160 n.5 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3543 (2010).

<sup>168</sup> 698 F. Supp. 2d 150 (D.D.C. 2010).

of election-related issues<sup>169</sup> and that the ban discriminates against the national political parties.<sup>170</sup> The court held that plaintiffs' claims were at odds with the Supreme Court's holding in *McConnell* and that the Court's recent decision in *Citizens United* did not disturb the part of *McConnell's* holding that addressed the constitutionality of the McCain-Feingold Act's limits on contributions to political parties.<sup>171</sup>

There are also several new issues that have been raised as a result of the holding in *Citizens United*. When President Obama "dressed down" the Supreme Court in his State of the Union address in 2009, he, along with other critics, conveniently failed to mention the group that benefitted the most from the decision—labor unions.<sup>172</sup> Skeptics could argue that this is because nine out of ten dollars spent on elections by unions goes to the Democrats—Obama's party.<sup>173</sup> It is interesting that the majority of the criticism of *Citizens United* comes from the political left, and while they lament the decision's impact as it relates to corporations, those same critics often fail to mention the impact on union participation in the electoral process. Unions admittedly spent approximately one-half billion dollars in the 2008 election, a figure that dwarfs the spending of corporations.<sup>174</sup>

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<sup>169</sup> *See id.* at 154–55. The RNC claimed it wanted to raise and spend unlimited soft money in order to (1) support state candidates in elections where only state candidates appear on the ballot; (2) support state candidates in elections where both state and federal candidates appear on the ballot; (3) support state parties' redistricting efforts following the 2010 census; (4) support "grassroots lobbying efforts" aimed at educating and mobilizing voters around "legislation and issues"; (5) pay the fees and expenses attributable to this case and "other litigation not involving federal elections"; and (6) pay maintenance and upkeep expenses associated with the RNC's headquarters.

*Id.*

<sup>170</sup> *See id.* at 160 n.5.

<sup>171</sup> *See id.* at 153 (citing *Citizens United v. FEC*, 130 S. Ct. 876, 910–11 (2010)).

<sup>172</sup> Steven J. Law, *Organized Labor and Citizens United*, WALL ST. J., Mar. 11, 2010, at A15 (noting that labor unions spent approximately half-a-billion dollars in the 2008 election, significantly more than any group representing business).

<sup>173</sup> *See id.*

<sup>174</sup> *See id.* (noting that while public companies have to deal with the pursuit of profits and the desires of shareholders, unions have very little holding them back from engaging in political action).

In addition, while critics of the decision claim the majority “piously claim it’s about ‘free speech,’”<sup>175</sup> they have sat silent, or in some cases applauded, as the Supreme Court relies on First Amendment jurisprudence in cases about Internet pornography,<sup>176</sup> flag burning,<sup>177</sup> topless dancing,<sup>178</sup> cross-burning,<sup>179</sup> and even creating, selling, or possessing films depicting animal torture for purposes of sexual arousal.<sup>180</sup> To hold that such conduct described in these cases is worthy of constitutional protection, yet simultaneously support the idea that a corporation that expends its funds in support of a political candidate should be exposed to criminal liability seems irreconcilable. Last, while political pundits and scholars have criticized the ability of corporations to use their vast wealth to allegedly influence elections, they rarely express the same concern for the sudden rise of wealthy individuals who are using their own millions to either buy an elected position for themselves or use it to influence the outcome of others.<sup>181</sup> Recent political candidates like Mayor Michael Bloomberg in New York, California gubernatorial candidates Arnold Schwarzenegger and Meg Whitman, New Jersey Governor John Corzine, the Kennedy and Bush families, Connecticut Senate candidate Linda McMahon and Florida Senate candidate Jeff Greene, and billionaires George Soros and Rupert Murdoch, just to name a few, have all used their own immense financial resources in an effort to influence the electorate.

While many critics focus on corporations making sizable expenditures on behalf of a candidate, they lose focus of the reality that the public’s participation in the political process has changed with the advent of the Internet. For example, given the success of Internet fundraising in the 2008 presidential election,

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<sup>175</sup> E.J. Dionne, Jr., *The Corporate States of America?*, WASH. POST, Jan. 25, 2010, at A17.

