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NOTE

Giving a Voice to the Inanimate: The Right of a Corporation to Political Free Speech

Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010).

ALEX OSTERLIND*

I. INTRODUCTION

The decisions of the United States Supreme Court invariably incite considerable commentary from the general public. However, rarely does a judicial decision spawn such a vast condemnation from the other two branches of government as that witnessed after the Supreme Court case of *Citizens United v. Federal Election Commission*.¹ So controversial was the Court's decision that President Barack Obama disparaged the ruling in the State of the Union address, lambasting the decision as an "open[ing of] the floodgates for special interests – including foreign corporations – to spend without limit in [United States] elections."² President Obama pejoratively continued, "I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities."³ Unfortunately, the President's treatment of *Citizens United* is partially incorrect, as the Court's holding only invalidated a U.S. statute prohibiting corporate political spending by domestic entities;⁴ foreign nationals, including foreign corporations, remain subject to the federal statutory prohibition on election campaign contributions.⁵ The President's mischaracterization of the *Citizens United* decision is a common misconception, but even sans fallacious warnings, the crux of the decision tests the boundaries of the Constitution's most eminent right – the First Amendment right to freedom of speech.⁶

This Note examines the concept of corporate personhood and whether the state-created corporate entity is contemplated by the First Amendment.

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1. 130 S. Ct. 876 (2010).

2. Bradley A. Smith, *President Wrong on Citizens United Case*, NAT'L REV. ONLINE, Jan. 27, 2010, <http://corner.nationalreview.com/post/?q=ZTVkODZiM2M0ODEzOGQ3MTMwYzgzYjNmODBiMzQzZjk=>.

3. *Id.*

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

5. See 2 U.S.C. § 441e (2006).

6. See U.S. CONST. amend. I.

To discuss this controversy in relation to federal election laws constraining corporate financing, this Note first explains the particulars giving rise to the *Citizens United* case. Next, this Note examines the legislative and judicial treatment of corporate financing laws in regard to elections. Building upon this milieu, this Note presents the viewpoints of both those opposed to unrestricted corporate political speech as well as those championing a broad interpretation of the First Amendment that encompasses the corporate entity. Finally, this Note concludes that while a dramatic decision like *Citizens United* would normally warrant a swift remedial response from Congress, the Court's unambiguous construction of the First Amendment has effectively foreclosed any legislative response short of a constitutional amendment.

II. FACTS AND HOLDING

The 2008 presidential election generated tremendous public attention, manifested most saliently in the Democratic presidential primaries, which featured two potential firsts for the office of the President of the United States: an African American in Barack Obama and a woman in Hillary Rodham Clinton. Predictably, the fervor surrounding the Democratic presidential primaries entailed a bevy of propaganda commensurate with the vehemence of those supporting each candidate. One particular production straddled the line separating an informative documentary from an impermissible "electioneering communication," which "refers to a clearly identified candidate for Federal office" and "is made within . . . 30 days before a primary" election.⁷ *Citizens United* released the film in controversy, *Hillary: The Movie (Hillary)*, in January 2008.⁸ *Citizens United*, a nonprofit corporation, derives most of its twelve million dollar budget from individual donations; however, a fraction of *Citizens United's* budget originates from for-profit corporations.⁹

7. 2 U.S.C. § 434(f)(3).

The term "electioneering communication" means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office; . . . is made within . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and . . . in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

Id. See generally 2 U.S.C. § 441b (proscribing any "contribution or expenditure in connection with any election at which presidential and vice presidential electors . . . are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices"), *invalidated by Citizens United*, 130 S. Ct. 876; 2 U.S.C. § 437g(d) (defining civil and criminal penalties for violation of 2 U.S.C. § 441b).

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

9. *Id.* at 886-87.

This budget afforded Citizens United the opportunity to release and distribute the provocative *Hillary*.¹⁰ *Hillary* is a ninety-minute documentary focusing on the titular political figure – then-Senator Hillary Clinton.¹¹ The substantive content of *Hillary* is an amalgamation of interviews with numerous individuals, including political commentators, which cast then-Senator Clinton in an unfavorable light.¹² Unsatisfied with their sales from both the theatrical and DVD releases of *Hillary*, Citizens United sought to expand *Hillary*'s distribution through video-on-demand.¹³ To publicize the new format release of *Hillary*, Citizens United produced several negative television advertisements about then-Senator Clinton succeeded by the name of the movie and the movie's website address.¹⁴ However, the time period in which Citizens United intended to distribute both the television ads and the video-on-demand version of *Hillary* was within thirty days of the 2008 Democratic primary election.¹⁵

Anticipating reprisal by the Federal Election Commission (FEC) for distributing a film encompassed by the statutory prohibition of independent electioneering expenditures derived from corporate capital,¹⁶ Citizens United sought injunctive relief against the FEC in the U.S. District Court for the District of Columbia.¹⁷ In the action before the district court, the FEC averred that Citizens United would violate the Bipartisan Campaign Reform Act of 2002 (BCRA)¹⁸ should Citizens United elect to distribute the video-on-demand version of *Hillary*.¹⁹ In opposition to the FEC's argument, Citizens

10. *Id.* at 887.

11. *Id.*

12. *Id.*

13. *Id.* Video-on-demand is a feature of digital cable whereby subscribers are able to select desired programming at any time. *Id.*

14. *Id.*

15. *Id.* at 888.

16. 2 U.S.C. § 441b (2006), *invalidated by Citizens United*, 130 S. Ct. 876.

It is unlawful for . . . any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors . . . are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices

Id.; see also 2 U.S.C. § 434(f)(3) (defining "electioneering communication"). See generally 2 U.S.C. § 437g(d) (defining civil and criminal penalties for violation of 2 U.S.C. § 441b).

17. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008).

18. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431-457). The Bipartisan Campaign Reform Act of 2002 prohibits unions and corporations from using any "electioneering communication" to expressly advocate the election or defeat of a candidate in specific federal elections. *Id.* at sec. 203, § 441(b), 116 Stat. at 91.

19. Defendant Federal Election Commission's Memorandum of Law in Support of Its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for

United defended the video-on-demand broadcast of *Hillary* on the grounds that BCRA section 203's prohibition of corporate-funded electioneering communications (codified at 2 U.S.C. § 441b)²⁰ violated the First Amendment right to free speech,²¹ both facially and as applied.²²

To support its facial challenge to BCRA's constitutionality, Citizens United claimed recent United States Supreme Court precedent interpreting BCRA²³ "left the door open to facial invalidation based on the sort of circumstances that have now arisen."²⁴ Predictably, the district court held that even if Citizens United had a colorable facial challenge, the lower courts were bound to follow the Supreme Court's validation of BCRA.²⁵

In the as-applied challenge, Citizens United represented *Hillary* as a film concerned with issues rather than as an electioneering communication expressly advocating the defeat of then-Senator Clinton.²⁶ Unpersuaded, the district court rejected any notion that *Hillary* was concerned with legislative issues, but instead found the film to be the functional equivalent of express advocacy because *Hillary* could only be construed as an account of the inadequacies disqualifying then-Senator Clinton from the office of President.²⁷ Accordingly, the district court denied Citizens United's motion for preliminary injunction because Citizens United was highly unlikely to prevail on either a facial or as-applied First Amendment challenge to BCRA.²⁸ Relying

Summary Judgment at 39-40, *Citizens United*, 530 F. Supp. 2d 274 (No. 07-2240), 2008 WL 2364184.

