

Articles

The Limits of *Citizens United v. Federal Election Commission*: Analytical and Practical Reasons Why the Sky Is Not Falling

By JAMES BOPP, JR.* & KAYLAN LYTLE PHILLIPS**

Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.

—Alexis de Tocqueville¹

Introduction

IN THE WAKE OF THE SUPREME COURT'S *Citizens United v. Federal Election Commission*² decision, average citizens, usually blissfully unaware of the complexity of campaign finance law, are now confronted by an onslaught of political rhetoric. The decision has evoked strong criticisms, from professors³ and pundits to politicians,⁴ and even the

* James Bopp Jr. has a national federal and state election law practice. He is General Counsel for the James Madison Center for Free Speech and former Co-Chairman of the Free Speech and Election Law practice group of the Federalist Society. Mr. Bopp was counsel for plaintiff Citizens United in the district court and prepared its jurisdictional statement upon which the Supreme Court granted review.

** Kaylan Lytle Phillips is an Associate attorney at The Bopp Law Firm and graduate of University of Tulsa School of Law. For her part, this Article is dedicated to her voice of reason: Travis Phillips.

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., Alfred A. Knopf 1945) (1831).

2. 130 S. Ct. 876 (2010).

3. Professor Laurence Tribe referred to the decision as “major upheaval in First Amendment law.” Laurence Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/>.

4. Alan Grayson, a Democratic congressman in his first term at the time of the decision, called the decision “the worst Supreme Court decision since the Dred Scott case.” Nick Baumann, *Grayson: Court's Campaign Finance Decision "Worst Since Dred Scott,"* MOTHER

President himself,⁵ some of whom accuse the Court of overturning a century of safeguards from corporate interference in elections.⁶

To be sure, *Citizens United* is a landmark decision. Its significance can be seen in the numerous scholarly publications analyzing the deci-

JONES (Jan. 22, 2010, 5:00 AM), <http://motherjones.com/mojo/2010/01/grayson-courts-campaign-finance-decision-worst-dredd-scott>. Russ Feingold, former U.S. Senator from Wisconsin and co-author of the Bipartisan Campaign Reform Act that the case, in part, challenged, called the decision a “terrible mistake.” Kasie Hunt, *John McCain, Russ Feingold Diverge on Court Ruling*, POLITICO (Jan. 21, 2010, 12:45 PM), <http://www.politico.com/news/stories/0110/31810.html>. Ralph Nader, four-time Green Party candidate for President, stated that the decision “shreds the fabric of our already weakened democracy by allowing corporations to more completely dominate our corrupted electoral process.” Ralph Nader, *The Supremes Bow to King Corporation*, COUNTERPUNCH (Jan. 22, 2010), <http://www.counterpunch.org/2010/01/22/the-supremes-bow-to-king-corporation/>.

5. It is unusual for any lawyer to openly criticize a judge, let alone for the President to arguably scold the highest Court in the United States in such a public way, during the President’s annual monopolization of the airwaves, no less. Specifically, the President stated:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems.

156 Cong. Rec. H414, H418 (daily ed. Jan. 27, 2010) (State of the Union Address by President Barack Obama). During this portion of the speech, television cameras caught Justice Samuel Alito mouthing the words “not true” in response to the President. Ben Fruman, *Alito Appears to Mouth ‘Definitely Not True’ After Obama Criticizes Court Decision*, TPMLIVEWIRE (Jan. 27, 2010, 10:40 PM), <http://tpmlivewire.talkingpointsmemo.com/2010/01/alito-appears-to-mouth-definitely-not-true-after-obama-criticizes-court-decision.php>. Justice Alito is correct. First, regarding the “century of law,” perhaps President Obama was referring to the Tillman Act that was passed in 1907. But that Act banned corporations from making direct contributions to federal candidates. See Tillman Act of 1907, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)). The *Citizens United* decision addressed corporate independent expenditures, not contributions. Congress did pass a ban on corporate independent expenditures in 1947 and the electioneering communication ban examined by the *Citizens United* Court was only enacted in 2002. See Hans von Spakovsky, *The Truth about President Obama and Citizens United*, FOUNDRY HERITAGE BLOG (Jan. 28, 2010, 6:24 PM), <http://blog.heritage.org/2010/01/28/the-truth-about-president-obama-and-citizens-united/>. Or, perhaps, the President was paraphrasing a sentence in Justice Stevens’s dissent: “The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*.” *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)); see also William G. Ross, *Constructive Criticism: Presidential Opposition to Supreme Court Rulings*, JURIST (Feb. 2, 2010), <http://jurist.law.pitt.edu/forumy/2010/02/constructive-criticism-presidential.php>. Either way, the President’s reactionary statement was not suited for the occasion.