<sup>176</sup> *Ashcroft v. ACLU*, 542 U.S. 656, 661, 666, 670 (2004); (invalidating the Child Online Protection Act (COPA), Pub. L. No. 105-277, 112 Stat 2681 (codified as amended at 47 U.S.C. § 231(2006))).

<sup>177</sup> *Texas v. Johnson*, 491 U.S. 397, 417–18 (1989).

<sup>178</sup> *California v. LaRue*, 409 U.S. 109, 117 (1972).

<sup>179</sup> *Virginia v. Black*, 538 U.S. 343, 358–63 (2003).

<sup>180</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1584–93 (2010); see also Bradley A. Smith, *Newsflash: First Amendment Upheld*, WALL ST. J., Jan. 23, 2010, at A15.

<sup>181</sup> Charles Krauthammer, *The U.S. House of Lords?*, WASH. POST, Dec. 19, 2008, at A35.

it is likely that in future elections, aggregations of smaller individual donations will actually outweigh the spending of corporations.<sup>182</sup> In his 2008 Presidential campaign, Barack Obama raised close to a half-a-billion dollars via Internet donations to his campaign.<sup>183</sup> Of the 6.5 million donations received by Obama, six million were for \$100 or less, with the average on-line donation being \$80.<sup>184</sup> According to the Federal Election Commission, the total sum of individual donations of \$200 or less to all political candidates in the 2008 election exceeded that of contributions from individual donors who gave more than \$2000.<sup>185</sup> In fact, to simplify and hopefully enhance this trend, some experts have suggested new ways for individual citizens to contribute to campaigns by way of a tax credit.<sup>186</sup> The proposal provides that each American should be allowed a limited federal tax credit that could only be applied if the money is donated to a federal candidate during election years.<sup>187</sup> It is further posited that, if the tax credit could be collected electronically in the form of a credit card, debit card, or directly from a bank account, the simplicity would increase participation and could result in candidates paying more attention to mainstream issues.<sup>188</sup>

#### CONCLUSION

*Citizens United*, while controversial, marks the end of more than twenty years of erosion of the First Amendment rights of corporations and unions, particularly on the issue of political

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<sup>182</sup> See Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 332 (2010).

<sup>183</sup> See Jose Antonio Vargas, *Obama Raised Half a Billion Online*, WASH. POST (Nov. 20, 2008, 8:00 PM), <http://voices.washingtonpost.com/44/2008/11/obama-raised-half-a-billion-on.html>.

<sup>184</sup> See *id.*

<sup>185</sup> 2008 Presidential Campaign Finance: Contributions to All Candidates, FED. ELECTION COMM'N, <http://www.fec.gov/disclosurep/national.do?jsessionid=0BE511403BC45C1D69984A1F7679DC31.worker1> (last visited Mar. 4, 2012) (reporting that the total sum of donations of \$200 and under was \$427,817,410 while the sum of the donations of \$2000 or greater was \$418,956,583).

<sup>186</sup> Bruce Ackerman & David Wu, *How To Counter Corporate Speech*, WALL ST. J., Jan. 27, 2010, at A13 (proposing that if each citizen had the chance to contribute "democracy dollars" in the form of a tax credit, that the aggregation of donations would likely dwarf the sums spent by corporations).

<sup>187</sup> See *id.*

<sup>188</sup> See *id.*

speech. As Justice Kennedy stated, one of the hallmarks of the First Amendment is that it should not be applied based on the identity of the speaker.<sup>189</sup> The idea that a speaker who engages in the political process can be imprisoned for his or her conduct is the antithesis of what freedom of speech is all about and sadly brings to mind regrettably similar acts in our history such as the Alien and Sedition Acts.<sup>190</sup> As noted above, there is likely to be very little change in corporate political activities after *Citizens United* because corporations have been participating in the political process despite the existence of the McCain-Feingold Act. They just had to do so through their PACs. After the dust settles, if Congress still believes that it is wrong to allow corporations and unions to use independent expenditures in support of or in opposition to a candidate for political office, they can certainly take appropriate action to address the problem—so long as that action is not unconstitutional.

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<sup>189</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

<sup>190</sup> *See* Alien and Sedition Acts, ch. 74, 1 Stat. 596 (1798).