20. Bipartisan Campaign Reform Act of 2002 sec. 203, 116 Stat. at 91 (codified as amended at 2 U.S.C. § 441b).

21. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

22. *Citizens United*, 530 F. Supp. 2d at 277. Citizens United also argued that BCRA section 201, requiring disclosure of the party responsible for the content of the electioneering communication, and BCRA section 311, requiring a disclaimer on electioneering communication of the party responsible for the content, were unconstitutional as applied to both Citizens United's ads for *Hillary* and the film *Hillary* itself. *Id.*

23. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476-81 (2007) (finding unconstitutional BCRA's restriction on issue ads in the months preceding elections); *McConnell v. FEC*, 540 U.S. 93, 154-57 (2003) (finding unconstitutional BCRA's restrictions on "soft money," which includes contributions to political parties for activities intended to influence state or local elections), *overruled in part by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

24. *Citizens United*, 530 F. Supp. 2d at 278 (internal quotation marks omitted).

25. *Id.* (observing that in order for Citizens United to prevail on its facial challenge to BCRA, *McConnell v. FEC*, 540 U.S. 93 (2003), would have to be overruled).

26. *Id.*

27. *Id.* at 279.

28. *Id.* at 280. The district court also held that Citizens United failed to offer a colorable constitutional challenge to BCRA sections 201 and 311, requiring disclosure and disclaimer of the party responsible for the content of an electioneering communication, with respect to Citizens United's advertisements for *Hillary*. *Id.* at 281.

upon the same reasoning, the district court subsequently granted the FEC's motion for summary judgment.²⁹

Following the district court's grant of summary judgment to the FEC, Citizens United appealed, and the Supreme Court noted probable jurisdiction to address the issues presented in *Citizens United v. FEC*³⁰ in November of 2008.³¹ After Citizens United presented its First Amendment claim before the Supreme Court, the Court ordered that the case be reargued.³² In instructing reargument in *Citizens United*, the Court found that proper disposition of Citizens United's constitutional challenge to BCRA required the Court to consider overruling Supreme Court precedent³³ addressing the facial validity of BCRA section 203.³⁴

In reargument, Citizens United sought to remove *Hillary* from BCRA coverage through a series of exemptions.³⁵ The Court, however, found all

The district court did not reach the question of whether BCRA sections 201 and 311 were unconstitutional as applied to *Hillary*. See *id.* at 277-78; see also *Citizens United v. FEC*, No. 07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008) (denying Citizens United's motion for summary judgment and granting the FEC's motion for summary judgment).

29. *Citizens United*, 2008 WL 2788753, at *1.

30. *Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010).

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

32. See *Citizens United*, 130 S. Ct. at 888; see also Thomas D. Edmondson & Kenneth P. Doyle, *High Court Defers Ruling on Hillary Movie, Sets Case for Reargument in Early September*, U.S. LAW WEEK, June 30, 2009, available at 77 U.S.L.W. 1817.

33. See *McConnell v. FEC*, 540 U.S. 93, 154-57 (2003) (finding unconstitutional BCRA's restrictions on "soft money"), *overruled in part by Citizens United*, 130 S. Ct. 876; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654-55 (1990) (finding state campaign finance regulation prohibiting corporations from using treasury money to support or oppose candidates in elections did not violate the First and Fourteenth Amendments), *overruled by Citizens United*, 130 S. Ct. 876. The Court noted that only the portion of *McConnell* addressing the facial validity of BCRA section 203 would need to be considered. *Citizens United*, 130 S. Ct. at 888.

34. *Citizens United*, 130 S. Ct. at 888. BCRA section 203 is codified at 2 U.S.C. § 441b (2006). See *supra* note 20.

35. *Citizens United*, 130 S. Ct. at 888-92. Citizens United first argued that 2 U.S.C. § 441b does not cover *Hillary* because the film does not qualify as an "electioneering communication." *Id.* at 888-89. Second, Citizens United argued that the Supreme Court's decision in *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449 (2007), exempted *Hillary* from section 441b because *Hillary* should not be construed as "express advocacy or its functional equivalent" under section 441b. *Id.* at 889-90. Third, Citizens United contended that section 441b should not apply to movies, such as *Hillary*, shown through video-on-demand because this distribution has little chance to distort the political process. *Id.* at 890-91. Finally, Citizens United argued that the Court should find an exception in section 441b's expenditure ban for political speech from nonprofit corporations deriving the majority of their funds from individuals. *Id.* at 891-92.

theories proposed by Citizens United to remove *Hillary* from 2 U.S.C. § 441b (section 441b) inadequate.³⁶ Rather than find the failure of Citizens United's arguments for exempting *Hillary* from section 441b fatal to its claim, the Court instead adopted the view that the arguments were unsatisfactorily narrow.³⁷ The Court opined that any interpretation of section 441b advanced by Citizens United would necessitate ad hoc scrutiny of every case to determine whether the political speech at issue was banned.³⁸ Thus, the Court held in *Citizens United* that it could not "resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment."³⁹ To actualize this finding, the Court invalidated section 441b, thereby overruling the decision of the District Court for the District of Columbia.⁴⁰

III. LEGAL BACKGROUND

The Court's opinion in *Citizens United* not only overruled the decision of the district court, but in finding section 441b unconstitutional, the Court was forced to also overrule the earlier Supreme Court decisions of *Austin v. Michigan Chamber of Commerce*⁴¹ and the portion of *McConnell v. FEC*⁴² upholding BCRA section 203's extension of section 441b's restrictions on independent corporate expenditures.⁴³ The Court engaged in thorough discussions of section 441b and the *Austin* and *McConnell* decisions that upheld it.⁴⁴ Fundamentally, the Court opined that "*Austin* was a significant departure from ancient First Amendment principles" and correspondingly, the decision's rationale was comprehensively defective.⁴⁵ Consequently, the Court found the same deficiencies evident in *McConnell* due to *McConnell*'s reliance on *Austin*.⁴⁶ However, the Court did ground its disapproval of *Austin* and *McConnell* in other Supreme Court precedent it found irreconcilable with the two cases.⁴⁷

36. *Id.* at 892.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.* at 913.

41. 494 U.S. 652 (1990), overruled by *Citizens United*, 130 S. Ct. 876.

42. 540 U.S. 93 (2003), overruled in part by *Citizens United*, 130 S. Ct. 876.