6. See, e.g., 156 Cong. Rec. H414 (daily ed. Jan. 27, 2010).

sion.⁷ However, the myths about *Citizens United* are as widespread as the criticism. This Article will first shine light⁸ on the foundation for *Citizens United* and then consider what the decision actually did, and (perhaps more importantly) what it did not do, including the practical and analytical limits to its holding, as well as several issues the Court did not address. This Article will also consider the arguments from the critics of *Citizens United*, in light of evidence from the 2010 election, and show that these criticisms are fallacious and misplaced.

I. The Foundation for *Citizens United's* Holding

One cannot examine *Citizens United* in a vacuum. The case may be a landmark but the *issue* of protecting political speech is not novel. However, the amount of protection given to this essential freedom varies based on the political climate of the time. While the speech-protective holding of *Citizens United* signifies another move toward fierce protection of political speech, the harsh criticism of the decision looms ominously and distracts from the core issues at stake. But before understanding what *Citizens United* did and what the criticism (much of it unfounded) means for the future of political expression, one must first understand the history and purpose of the First Amendment. Next, it is important to consider the legislative progression of campaign finance reform. Finally, one must examine several key Supreme Court cases that laid the foundation for *Citizens United*.

A. The Exposition: “Congress Shall Make No Law”

The Founding Fathers debated whether the Constitution needed a Bill of Rights. The opponents were the Federalists, who believed that the Bill of Rights was either (1) superfluous, as the rights were so obvi-

7. Among the many publications regarding *Citizens United* are three law review articles co-written by Author Bopp. See James Bopp, Jr. & Richard E. Coleson, *Citizens United v. Federal Election Commission: “Precisely What WRTL Sought to Avoid,”* 2010 CATO SUP. CT. REV. 29 [hereinafter Bopp & Coleson]; James Bopp, Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer: Citizen United’s Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMENDMENT L. REV. 251 (2011) [hereinafter Bopp, La Rue & Kosel]; James Bopp, Jr. & Jared Haynie, *The Tyranny of “Reform and Transparency”: A Plea to the Supreme Court to Revisit and Overturn Citizens United’s “Disclaimer and Disclosure” Holding*, 16 NEXUS CHAP. J.L. & POL’Y 3 (2011) [hereinafter Bopp & Haynie]. To avoid repetitiveness yet be comprehensive, this Article may cover similar points but will cross-reference the earlier-published articles when possible for further discussion.

8. After all (to use an oft-quoted term from many *Citizens United* critics), “[s]unlight is said to be the best of disinfectants.” This phrase was coined by Justice Louis Brandeis. LOUIS D. BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE’S MONEY 92, 92 (1914), available at <http://www.law.louisville.edu/library/collections/brandeis/node/196>.

ous that enumerating them would prove to be a hindrance by limiting people to just what was written; or (2) something that should be left to the states to implement, if such enumeration were necessary.⁹ The anti-Federalists fought for the Bill of Rights, believing the rights were too important not to protect them proactively.¹⁰ Thomas Jefferson, when urging James Madison to consider the addition, described the Bill of Rights as “what the people are entitled to against every government on earth . . . and what no just government should refuse, or rest on inference.”¹¹ Madison was persuaded and even advocated for the Bill of Rights before Congress.¹²

In ratifying the Bill of Rights, the Founding Fathers drew a clear distinction between the new democracy and the old English monarchy. Such a statement of basic entitlements was a significant departure from the monarchical mindset because it signaled the need to control the *government* by proactively giving authority to the people. Notably, the Bill of Rights begins by admonishing the government about its obligations. “*Congress* shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”¹³ The placement of the rights mentioned in the First Amendment is no accident; freedom of speech, press, assembly,¹⁴ and petition¹⁵ are essential to the establishment of a self-governing society.¹⁶

9. See Letter from Thomas Jefferson to James Madison (Dec. 22, 1925), in 2 THE WRITINGS OF THOMAS JEFFERSON 327, 329 (H.A. Washington, ed., 1859) [hereinafter Letter from Thomas Jefferson to James Madison] (setting forth the arguments of the Federalists). The first fear was addressed by the Ninth Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

10. See, e.g., Letters from the Federal Farmer, Letter II (Oct. 9, 1787), reprinted in EMPIRE AND NATION 98, 100 (1962) (“There are certain inalienable and fundamental rights, which . . . ought to be explicitly ascertained and fixed . . . These rights should be made the basis of every constitution . . .”).

11. See Letter from Thomas Jefferson to James Madison, *supra* note 9, at 330.

12. See 1 ANNALS OF CONG. 439–41 (1789) (Joseph Gales ed., 1834).

13. U.S. CONST. amend. I (emphasis added).

14. “Assemble” has been interpreted to mean the freedom to associate. See *infra* Part I.C.1. The most common way for people to associate today is through a corporation, labor union, or political party. As will be explained *infra* Part III.B, targeting corporations for restrictions hurts people of average means more than the wealthy.