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

44. *Id.* at 893-913.

45. *Id.* at 888 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 490 (2007) (Scalia, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

46. *Id.* at 913.

47. *Id.* at 912. The Court found *Austin* contradicted the precedential decisions of *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding federal limits on campaign contributions, but holding that money spent to influence elections is free speech protected by the Constitution), and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)

A. Statutory Regulation of Independent Corporate Expenditures

The proscription of corporate independent political expenditures upheld in the *Austin* and *McConnell* decisions directly originated nearly two decades earlier with the Federal Election Campaign Act of 1971 (1971 FECA).⁴⁸ While the 1971 FECA did increase the requisite disclosure of financial contributions relating to federal campaigns, it was relatively anemic as a prophylactic for corruption.⁴⁹ Following disconcerting findings of corruption in the wake of the 1972 presidential election,⁵⁰ Congress amended the 1971 FECA with the Federal Election Campaign Act of 1974 (1974 FECA).⁵¹ In an effort to curb corruption and the appearance thereof, the 1974 FECA was fashioned to further constrain the financial influence pervading federal elections.⁵² To achieve this end, the 1974 FECA placed a limitation on campaign contributions by individuals and organizations and an outright prohibition on donations directly from corporations.⁵³ Though repealed from its original site

(finding unconstitutional a state law prohibiting corporations from spending money for advertising its views before a state referendum). *Id.*

48. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3. The 1971 FECA was originally codified at 18 U.S.C. §§ 608, 610, and 611. *Id.* The ban on independent political expenditures by corporations, as well as other campaign finance reform, has since been recodified at 2 U.S.C. § 441b. *See infra* note 54 and accompanying text.

49. The 1972 presidential election involved the Watergate investigations surrounding President Nixon. *See* E. Stewart Crosland, Note, *Failed Rescue: Why Davis v. FEC Signals the End to Effective Clean Elections*, 66 WASH. & LEE L. REV. 1265, 1271-72 (2009) (“The Watergate investigations’ revelation of several improprieties by President Nixon’s 1972 presidential campaign raised questions regarding money’s deleterious effect on the political process and highlighted the existing federal election laws’ failings.”).

50. *See id.*

51. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., and 26 U.S.C.). Many statutes from the 1974 FECA have been repealed, and some have been recodified at other sites within the United States Code. *See infra* note 52. For example, the ban on independent political expenditures by corporations, as well as other campaign finance reform, has since been recodified at 2 U.S.C. § 441b. *See* Federal Election Campaign Act Amendments of 1976, § 321, Pub. L. No. 94-283, 90 Stat. 475, 490 (addressing “Contributions or Expenditures by National Banks, Corporations, or Labor Organizations”) (codified as amended at 2 U.S.C. § 441b (2006)); *see also infra* note 54 and accompanying text.

52. Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263; *see also* 2 U.S.C. § 441b (2006), *invalidated by Citizens United*, 130 S. Ct. 876; Bipartisan Campaign Reform Act of 2002, sec. 203, Pub. L. No. 107-155, 116 Stat. 81, 91-92 (codified as amended at 2 U.S.C. § 441b).

53. *See Buckley v. Valeo*, 424 U.S. 1, 196 (1976). This section of the 1974 FECA was repealed by the Federal Election Campaign Act Amendments of 1976, §

within the United States Code, the statutory prohibition on independent expenditures by corporations was subsequently recodified by the Federal Election Campaign Act Amendments of 1976 at 2 U.S.C. § 441b.⁵⁴ Section 441b prohibits corporations and unions from both directly contributing to candidates and independently financing, through general treasury capital, any media advertisement expressly advocating the election or defeat of a specific candidate in specific federal elections.⁵⁵

Recognizing some deficiency in the statutory regulation of campaign financing, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA).⁵⁶ BCRA amended a substantial portion of the campaign financing statutes, including section 441b.⁵⁷ Section 441b was amended by adding any “electioneering communication” to the list of explicitly proscribed independent corporate expenditures.⁵⁸ BCRA section 201 defines an “electioneering communication” as “any broadcast, cable, or satellite communication . . . refer[ing] to a clearly identified candidate for Federal office” made within

201, 90 Stat. 475. The *Buckley* opinion contains the full text of 18 U.S.C. § 610 prior to repeal:

It is unlawful for . . . any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever . . . to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Buckley, 424 U.S. at 196.

54. *Citizens United v. FEC*, 130 S. Ct. 876, 902 (2010); see also Federal Election Campaign Act Amendments of 1976, § 321, 90 Stat. 475. See generally Eric C. Surette, Annotation, *Validity, Construction, and Application of 2 U.S.C.A. § 441b and Predecessor Statute (18 U.S.C.A. § 610), Prohibiting Certain Entities from Making Contributions or Expenditures in Connection with Federal Elections*, 190 A.L.R. FED. 169 (2003).

55. 2 U.S.C. § 441b (2006), *invalidated by Citizens United*, 130 S. Ct. 876. The enabling legislation banning independent political expenditures by corporations at 2 U.S.C. § 441b is found in section 321 of the Federal Election Campaign Act Amendments of 1976, 90 Stat. 475. See also Surette, *supra* note 54 (collecting federal cases discussing the validity, construction, and application of 2 U.S.C. § 441b and predecessor statute 18 U.S.C. § 610).

56. Bipartisan Campaign Reform Act of 2002, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431-456).

57. *Id.* at sec. 203, § 441b, 116 Stat. at 91-92.

58. *Id.*

thirty days of a primary election or sixty days of a general election.⁵⁹ Specifically addressing “electioneering communication” within the confines of an election for president, “publicly distributed” communications capable of being “received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days” are expressly prohibited.⁶⁰ Consequently, any laudation or disparagement of a specific candidate for President through any broadcast format available to at least 50,000 individuals is statutorily forbidden if financed by the general treasury of any corporation.⁶¹

Significantly, the ban on independent expenditures by a corporation operated only to prohibit such spending when the capital was derived from the corporation’s general treasury.⁶² To circumvent the section 441b ban, corporations are statutorily permitted to establish a political action committee (PAC) to advocate the election or defeat of a specific candidate or to produce an electioneering communication.⁶³ PAC is the colloquialism attached to the section 441b caveat permitting creation of a “separate segregated fund” by a corporation for purposes otherwise prohibited by section 441b.⁶⁴ However, a corporate PAC may permissibly obtain capital only from employee, personnel, and shareholder donations.⁶⁵ Thus, a PAC theoretically preserves political speech by a corporation while simultaneously safeguarding the political interests of the corporate shareholders holding discordant political views and facilitating government regulation of corporate political activities.⁶⁶

59. Bipartisan Campaign Reform Act of 2002 sec. 201(a)(3)(A), 116 Stat. at 89 (codified as amended at 2 U.S.C. § 434(f)(3)(A) (2006)).