15. The right to petition, or lobby, the government is “cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression James Madison made clear in the congressional debate on the proposed amendment that people ‘may communicate their will’ through direct petitions to the legislature and government officials.” *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

16. “The First Amendment, in particular, serves significant societal interests.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

It is also no accident that the Founders guaranteed these essential rights by *depriving* the *government* of the ability to infringe. In so doing, the First Amendment protects these freedoms, rather than conferring certain rights.¹⁷ Freedom of speech, press, assembly, and petition go to the nature of the country itself and why the country was founded.¹⁸ This is important because the question of protecting the freedom of speech does not turn on who the *speaker* is but on the protection of the *freedom* itself.¹⁹

In the age-old struggle between the people and the government, the First Amendment is the lynchpin of the United States's self-governing society. It empowers the people to maintain control over the government and not the other way around. Unfortunately, the battle to ratify the Bill of Rights was only the first of many struggles the First Amendment would endure.

B. Rising Action: Congress Chooses to Make Laws

The admonition that “Congress shall make no law” directly conflicts with a politician’s desire for self-preservation. “The first instinct of power is the retention of power”²⁰ Nowhere is this maxim more evident than in regulations restricting political speech. Laws to “promote the integrity of elections” are passed, sometimes in blatant disregard for the Constitution, by politicians fearful of the power of criticism.²¹ This is demonstrated by Congress’ passage of the Alien and Sedition Acts, the Tillman Act, the Federal Election Campaign Act (“FECA”), and most recently, the Bipartisan Campaign Reform Act (“BCRA”).²²

17. *Cf.* U.S. CONST. amend. II (“[T]he right of the people to keep and bear Arms, shall not be infringed.”); U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

18. *See* Bopp & Haynie, *supra* note 7, at 7–10.

19. The issue of “corporate personhood” frequently comes up in debates over *Citizens United*. But, as stated above, the First Amendment provides the freedom of speech, regardless of the identity of the speaker. For a more in-depth analysis of the history of corporate personhood, see Bopp, La Rue & Kosel, *supra* note 7, at 257–59.

20. *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

21. *See* Bopp & Haynie, *supra* note 7, at 10–14 (explaining that most legislatures urge campaign finance reform as means of curtailing “negative attack ads” but, in reality, it is to protect them from criticism).

22. BCRA will be discussed *infra* Part I.C.2.

1. The Alien and Sedition Acts: A Reactionary Response

The ink was not yet dry on the Bill of Rights when the government passed the first significant infringement of the First Amendment. The Alien and Sedition Acts,²³ passed a mere seven years after the Bill of Rights was ratified, were born out of the Federalist-controlled Congress'²⁴ fear of Democratic-Republican criticism during a season of political uncertainty.²⁵ The Alien and Sedition Acts, in part, made it illegal to publish "any false, scandalous and malicious writing[s] . . . with the intent to defame" the government, "or to stir up sedition within the United States"²⁶

Many people were penalized for violating these Acts.²⁷ Ironically, the Federalists' prosecution of dissenters under the Acts only led to more criticism, and the party was defeated in the next election.²⁸ The Sedition Act "first crystallized a national awareness of the central meaning of the First Amendment."²⁹ Significantly, "malicious falsehoods about the Vice President—Thomas Jefferson, who was a leading Republican" were exempt and the Sedition Act conveniently expired "the day before Federalist President John Adams's term was to end," demonstrating that the law's purpose was to silence criticism.³⁰

23. Alien and Sedition Acts of 1798, ch. 74, 1 Stat. 596 (expired 1801). The Acts were comprised of four parts. The relevant part here was "An Act for the Punishment of Certain Crimes against the United States," commonly known as the Sedition Act, the full text of which can be found at *An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States*, YALE L. SCH., http://avalon.law.yale.edu/18th_century/sedact.asp (last visited Dec. 7, 2011).

24. At the time, "[t]he Federalist Party controlled all three branches of the federal government." Eugene Volokh, *Freedom of Speech and of the Press*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 312 (Edwin Meese III et al. eds., 2005).

25. See *The Formation of Political Parties: The Alien and Sedition Acts*, NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/treasures_of_congress/text/page5_text.html (last visited Dec. 7, 2011). The other three laws related to residency and deportation of non-citizens and, like the Sedition Act, had paternalistic motives relating to a distrust of an alien's loyalty. The Sedition Act was targeted at the Democratic-Republicans as "the party typically favored by new citizens." *Id.*

26. Alien and Sedition Acts of 1798, 1 Stat. 596. The crime was punishable by up to a \$5000 fine and up to five years in prison. *Id.*

27. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 63–64 (2004).

28. See *The Formation of Political Parties: The Alien and Sedition Acts*, *supra* note 25.

29. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

30. Volokh, *supra* note 24, at 312.

Thomas Jefferson and James Madison vehemently opposed the Acts.³¹ They appealed to the people, who responded by passing resolutions, such as the Virginia Resolution of 1798, which stated:

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution . . . ; [the Sedition Act], exercises . . . a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.³²

Nevertheless, Democratic-Republican candidate Thomas Jefferson beat out Federalist John Adams in the 1800 election.³³ President Jefferson pardoned all of those still serving sentences for violating the Sedition Act.³⁴ Later, Congress denounced the Sedition Act as unconstitutional and refunded the fines that had been levied under it.³⁵ Since then, courts have assumed the Act to be invalid “because of the restraint it imposed upon criticism of government and public officials,

31. See 4 ANNALS OF CONG. 934 (1794) (“If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.” (summary of remarks by James Madison)).

32. Virginia Resolution of 1798 (Dec. 21, 1798), reprinted in 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 528, 528–29 (Jonathan Elliot ed., 2d ed. 1907), available at <http://www.constitution.org/cons/virg1798.htm>.

33. *Presidential Election of 1800: A Resource Guide*, LIBRARY CONG., <http://www.loc.gov/rr/program/bib/elections/election1800.html> (last visited Dec. 7, 2011).

34. “I discharged every person under punishment or prosecution under the Sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image” Letter from Thomas Jefferson to Mrs. John Adams (July 22, 1804), in THE JEFFERSONIAN CYCLOPEDIA 988, 988–89 (John P. Foley ed., 1900). There are many stories of people who violated the Sedition Act that border on the absurd. One of the most absurd examples is that of David Brown, who was a “vagabond radical who wandered from town to town preaching the evils of the Federalist government.” STONE, *supra* note 27, at 64. A group, merely *inspired* by Brown, set up a pole with the words: “No Stamp Act, No Sedition Act, No Alien Bills, No Land Tax, downfall to the Tyrants of America; peace and retirement to the President; Long Live the Vice-President.” *Id.* The Federalists chopped down the pole and embarked on a man-hunt for Brown. *Id.* Brown was arrested and pled guilty but Justice Samuel Chase wanted the names of any accomplices. *Id.* Because he refused, Justice “Chase sentenced Brown to a fine of \$450 and eighteen months in prison.” *Id.* Even worse, because he could not afford to pay his fine, he was forced to remain in prison for even longer. *Id.* at n.*.

35. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (citing Act of July 4, 1840, ch. 45, 6 Stat. 802 and H.R. REP. NO. 26-86 (1840)).

was inconsistent with the First Amendment.”³⁶ The First Amendment was victorious.

2. The Domino Effect: From Tillman to FECA

A hundred years later, newly elected President Theodore Roosevelt was confronted by criticism about corporate contributions to his and other Republican campaigns.³⁷ Roosevelt responded by urging Congress to ban such contributions altogether.³⁸ Democratic Senator Benjamin Tillman heard the call.³⁹ The Tillman Act, passed in 1907, banned all corporate contributions.⁴⁰ While the Tillman Act may *seem* like a small encroachment on political speech,⁴¹ it marked

36. *Id.*

37. See Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 14–15 (2008) (“Although everyone knew that corporations gave money to political campaigns, the investigation detailed how much had gone to the Republican Party, and suddenly the idea of corporate contributions became scandalous and a menace to democracy.”).

38. Specifically, President Roosevelt urged that:

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. Not only should both the National and the several State legislatures forbid any officer of a corporation from using the money of the corporation in or about any election, but they should also forbid such use of money in connection with any legislation save by the employment of counsel in public manner for distinctly legal services.

40 CONG. REC. 96 (1906); see also *United States v. UAW*, 352 U.S. 567, 572 (1957) (explaining the historical background of the corporate contribution ban).

39. Senator Tillman is also known for being violent, offensive, and racist. He was one of the architects of the Jim Crow laws in South Carolina. See Urofsky, *supra* note 37, at 16; see also Brad Smith, *Ben Tillman: Forgotten Founding Father of “Reform,”* CENTER COMPETITIVE POL. BLOG (Dec. 1, 2006), http://www.campaignfreedom.org/blog/ID.124/blog_detail.asp. Senator Tillman did not hide his feeling towards the general populace, poignantly saying, “I have come to doubt that the masses of the people have sense enough to govern themselves.” *Id.*

40. Tillman Act of 1907, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)). The Act stated that “[i]t shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.” *Id.* Violations resulted in a fine against the corporation and a fine or jail sentence for any involved officers, or, in the discretion of the court, both a fine and jail sentence, if the officers consented to contributions in violation of the provisions. *Id.*

41. “Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction.” *FEC v. Mass. Citizens for Life, Inc. (MCFI)*, 479 U.S. 238, 264–65 (1986).

the beginning of a long line of restrictions under the guise of “reform” and “clean government.”