60. Electioneering Communication, 11 C.F.R. § 100.29(b)(3)(ii) (2010).

61. *Id.*

62. 2 U.S.C. § 441b(b)(2). “General treasury” is used colloquially to encompass funds described in 2 U.S.C. § 441b(b)(2).

63. *Citizens United v. FEC*, 130 S. Ct. 876, 887-88 (2010).

64. 2 U.S.C. § 441b(b)(2)(C); *see also* 2 U.S.C. § 441b(b)(3)(B).

It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of \$50 or less as a result of such solicitation and who does not make such a contribution.

Id. § 441b(b)(4)(B). Other allowable corporate actions are additionally outlined. *Id.* § 441b(b)(4)(C), (D).

65. *Id.* § 441b(b)(4)(A)(i).

66. *FEC v. Beaumont*, 539 U.S. 146, 163 (2003); *see also* 2 U.S.C. §§ 432-434.

B. Precedent Endorsing Corporate Political Speech

The first significant Supreme Court decision to focus on Congress' progressive campaign finance legislation was the 1976 case of *Buckley v. Valeo*, which addressed the Federal Campaign Act Amendments of 1974.⁶⁷ *Buckley* was an immense action, composed of eleven plaintiffs, including a presidential candidate, an incumbent senator, and the New York Civil Liberties Union, opposing five named defendants, the FEC among them.⁶⁸ In the aggregate, the plaintiffs asserted that several provisions of the Federal Campaign Act Amendments of 1974 were incapable of withstanding the strict judicial scrutiny necessitated by legislation burdening the First Amendment.⁶⁹

Of particular significance, the plaintiffs challenged an expenditure ban applying to individuals, corporations, and unions codified at 18 U.S.C. § 608(e)(1).⁷⁰ Section 608(e)(1) provided that “[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000.”⁷¹ The *Buckley* Court interpreted this statute to “exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.”⁷² In justifying the constitutionality of section 608(e)(1), the defendants argued that the statute facilitated the compelling governmental interest of preventing corruption and the appearance thereof and, furthermore, rendered the political landscape equitable to those with otherwise disparate political spending power.⁷³ The Court, however, found the defendants' rationales behind section 608(e)(1) inadequate to cross the threshold of a “compelling governmental

67. 424 U.S. 1, 6 (1976).

68. *Id.* at 7-8. The other named plaintiffs in *Buckley* were “a potential contributor, the Committee for a Constitutional Presidency – McCarthy ‘76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc.” *Id.* The other named defendants in *Buckley* were “the Secretary of the United States Senate and the Clerk of the United States House of Representatives, both in their official capacities and as ex officio members of the Federal Election Commission,” the Attorney General of the United States, and the Comptroller General of the United States. *Id.* at 8.

69. *Id.* at 11. Other specific provisions of the Federal Election Campaign Act of 1971, as amended in 1974, and related tax regulations were also challenged by the plaintiffs. *Id.* The text of many of these statutes is reproduced in the opinion itself. *Id.* at 144-235.

70. *Id.* at 43-44; see also *Citizens United v. FEC*, 130 S. Ct. 876, 901-02 (2010).

71. *Buckley*, 424 U.S. at 193.

72. *Id.* at 19-20.

73. *Id.* at 45, 48.

interest.”⁷⁴ In so finding, the Court first asserted that avoiding corruption and the appearance of corruption was insufficient to mitigate section 608(e)(1)’s encumbrance of the First Amendment right to political speech.⁷⁵ Secondly, the Court rejected any equitable justification for section 608(e)(1), proclaiming “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.”⁷⁶ Consequently, the Court concluded that section 608(e)(1)’s constraint on the protection of political speech evident in the First Amendment was unconstitutionally oppressive.⁷⁷

Two years after *Buckley*, the Supreme Court adjudicated constitutional challenges to a state statute analogous to the federal statutory prohibition on independent corporate expenditures in *First National Bank of Boston v. Bellotti*.⁷⁸ While *Buckley* centered on the federal restriction upon corporate expenditures relating to a particular candidate,⁷⁹ the plaintiffs in *Bellotti* challenged a Massachusetts statutory prohibition on corporate expenditures relating to referendum proposals subject to vote.⁸⁰ The Massachusetts statute forbid banks and corporations from making expenditures “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.”⁸¹ In clarification, the statute excluded personal taxation referenda from the content of “property, business or assets of the corporation.”⁸² In relief, the plaintiffs sought to have the statute declared unconstitutional, both facially and as applied, as violative of the First Amendment.⁸³

Ruling in favor of the plaintiffs, the Court invalidated the statute as a consequence of its unconstitutional restriction on speech protected by the First Amendment.⁸⁴ In support of the decision, the Court opined that political

74. *Id.* at 45, 48-49.

75. *Id.* at 48-49.

76. *Id.*

77. *Id.* at 51.

78. 435 U.S. 765, 767-68 (1978). The plaintiffs, appellants in the Supreme Court action, were First National Bank of Boston, New England Merchants National Bank, the Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co. *Id.* at 768 n.1.

79. *See supra* notes 70-71 and accompanying text.

80. *Bellotti*, 435 U.S. at 767.

81. *Id.* at 767-68 (alteration in original) (internal quotation marks omitted) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). For the verbatim text of chapter 55, section 8 of the Massachusetts statute at issue, see *id.* at 768 n.2. Criminal sanctions for violation of the at-issue statute are also provided in the *Bellotti* opinion. *Id.*

82. *Id.* at 768.

83. *Id.* at 770. The plaintiffs also alleged that the Massachusetts statute violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as some provisions of the Massachusetts Constitution. *Id.*

84. *Id.* at 795.

speech is imperative in a democracy and “[t]he 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.”⁸⁵ As a result, *Bellotti* is the first instance in which the Court interpreted the First Amendment to provide protection to corporations as well as persons.⁸⁶

However, the logical deduction in finding corporations guaranteed the same First Amendment freedoms as individuals was not without opposition within the *Bellotti* Court. In dissent, Justice Rehnquist thought First Amendment liberties sufficiently parochial to exclude corporations.⁸⁷ In so finding, Justice Rehnquist characterized a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence.”⁸⁸ Construing a corporation as such an entity, Justice Rehnquist favored subjecting corporations to otherwise unconstitutional legislative restrictions on political speech.⁸⁹

More recently, and most apposite to *Citizens United*, the Supreme Court confronted BCRA section 203’s regulatory effect on campaign financing in *FEC v. Wisconsin Right to Life, Inc. (WRTL)*.⁹⁰ The action in *WRTL* arose from Wisconsin Right to Life, Inc.’s televised advertisements urging Wisconsin constituents to voice their opposition to a filibuster of federal judicial nominees to their senators.⁹¹ Wisconsin Right to Life, Inc. planned to broadcast these advertisements during the thirty-day window prior to the Wisconsin primary proscribed by BCRA section 203.⁹² Consequently, Wisconsin Right to Life, Inc. filed suit against the FEC alleging the unconstitutionality of BCRA section 203 and requesting declaratory and injunctive relief.⁹³

Distinguishing the issue in *WRTL* from other Supreme Court precedent upholding limitations of corporate campaign speech directed toward a specific candidate, the Court contracted BCRA section 203, and by association section 441b, by finding that corporate campaign expenditure restrictions are unconstitutional as applied to issue advocacy of the sort engaged in by Wis-

85. *Id.* at 776-77.