In the wake of the First and Second World Wars and during the uncertainty at the beginning of the Cold War, labor organizations became formidable entities, often threatening or carrying out long-lasting strikes. Two Republicans, Senator Robert Taft and Representative Fred A. Hartley, Jr., sponsored legislation to, among other things, ban “unfair labor practices.”⁴² Congress passed the Taft-Hartley Act in 1947.⁴³ In addition to regulating strikes and internal leadership, it “was the first law barring unions and corporations from making independent expenditures in support of or opposition to federal candidates.”⁴⁴ The Act passed over President Truman’s adamant veto.⁴⁵

As the country grew, so did the stakes in obtaining and retaining political office, and with that, a fear of “undue influence” in the political process. New media technology changed the way campaigns were run and, in turn, allowed more citizens to see and be solicited by individual candidates.⁴⁶ Because they were able to reach more people, politicians began campaigning constantly.⁴⁷ The increased campaigning brought with it an increase of scandal. Notably, even before Water-

42. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 8, 61 Stat. 136, 140.

43. 29 U.S.C. § 141(b) (2006). Congress stated that it passed the Act:

[I]n order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Id.

44. Floyd Abrams & Burt Neuborne, *Debating Citizens United*, *NATION*, Jan. 31, 2011, available at <http://www.thenation.com/article/157720/debating-citizens-united> (last visited Dec. 7, 2011); see also Urofsky, *supra* note 37, at 27 (“Taft-Hartley not only attempted to regulate the use of money, but also for the first time overtly tried to limit political speech by a particular group.”).

45. Harry S. Truman, Veto of the Taft-Hartley Labor Bill, 1947 *PUB. PAPERS* 288, 297 Note (June 20, 1947). President Truman, in relevant part, stated that the legislation:

[W]ould prohibit many legitimate activities on the part of unions and corporations . . . [and] would prevent the ordinary union newspaper from commenting favorably or unfavorably upon candidates or issues in national elections. I regard this as a dangerous intrusion on free speech, unwarranted by any demonstration of need, and quite foreign to the stated purposes of this bill.

Id. at 296.

46. Urofsky, *supra* note 37, at 31–32.

47. *Id.* at 32.

gate, then-Senator and Vice Presidential candidate Richard Nixon dealt with accusations of “personal favors.”⁴⁸ Congress again decided to make laws regulating political speech in order to preserve “the integrity of our electoral process.”⁴⁹ In 1971, Congress passed an expansive campaign reform act known as the Federal Election Campaign Act (“FECA”).⁵⁰ Among other things, this Act required full reporting of campaign contributions⁵¹ and expenditures,⁵² laid the foundation for corporate separate segregated funds,⁵³ and limited spending on media advertisements.

The first election after FECA was implemented happened to be rife with political scandal. President Nixon’s involvement in, and subsequent cover-up of, the Watergate scandal, crimes having “little or nothing to do with campaign financing,”⁵⁴ led Congress to pass sub-

48. Then-Vice-Presidential candidate Nixon addressed the concerns in his famous “Checkers Speech.” See David LaGesse, *The 1952 Checkers Speech: The Dog Carries the Day for Richard Nixon*, U.S. NEWS (Jan. 17, 2008), <http://www.usnews.com/news/politics/articles/2008/01/17/the-dog-carries-the-day-for-nixon>.

49. *Buckley v. Valeo*, 519 F.2d 821, 835 (D.C. Cir. 1975), *aff’d in part, rev’d in part*, 424 U.S. 1 (1976), *modified*, 532 F.2d 187 (D.C. Cir. 1976) (quoting *United States v. UAW*, 352 U.S. 567, 570 (1957)).

50. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of the U.S. Code).

51. “Contribution” includes:

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. § 431(8)(A) (2006).

52. “Expenditure” includes: (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. 2 U.S.C. § 431(9)(A).

53. A “separate segregated fund” is “commonly known as a ‘PAC.’” *FEC v. Wis. Right to Life, Inc. (WRTL-II)*, 551 U.S. 449, 485 (2007) (Scalia, J., concurring in part and concurring in judgment). According to the FEC:

The term “political action committee” (PAC) refers to two distinct types of political committees registered with the FEC: separate segregated funds (SSFs) and nonconnected committees. Basically, SSFs are political committees established and administered by corporations, labor unions, membership organizations or trade associations. These committees can only solicit contributions from individuals associated with connected or sponsoring organization. By contrast, nonconnected committees—as their name suggests—are not sponsored by or connected to any of the aforementioned entities and are free to solicit contributions from the general public.

Quick Answers to PAC Questions, FEC, http://www.fec.gov/ans/answers_pac.shtml (last visited Dec. 7, 2011).

54. Urofsky, *supra* note 37, at 55.

stantive amendments to FECA in 1974.⁵⁵ These amendments also created the Federal Election Commission (“FEC”) to oversee the administration of the Act, and set limits on candidate and political committee contributions and expenditures.⁵⁶

C. Rising Action, Continued: Courts Scrutinize Congress’ Laws

Buckley v. Valeo, the seminal campaign finance case, involved a constitutional challenge to FECA.⁵⁷ The challengers sought in district court declaratory and injunctive relief against several provisions of the new campaign-finance regulations.⁵⁸ The Court of Appeals,⁵⁹ acknowledging the First Amendment concerns implicated by the passage of FECA, stated that the case “raises issues not less than basic to a democratic society.”⁶⁰ However, the Court of Appeals’ opinion appeared to have been influenced by “the shock waves of momentous revelations concerning events of the last Presidential campaign”⁶¹ and a deep concern about the “alarming” increase of money spent on federal election campaigns, rather than by the root obligation to protect political speech.⁶² Reviewing the challenged regulations under constitu-

55. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in various sections of the U.S. Code). There were also significant changes in Congress as a result of the election following Watergate, with the Democrats gaining four seats in the Senate and forty-nine in the House. CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 4, 1974, at 46 (1975), available at http://clerk.house.gov/member_info/electionInfo/1974election.pdf.

56. 2 U.S.C. §§ 431–455.

57. *Buckley v. Valeo*, 424 U.S. 1, 6 (1976).

58. *Buckley v. Valeo*, 387 F. Supp. 135 (D.D.C. 1975). Plaintiffs asked for expedited relief under a special provision of FECA, 2 U.S.C. § 437h, so the district court’s role was limited. *Id.*

59. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), *aff’d in part, rev’d in part*, 424 U.S. 1 (1976), *modified*, 532 F.2d 187 (D.C. Cir. 1976).

60. *Id.* at 835 (quoting *United States v. UAW*, 352 U.S. 567, 570 (1957)).

61. *Id.* The Supreme Court was also influenced by “deeply disturbing examples surfacing after the 1972 election.” *Buckley v. Valeo*, 424 U.S. at 27.

62. *Buckley*, 519 F.2d at 837 (internal quotation marks omitted).

The escalation of the 1972 election and the shock of its aftermath led to a call for comprehensive corrective measures. Congress found that federal election campaigns have become enormously expensive, with costs increasing at an “alarming” rate. An estimated \$400 million was spent in 1972 for nomination and election campaigns—almost a 300% increase since 1952, in a period when the consumer price index rose 57.6%. In 1972, Presidential campaign spending alone totaled \$94.4 million—up 67 percent from \$56.4 million in 1968; up 147 percent from \$38.1 million in 1964; and up 247 percent from \$27.2 million in 1960.

Id.

tional scrutiny, the Court of Appeals held that the key provisions of FECA were justified.⁶³

The challengers appealed the decision to the Supreme Court.⁶⁴ The Court struck down the limitations on campaign expenditures, independent expenditures, and expenditures from a candidate's personal funds.⁶⁵ This decision set the tone for judicial review of campaign finance reform. *Buckley's* standards still inform and influence campaign finance law today.

1. *Buckley*: The Supreme Court Protects Speech

Buckley affirmed that "[t]he First Amendment protects political association as well as political expression."⁶⁶ The right of association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'"⁶⁷ Therefore, FECA's limitations "impinge on protected associational freedoms."⁶⁸ While the Court found that both the restrictions on expenditures and on contributions "implicate fundamental First Amendment interests," it found that "expenditure ceil-

63. *Id.* at 851–59, 861–62, 865, 868–70.

64. *Buckley*, 424 U.S. at 7.

The statutes at issue summarized in broad terms, contain the following provisions: (a) individual political contributions are limited to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to \$1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code; and (d) a Federal Election Commission is established to administer and enforce the legislation.

Id.

65. *Id.* at 143. The Supreme Court stated that independent expenditures are "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

66. *Id.* at 15.

The constitutional right of association explicated in *NAACP v. Alabama* stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "'freedom to associate with others for the common advancement of political beliefs and ideas,'" a freedom that encompasses "'[t]he right to associate with the political party of one's choice.'"

Id. (alterations in original) (citations omitted).

67. *Id.* at 65–66.

68. *Id.* at 22.

ings impose significantly more severe restrictions on protected freedoms of political expression and association” than the restrictions on contributions.⁶⁹

Restrictions on expenditures are especially problematic “because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”⁷⁰ Limiting the amount an individual or group may expend on a communication “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”⁷¹

Regarding limits on contributions, the Court noted that they “operate in an area of the most fundamental First Amendment activities” because “[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.”⁷² But the Court said that contribution limits “entail[] only a marginal restriction upon the contributor’s ability to engage in free [speech].”⁷³ This is because the “contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for that support.”⁷⁴ According to the Court, limits on contributions still allow contributors to associate with, and speak their support for, candidates.⁷⁵ The Court subjected the challenged contribution limits to constitutional scrutiny, which it held they passed.⁷⁶

The *Buckley* Court also set the ground rules for what groups may be treated as political committees under FECA. Only groups that are “under the control of a candidate or the major purpose of which is the nomination or election of a candidate” may be regulated as political committees.⁷⁷ Commonly known as the “major purpose test,” this

69. *Id.* at 23.

70. *Id.* at 19.

71. *Id.* at 19. “The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.” *Id.*

72. *Id.* at 14.

73. *Id.* at 20.

74. *Id.* at 21.

75. *Id.* at 22.