86. *Id.* at 778 n.14. The *Citizens United* Court cited *Bellotti* for this exact verity. *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010).

87. *Bellotti*, 435 U.S. at 823-24 (Rehnquist, J., dissenting).

88. *Id.* at 823 (quoting *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819)).

89. *Id.* at 826.

90. 551 U.S. 449, 455-56 (2007).

91. *Id.* at 458-60.

92. *Id.* at 460.

93. *Id.*

consin Right to Life, Inc.⁹⁴ The Court found that the constitutionally permissible construction of section 441b is a prohibition on “express advocacy or its functional equivalent” of a specific candidate.⁹⁵ Thus, the Court concluded the idea that “campaign speech could also embrace issue advocacy would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights.”⁹⁶ The *WRTL* Court did not, however, sanction all legislative interdiction of the “express advocacy or its functional equivalent” of a specific candidate, but it instead explicitly declined to address the issue.⁹⁷

C. *Austin v. Michigan Chamber of Commerce*

In *Austin*, the Michigan Chamber of Commerce (Chamber), a nonprofit Michigan corporation, challenged section 54(1) of the Michigan Campaign Finance Act⁹⁸ on the grounds that it impermissibly burdened the Chamber’s exercise of political expression in violation of the First Amendment.⁹⁹ In June 1985, the State of Michigan scheduled a special election for a vacant seat in the Michigan House of Representatives.¹⁰⁰ Having an interest in the election, the Chamber sought page space in a local newspaper to advocate a particular candidate in the election.¹⁰¹ To fund this advocacy, the Chamber intended to draw on the available capital in its local treasury.¹⁰² However, such a general treasury expenditure advocating a specific candidate was statutorily felonious under Michigan law.¹⁰³ In an effort to avoid criminal repercussions, the Chamber brought suit in the United States District Court for the Western District of Michigan to enjoin enforcement of the Michigan Campaign Finance Act, arguing Michigan’s corporate expenditure restrictions

94. *Id.* at 481. The two precedential decisions avoided by the *WRTL* Court regarding corporate political expenditure bans are *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010). These two cases are addressed *infra* Part III.C-D.

95. *See WRTL*, 551 U.S. at 480-81.

96. *Id.* at 480.

97. *See id.* at 481.

98. Michigan Campaign Finance Act, § 54(1), 1976 Mich. Pub. Acts 388 (codified at MICH. COMP. LAWS § 169.254(1) (1979)) (“[A] corporation . . . shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution pursuant to section 4(3)(a).”).

99. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 656 (1990), *overruled* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*; *see also* MICH. COMP. LAWS § 169.254(4) (2005) (outlining penalties for violation of the corporate expenditure laws).

violated the First Amendment.¹⁰⁴ Finding against the Chamber, the district court upheld the statute.¹⁰⁵ However, on appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court, holding that the corporate expenditure restrictions of the Michigan Campaign Finance Act impermissibly abridged the First Amendment's protection of free speech.¹⁰⁶

In 1990, reversing the Sixth Circuit, the Supreme Court ruled that despite the burdensome effects of the Michigan Campaign Finance Act, it was sufficiently narrowly tailored to achieve a compelling state interest and, as such, did not violate the First Amendment.¹⁰⁷ To assess Michigan's compelling interest in regulating independent corporate political expenditures, the Court relied heavily on the State's proffered justifications of avoiding both corruption and the appearance thereof.¹⁰⁸ Accepting this justification, the Court adopted a broad definition of "corruption" by focusing on corporations' deleterious influence in the spectrum of politics as an intrinsic attribute of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."¹⁰⁹

D. *McConnell v. FEC*

The Supreme Court squarely addressed the validity of regulatory campaign finance statutes regarding corporations, including BCRA section 203, in *McConnell v. FEC*.¹¹⁰ Similar in posture to *Buckley*, *McConnell* provided the Court an opportunity to thoroughly evaluate the BCRA, rather than merely resolve challenges to one or two of its provisions.¹¹¹ As it came before the Court, *McConnell* consisted of eleven consolidated actions disputing the constitutionality of the BCRA and seeking declaratory and injunctive relief against its enforcement.¹¹² Among other claims, the plaintiffs sought to invalidate BCRA section 203's prohibition on electioneering communications.¹¹³

104. *Austin*, 494 U.S. at 656. The Chamber also argued that Michigan's corporate expenditure restrictions violate the Fourteenth Amendment. *Id.*

105. *Mich. Chamber of Commerce v. Austin*, 643 F. Supp. 397, 405 (W.D. Mich. 1986), *rev'd*, 856 F.2d 783 (6th Cir. 1998), *rev'd*, 494 U.S. 652 (1990).

106. *Mich. Chamber of Commerce v. Austin*, 856 F.2d 783, 790 (6th Cir. 1988), *rev'd*, 494 U.S. 652 (1990).

107. *Austin*, 494 U.S. at 660-61. The Court also found that Michigan Campaign Finance Act section 51(1) did not violate the Fourteenth Amendment. *Id.* at 668.

108. *Id.* at 659-60.

109. *Id.*

110. 540 U.S. 93, 114 (2003), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

111. *McConnell v. FEC*, 251 F. Supp. 2d 176, 183 (D.D.C. 2003) (per curiam), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

112. *Id.* *McConnell* is a complicated action comprised of an amalgamation of claims. For clarity, only the challenge to BCRA section 203 is addressed.

113. *Id.*

The plaintiffs averred that section 203's use of "electioneering communication" was both overbroad, in that its prohibition encompassed protected speech, and underinclusive, in that it failed to prohibit speech beyond the term's narrow definition.¹¹⁴

First directing its attention to the overbroad claim, the Court evaluated whether section 203 surpassed the threshold requirement of serving a compelling state interest via a narrowly tailored solution.¹¹⁵ Reaffirming *Austin's* characterization of corporations as pernicious in the political spectrum, the Court easily found a compelling state interest for section 203 because "the special characteristics of the corporate structure require particularly careful regulation."¹¹⁶ The Court further justified the compelling state interest by asserting that regulation of corporations in the political landscape is particularly necessary to thwart the avoidance by corporations of legitimate contribution limits.¹¹⁷ After finding a compelling state interest, the Court found that section 203 did not impermissibly burden First Amendment protections.¹¹⁸ The Court reasoned that although section 203's prohibition might bar some small amounts of otherwise-protected speech, this prohibition did not justify invalidating the statute.¹¹⁹

In support of their alternative attack on the BCRA, the plaintiffs argued that requiring corporations to create segregated funds for electioneering communications is unconstitutionally underinclusive because it does not prohibit advertising in print media or on the Internet.¹²⁰ Unpersuaded, the Court asserted that section 203 was enacted in response to congressional reports detailing the myriad of televised advertisements pertaining to upcoming federal elections.¹²¹ Furthermore, the Court opined that to avoid invalidation as underinclusive, remedial legislation does not need to be enacted in unison; rather, Congress is free to resolve the most salient inequities at its own discretion.¹²²

IV. INSTANT DECISION

Despite the substantial legislative and judicial support of regulatory measures on independent expenditures by corporations found in the BCRA as well as the *Austin* and *McConnell* decisions, Citizens United boldly advanced its challenge to section 203 before the Supreme Court.¹²³ Surely recognizing

114. *McConnell*, 540 U.S. at 204-05.

115. *Id.* at 205.

116. *Id.* (quoting *FEC v. Beaumont*, 539 U.S. 146, 155 (2003)).

117. *Id.*

118. *Id.* at 207.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 207-08.

123. *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

the apparent futility of its claim, Citizens United declined to pursue a facial challenge to section 441b, electing to proceed only with its as-applied challenge to the prohibition of corporate political speech.¹²⁴ Accordingly, the FEC argued that Citizens United had waived any facial challenge to section 441b.¹²⁵

The Court, however, was unpersuaded by the FEC's declaration that a facial challenge to section 441b had been eliminated from the case.¹²⁶ Instead, the Court proceeded to evaluate Citizens United's case by deliberately considering the facial validity of section 441b, rather than whether *Hillary* avoided the section either by scope or exemption.¹²⁷ Citizens United submitted no arguments to the Court suggesting that section 441b was facially invalid, yet the Court maintained that its "judicial responsibility" compelled it to examine whether section 441b was reconcilable with the First Amendment's safeguard of political speech.¹²⁸ In support of this interpretive undertaking, the Court posited that avoiding a facial challenge in the instant case would contribute to the uncertainty clouding section 441b, rendering the statute vulnerable to improper judicial construction.¹²⁹ Furthermore, the Court asserted political speech would be impermissibly hindered by the time frame entailed by as-applied challenges to section 441b; effectively, the extensive time period commensurate with litigation triggered by political speech under section 441b would defeat the purpose of such political speech directed at any particular election.¹³⁰ Finally, and of greatest significance, the Court emphasized the potential for section 441b to chill political speech altogether.¹³¹

Proceeding under its tripart justification, the Court ultimately held that section 441b was irreconcilable with the First Amendment's protection of political speech and, therefore, was unconstitutional.¹³² In overruling its own precedent and finding section 441b's prohibition of political speech unconstitutional, the Court determined that corporations should be afforded the same constitutional protections of political speech as individuals because the First Amendment proscribes distinctions between classes of speakers.¹³³ This supposition, the Court concluded, is plausible because the Court has understood the First Amendment to comprehend corporations.¹³⁴ Syllogistically, the

124. *Id.* at 888.

125. *Id.* at 892.

126. *Id.* at 892-93.

127. *Id.* at 893.

128. *Id.* at 894.

129. *Id.* at 894-95.

130. *Id.* at 895.

131. *Id.* at 895-96.

132. *Id.* at 913.

133. *Id.*

134. *Id.* at 899 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)).

Court held that the First Amendment contemplates political speech by a corporation.¹³⁵

In essence, the Court places corporations on the same plane as individuals. The fulcrum of the Court's logic is that section 441b deprives a corporation of the right to political speech, thereby creating a favored class of speakers in individuals.¹³⁶ Thus, the Court reasoned that section 441b can be interpreted only as an absolute prohibition on political speech.¹³⁷ Consequently, section 441b's "ongoing chill upon speech that is beyond all doubt protected makes it necessary . . . to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated."¹³⁸

However, where earlier precedent taught that section 441b was constitutional and should therefore be upheld, the Court overruled itself. In overruling *Austin*, the Court rejected the "antidistortion" rationale buttressing the *Austin* Court's holding.¹³⁹ The Court dismissed as immaterial the fact that a corporation's wealth is exponentially greater than an individual's wealth because "[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."¹⁴⁰ Preferring instead to portray corporations as valuable contributors to the country's political discourse, the Court asserted that corporations epitomize principal sectors of the constituency and "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."¹⁴¹ Thus, the Court concluded that the antidistortion rationale bolstering the *Austin* decision is an "aberration" and should not be followed.¹⁴² In accordance with the rejection of *Austin*, the Court was additionally forced to overrule the portion of *McConnell* upholding BCRA section 203.¹⁴³ In validating BCRA section 203, the *McConnell* opinion relied heavily upon the antidistortion rationale espoused in *Austin*, albeit to uphold an even more expansive suppression of political speech.¹⁴⁴ Therefore, because the Court found the antidistortionist basis insufficient to vindicate a suppression of corporate political speech, the Court was compelled to overrule *McConnell* in part.¹⁴⁵

135. *Id.* at 900.

136. *Id.* at 899.

137. *Id.* at 897.

138. *Id.* at 896.

139. *Id.* at 903-04, 913.

140. *Id.* at 905.

141. *Id.* at 907.

142. *Id.*

143. *Id.* at 913.

144. *Id.*

145. *Id.*

The Court further rejected other arguments espoused by the FEC in support of the constitutionality of section 441b, such as anticorruption and shareholder protection interests.¹⁴⁶ First repudiating a compelling governmental interest in preventing corruption inherent in corporate political speech, the Court reiterated the chilling effect of section 441b.¹⁴⁷ It opined that a governmental interest in reducing corruption is an inadequate justification for section 441b's restraint on political speech.¹⁴⁸ Secondly, the Court denied that corporate political speech will forsake corporate shareholders valuing interests divergent from the corporation.¹⁴⁹ In an effort to assuage the concern, the Court insisted that corporate democracy is better suited to reconcile conflicting political interests within a corporation and scant evidence suggests this is an inadequate remedy.¹⁵⁰

Ultimately, while the Court decided in favor of Citizens United by rendering section 441b unconstitutional and overruling those cases affirming its validity,¹⁵¹ the decision was reached with a five-to-four split between the Justices.¹⁵² Articulating the disagreement of the dissenting justices, Justice Stevens filed an extensive dissent, surpassing the Court's own opinion in page length.¹⁵³ The dissent thoroughly rebuked any conception that corporations should enjoy the same constitutional freedoms afforded individuals, decrying that equating corporations "to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition in

146. *Id.* at 908-11.

147. *Id.* at 908.

148. *Id.*

149. *Id.* at 911.

150. *Id.*

151. *Id.* at 913; *see also* *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding the validity of BCRA § 203 as codified at amended 2 U.S.C. § 441b), *overruled in part by Citizens United*, 130 S. Ct. 876; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (upholding restrictions on corporate political speech), *overruled by Citizens United*, 130 S. Ct. 876.