76. *Id.* at 29.

77. *Id.* at 79. Whether an entity meets the major purpose test depends on either its “central organizational purpose” or its “independent spending.” *MCFL*, 479 U.S. 238, 252 n.6, 262 (1986).

protects individuals and groups temporarily engaging in political speech from being subjected to permanent burdens.⁷⁸

2. BCRA: Congress Makes Law, Again

After *Buckley*, Congress made several other amendments to FECA, primarily implementing the Supreme Court's direction and other changes to campaign finance regulations.⁷⁹ However, the most sweeping changes to the nation's campaign finance scheme came when Congress passed a series of amendments to FECA in the form of the Bipartisan Campaign Reform Act of 2002 ("BCRA").⁸⁰ Senators John McCain and Russ Feingold heralded the need for reform in order to stop "sham issue ads" that allowed undue influence in elections.⁸¹ The crux of BCRA is to address two issues: (1) the role of "soft money"⁸² in campaigns; and (2) the role of "issue ads"⁸³ near an election. To address these issues, BCRA: (1) prohibited political parties from raising

78. The "major purpose test" has been recognized by various courts and the FEC. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,064 (Nov. 23, 2004) (to be codified at 11 C.F.R. pt. 100) ("Nearly three decades ago, the Supreme Court narrowed . . . 'political committee' . . . to . . . organizations . . . the major purpose of which is the nomination or election of a candidate." (citation omitted)); Express Advocacy, Independent Expenditures, Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,303-04 (July 6, 1995) (to be codified at 11 C.F.R. pt. 100).

79. *Appendix 4: Brief History*, FEC, <http://www.fec.gov/info/appfour.htm> (last visited Dec. 7, 2011).

80. BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002) (also referred to as the McCain-Feingold Act). For more in-depth discussion of the origins of BCRA, please see James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers,"* 51 CATH. U. L. REV. 785, 796-97 (2002) (discussion of how McCain-Feingold benefits wealthy individuals and incumbent politicians).

81. See James Bopp, Jr., *Silencing Criticism*, NAT'L REV. ONLINE (Apr. 24, 2007, 6:00 AM), <http://www.nationalreview.com/articles/220712/silencing-criticism/james-bopp-jr?page=1>. "The calls to 'stop the wealthy' from influencing government policy were actually generated by \$140 million in grants from wealthy foundations like Pew: \$123 million came from just eight foundations, and \$104 million went to just 17 'campaign finance reform' organizations." *Id.*

82. "Soft money" consists of:

Donations made solely for the purpose of influencing state or local elections[, which] are therefore unaffected by FECA's requirements and prohibitions. As a result, prior to the enactment of BCRA, federal law permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to federal candidates, to contribute "nonfederal money"—also known as "soft money"—to political parties for activities intended to influence state or local elections.

McConnell v. FEC, 540 U.S. 93, 122-23 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

83. "Issue ads" are ads that were not regulated as express advocacy because, "even if the ads mentioned the name of a federal candidate . . . they did not expressly advocate the

or spending any non-federal funds; and (2) created a category of speech called “electioneering communications,” for which it established regulations.⁸⁴

Just as *Buckley*’s constitutional challenge followed closely on the heels of the passage of FECA, the constitutionality of BCRA was challenged almost immediately in *McConnell v. Federal Election Commission*.⁸⁵ But where *Buckley* recognized the First Amendment problems inherent in the regulations, *McConnell* upheld the challenged provisions on their face.⁸⁶

D. The Climax: Wisconsin Right to Life Challenges BCRA Regulations

McConnell dealt a serious blow to the First Amendment. However, because it was a facial holding, there remained opportunities for as-applied challenges to BCRA’s regulations. Such a challenge came before the Court in *Federal Election Commission v. Wisconsin Right to Life* (“*WRTL-II*”).⁸⁷ While *McConnell* held the corporate electioneering

candidate’s election or defeat.” *McConnell*, 540 U.S. at 123–24, *overruled by Citizens United*, 130 S. Ct. 876 (citation omitted).

84. Electioneering communications include “any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office.” *WRTL-II*, 551 U.S. 449, 457 (2007) (controlling opinion by Roberts, C.J., joined by Alito, J.) (quoting 2 U.S.C. § 434(f)(3)(A) (2006)). Electioneering communication regulations were troubling since they would sweep in grassroots lobbying regarding important issues that just happened to be up for debate near an election.

85. 540 U.S. 93 (2003).

86. For more information on the Supreme Court’s decision in *McConnell*, see James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy*, 31 N. KY. L. REV. 289, 333–40 (2004). Relevant to the discussion at hand, the article explains that “[e]ven though *McConnell* declared that the express advocacy test is not compelled by the Constitution, it nonetheless required that there be something functionally equivalent to the express advocacy test if the express advocacy test is not employed to analyze statutes for constitutionality.” *Id.* at 291.