152. *Citizens United*, 130 S. Ct. at 886. While finding section 441b facially invalid, the Court did uphold the disclaimer and disclosure requirements of BCRA sections 201 and 311. *Id.* at 914. Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts, Justice Scalia, and Justice Alito joined. *Id.* at 886. Justice Thomas joined the opinion in all but the part upholding BCRA sections 201 and 311, but did file an opinion concurring in part and dissenting in part. *Id.* Justice Stevens filed an opinion concurring in upholding BCRA sections 201 and 311 and dissenting as to the rest, in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined. *Id.* In addition to concurring in the upholding of BCRA sections 201 and 311 and dissenting in invalidating section 441b, the dissent reproached the majority for departing from *stare decisis* in overruling *Austin* and *McConnell*. *Id.* at 938-42 (Stevens, J., concurring in part and dissenting in part).

153. *Id.* at 929-79. The opinion authored by Justice Kennedy begins on page 886 and ends on page 917, whereas the dissent authored by Justice Stevens begins on page 929 and concludes on page 979. *See generally id.* at 886-917 (majority opinion); *id.* at 929-79 (Stevens, J., concurring in part and dissenting in part).

this case.”¹⁵⁴ The dissent comprehensively disassociated individuals from corporations, premised on the obvious natural differences between the former, natural entities and the latter, created at the leisure of the former.¹⁵⁵ The dissent characterized the Court’s criticism of identity-based restrictions as specious and unprecedented.¹⁵⁶ Instead, the dissent would have upheld the decision of the district court, thereby sustaining the constitutionality of section 441b.¹⁵⁷

V. COMMENT

Nothing drew the ire of both the dissent in *Citizens United* and those joined in opposition to the decision more than the majority’s understanding of “corporate personhood.”¹⁵⁸ In writing for the dissent in *Citizens United*, Justice Stevens argued that “[a]lthough they make enormous contributions to our society, corporations are not actually members of it.”¹⁵⁹ In so concluding, the dissent and others opposed to the extension of First Amendment liberties to corporations harken back to Justice Rehnquist’s forceful dissent in *Bellotti* – asserting that in granting the institution of a corporation, the government does not also implicitly endow the corporation with all those constitutional freedoms enjoyed by natural persons.¹⁶⁰ However, the *Bellotti* Court – the first Court to invest corporations with First Amendment liberties – suggested that concentrating upon whether a corporation was a “person” under the First Amendment missed the forest for the trees.¹⁶¹

Constructing the First Amendment as simply a liberty possessed by individuals misapprehends the bona fide intent of the amendment. The First Amendment reads “Congress shall make no law . . . abridging the freedom of

154. *Id.* at 930 (Stevens, J., concurring in part and dissenting in part).

155. *Id.* at 972.

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

Id.

156. *Id.* at 948.

157. *Id.* at 979.

158. *Id.* at 930; see also Posting of David H. Gans to ACSblog, *Citizens United, Corporate Personhood and the Constitution*, <http://www.acslaw.org/node/15118> (Jan. 19, 2010, 14:39 EST).

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

160. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting).

161. *Id.* at 775-76 (majority opinion).

speech”¹⁶² Correspondingly, “[t]he proper question . . . is not whether corporations ‘have’ First Amendment rights,” but rather “the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.”¹⁶³ Therefore, the First Amendment should be construed as fostering “an open marketplace where ideas, most especially political ideas, may compete without government interference.”¹⁶⁴ This First Amendment institution of a free market of ideas intimates other unretractable liberties, including the right to receive information.¹⁶⁵

Consequently, the “open marketplace” of knowledge established by the First Amendment effectively silences the critics of *Citizens United* who malign the Court’s personification of corporations. Though it is a relatively contemporary interpretation of the First Amendment, understanding the amendment’s primary purpose to be the facilitation of the free marketplace of ideas enjoys considerable support.¹⁶⁶ Under such an understanding, considerations such as personhood are conferred an ancillary role.¹⁶⁷ Thus, *Citizens United* properly approached section 441b, as amended by BCRA section 203,¹⁶⁸ from the precedential perspective of the statute’s impinging effect upon the free marketplace of ideas, in which the status of the contributor to that marketplace constitutes only a subordinate consideration. Cast in this light, section 441b evidently inhibits ideas, which all individuals would otherwise be free to collect from the marketplace and contrast with other ideas derived therefrom. In this way, section 441b encroaches upon the First Amendment liberty of individuals to *receive* speech.¹⁶⁹ Couched in these terms, section 441b impermissibly abridges the First Amendment rights guaranteed to natural persons; therefore, the majority in *Citizens United* ostensibly reached the correct conclusion in invalidating section 441b, ancillary factors aside.

Notwithstanding the “right” of a corporation to contribute to the public political discourse, a troubling implication arises in unrestrainedly allowing a corporation to contribute to the realm of political speech: the immense collec-

162. U.S. CONST. amend. I.

163. *Bellotti*, 435 U.S. at 776.

164. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008).

165. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

166. *See Lopez Torres*, 552 U.S. at 208; *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986); *Bellotti*, 435 U.S. at 776-77; *see also Griswold*, 381 U.S. at 482 (“[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”).

167. *See Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 634 (1990); *see also Bellotti*, 435 U.S. at 778 n.14.

168. For brevity, the reference to section 441b includes the amendment by BCRA section 203.

169. *See, e.g., Griswold*, 381 U.S. at 482 (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to *receive*”) (emphasis added).

tion of capital available to a corporation to convey its “speech,” and the original source of that capital. Both Justice Stevens’ dissent and the majority in *Citizens United* addressed the role of corporate finances on United States politics – the former distressed at its perniciousness,¹⁷⁰ while the latter considered it irrelevant.¹⁷¹ The deleterious consequences of a corporation’s disproportionate wealth buttressed *Austin*’s “antidistortion” rationale in condoning a state statute analogous to section 441b.¹⁷² Yet the *Citizens United* majority essentially dismisses the distorting effects of corporate wealth because “political speech cannot be limited based on a speaker’s wealth.”¹⁷³

However, the opinion of the Court in *Austin* did not uphold BCRA section 203 based solely on a corporation’s immense wealth.¹⁷⁴ Instead, *Austin* suggested the “special advantages” of corporations – e.g., “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets” – afforded corporations an inequitable advantage in the political speech spectrum.¹⁷⁵ Therefore, a corporation’s assets cannot be properly analogized to an individual’s assets, as the *Austin* Court appropriately recognized.¹⁷⁶ However, the *Citizens United* Court disagreed, finding the distinction wholly irrelevant.¹⁷⁷ In doing so, the Court evidently contravenes earlier Supreme Court precedent not overruled in the instant decision; at the very least, the Court is biasedly selective of which opinion dictum is apposite and which is not.¹⁷⁸ The Court’s disregard of earlier decisions includes neglecting a “concern over the corrosive influence of concentrated corporate wealth reflect[ing] the conviction that it is important to protect the integrity of the marketplace of political ideas.”¹⁷⁹ Nonetheless, the Court grounds its ruling against section 441b in its own absolutist First Amendment interpretation that any form of wealth – however accumulated, including through a corpora-

170. *Citizens United v. FEC*, 130 S. Ct. 876, 957 (2010) (Stevens, J., concurring in part and dissenting in part).

171. *Id.* at 905 (majority opinion).

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

173. *Citizens United*, 130 S. Ct. at 905.

174. *See Austin*, 494 U.S. at 658-59.

175. *Id.*

176. *Id.*; *see also* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1111-12 (2002).

177. *Citizens United*, 130 S.Ct. at 905.

178. *See, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982) (“In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.”).

179. *Mass. Citizens for Life*, 479 U.S. at 257 (emphasis added).

tion's "special advantages" – is an insufficient justification to subtract corporate content from the free marketplace of ideas.¹⁸⁰

Conceding, *arguendo*, that Congress is prohibited from constraining a corporate speaker based on its funds, who is the corporate speaker? Obviously the corporation cannot speak for itself – it is a creation of the government to simplify a commercial undertaking. A corporation is nothing more than an amalgamation of shareholder capital unified through contracts, either express or implied, to achieve an economic goal.¹⁸¹ A corporate speaker, then, must be the board of directors or executives – those often only representing a fraction of the natural individuals having an interest in the corporation.¹⁸² Thus, each appropriation of treasury funds derived from shareholders for a political statement is an appropriation towards a goal not authorized by the shareholders. This misuse of shareholder contributions has been rightly labeled "embezzlement" by Congress and vilified by President Theodore Roosevelt.¹⁸³ More importantly, such a course of action by the overseers of a corporation would violate their statutory fiduciary duty if not taken in the interests of the corporation.¹⁸⁴

Logically, in *Citizens United* the FEC advanced this shareholder protectionist justification in arguing that section 441b should be upheld.¹⁸⁵ The Court only cursorily glances at this significant concern – brushing it aside by positing that shareholder protectionism is not a "compelling [state] interest" and that "corporate democracy" would sufficiently rectify any shareholder abuse.¹⁸⁶ Concededly, corporate democracy potentially is a sufficiently remedial avenue, but this reasoning rests upon an assumption that there is an abundance of dissenting shareholders knowledgeable about the corporation's extra-industry activities. Thus, the "corporate democracy" solution eschews the issue of those shareholders enabling corporate activities indirectly, such

180. *Citizens United*, 130 S.Ct. at 905.

181. Sitkoff, *supra* note 176, at 1111-12.

182. *See Citizens United*, 130 S.Ct. at 972 (Stevens, J., concurring in part and dissenting in part) ("Perhaps the officers or directors of the corporation have the best claim to be the ones speaking . . .").

183. Sitkoff, *supra* note 176, at 1114-15, 1115 n.45.

184. *See, e.g.*, ALA. CODE § 10-2B-8.30(a) (2010) ("A director shall discharge his or her duties as a director, including duties as a member of a committee: . . . (3) In a manner the director believes to be in the best interests of the corporation."); *see also* Adam Winkler, *Corporate Speech is Not "Free"*, HUFFINGTON POST, Feb. 4, 2010, http://www.huffingtonpost.com/adam-winkler/corporate-speech-is-not-f_b_448854.html ("All corporations operate under the dictates of state corporate law.

That law mandates that all spending by a corporation be 'in the interests of the corporation.' Corporate executives are therefore barred from making any expenditure that they know won't benefit the company.").

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

186. *Id.*

as through mutual funds and minority shareholders.¹⁸⁷ Unauthorized corporate political speech impinges upon the First Amendment liberty of such unrepresented shareholders – that is, the right not to speak.¹⁸⁸ Granted, a shareholder could simply disassociate himself from a corporation should its expressed political ideals conflict with his own. However, by the time a shareholder first learns his political views conflict with those disseminated by the corporation, the initial harm has already been inflicted. After all, the corporation’s political goals will presumably be elucidated to the shareholder only after the corporation has already appropriated his contributions to subsidize the political speech he finds objectionable. Furthermore, in the case of a mutual fund investor, due to the opacity and aggregate function of mutual funds, it would be an absurdly time-consuming and tedious undertaking for an investor to research the expressed political values of each corporation in which the investor has an interest.

VI. CONCLUSION

Citizens United v. FEC demonstrates an extraordinary level of judicial activism from a majority of Supreme Court Justices normally aligned with a strict construction of the Constitution (as opposed to interpreting the Constitution as a “living document”). PACs had already provided the corporate entity in America with a constitutionally sufficient avenue to express political speech. Unfortunately, *Citizens United* leaves the nation with little avenue to constrain the tremendous endowment bestowed upon corporations by the Court. Undeterred, President Obama plans to have the executive branch “get to work immediately with Congress” to develop “a forceful response” to *Citizens United*.¹⁸⁹ However, it is doubtful that any governmental response to *Citizens United* could have a substantial remedial effect based on the Court’s unambiguous construal of the First Amendment. The only counteractive measure guaranteed to squarely address *Citizens United* would be to amend the Constitution; such a dramatic response to a single decision of the Supreme Court is unfeasible in the near future.

Alternatively, the Fair Elections Now Act (FENA) could effect a congressional answer, albeit a feeble one.¹⁹⁰ FENA would offer a voluntary sys-

187. A mutual fund is “[a]n investment company that invests its shareholders’ money in a usu[ally] diversified selection of securities.” BLACK’S LAW DICTIONARY (8th ed. 2004).

188. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634-35 (1943).

189. Posting of Lyle Denniston to SCOTUSblog, *Analysis: A New Law to Offset Citizens United?*, <http://www.scotusblog.com/2010/01/analysis-a-new-law-to-offset-citizens-united/> (Jan. 21, 2010 16:00 EST).

190. See Press Release, Congressman John Larson, Larson’s Campaign Finance Reform Bill Garners Support from Majority of House Democrats (Feb. 4, 2010),

tem for financing federal elections, giving candidates the option of financing campaigns on an aggregation of public funding and small individual contributions.¹⁹¹ FENA “would not raise the constitutional challenges that have been levied against [BCRA]. It would offer candidates the choice of accessing public funds for their campaigns if they reach a certain threshold of support and forego big dollar fundraising in exchange for the sort of grassroots small donor efforts”¹⁹² The type of campaign contributions contemplated by FENA can be sufficiently effective and were, in fact, successfully employed by President Obama during his presidential campaign.¹⁹³

However, FENA is not a direct response to *Citizens United*, and its potential remedial impact is lessened by its voluntary nature. Thus, short of constitutional amendment, corporations will now be as free to influence elections as any natural individual.

http://www.larson.house.gov/index.php?option=com_content&task=view&id=1040&Itemid=87.

191. *Id.*

192. *Id.*

193. *Id.*