87. *WRTL-II*, 551 U.S. 449; *see also* Bopp & Coleson, *supra* note 7, at Part III; Bopp, La Rue & Kosel, *supra* note 7, at 313. *WRTL* went before the Supreme Court twice for this controversy. The first time was on the procedural issue of whether such an as-applied challenge was permissible. The Supreme Court agreed that such a challenge was permissible and sent the case back to the district court. *Wis. Right to Life, Inc. v. FEC (WRTL-I)*, 546 U.S. 410 (2006) (per curiam). The district court then ruled in *WRTL*’s favor, *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006), and the FEC appealed.

communications ban constitutional on its face,⁸⁸ *WRTL-II* questioned whether the ban was constitutional as applied to issue advocacy.⁸⁹

In 2004, Wisconsin Right to Life (“WRTL”), an ideological corporation, wanted to lobby to stop Congress from filibustering President George W. Bush’s judicial nominees.⁹⁰ The group created broadcast ads urging citizens to ask the Wisconsin Senators (Senators Herb Kohl and Russ Feingold) to oppose the filibusters.⁹¹ However, Senator Feingold was a candidate in the November 2004 election.⁹² Under the corporate electioneering-communication ban, WRTL could not broadcast its ads thirty days before the primary or sixty days before the general election.⁹³ In Wisconsin, this meant that it could not broadcast its ads from August 15 until after the general election in November.⁹⁴ The fact that WRTL’s issue ads had nothing to do with the election was inconsequential under the ban.⁹⁵

The Supreme Court got a chance in *WRTL-II* to resuscitate the First Amendment after the blows it suffered in *McConnell*. The Court brought the focus back to the First Amendment⁹⁶ and made it clear that “benefit of the doubt” should go to free speech.⁹⁷ The Court rejected consideration of speech’s “intent and effect,”⁹⁸ context,⁹⁹ or its proximity to the election,¹⁰⁰ and instead reviewed the regulations in an objective and substantive manner.¹⁰¹

The Supreme Court created a test to protect issue advocacy. Under the newly-minted “appeal to vote” test, an ad satisfies *McConnell*’s “functional equivalent of express advocacy” test¹⁰² and is subjected to the corporate prohibition only if it “is susceptible of no reasonable interpretation other than as an appeal to vote for or

88. *McConnell*, 540 U.S. at 204–06.

89. *WRTL-II*, 551 U.S. at 456.

90. *Id.* at 458–59.

91. *Id.*

92. *Id.* at 464.

93. *Id.* at 457–58.

94. *Id.* at 460.

95. *See id.* at 465–69.

96. *Id.* at 481–82.

97. *Id.* at 474 n.7, 482.

98. *Id.* at 461–65 (rejecting the consideration of intent and effect in the context of as-applied challenges).

99. *Id.* at 471–73 (stating that “contextual factors . . . should seldom play a significant role in the inquiry”).

100. *Id.* at 472–73.

101. *Id.* at 469.

102. *See supra* note 86.

against a specific candidate.”¹⁰³ This carved out a broad exception to the electioneering communication ban. Even so, three Justices wanted to go further.¹⁰⁴ But the author of the controlling opinion, Chief Justice Roberts (joined by Justice Alito), decided on a constrained, narrow holding in order to salvage *McConnell*.¹⁰⁵

However, the Court’s narrow ruling in *WRTL-II* did not work. Following *WRTL-II*, the FEC turned the Court’s simple test into a “two-part, 11-factor balancing test.”¹⁰⁶ The Court repudiated this, stating that the First Amendment is “[p]remised on mistrust of government power”¹⁰⁷ and that “the FEC’s ‘business is to censor.’”¹⁰⁸ The FEC was not equipped to champion the First Amendment. In practice, the FEC believed its authority to be plenary¹⁰⁹ and, as a result of the FEC passing extensive regulations pursuant to this apparent authority, citizens were at a loss as to when they were permitted to speak. But “[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.”¹¹⁰ However, after the Court’s narrow ruling in *WRTL-II* and the FEC’s interpretation of that ruling, that is exactly what was required.

II. The Reality of *Citizens United*

Citizens United is a nonprofit corporation that wished to distribute a movie about then-Senator Hillary Clinton in various mediums, including theaters, video-on-demand broadcasts, and DVD sales.¹¹¹ The organization also wanted to make and distribute two ten-second and one thirty-second advertisements for the film.¹¹² Because Clinton was a presidential candidate, the distribution of the film and

103. *Id.* at 469–70.

104. *See id.* at 483–504 (Scalia, J., concurring in part and concurring in judgment, joined by Kennedy, J. and Thomas, J.).

105. *See* Bopp & Coleson, *supra* note 7, at 34.

106. *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010); *see also* Bopp & Coleson, *supra* note 7, at 39, 51.

107. *Citizens United*, 130 S. Ct. at 882.

108. *Id.* at 896 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965)).

109. The Solicitor General even admitted, much to everyone’s shock, that the government thought it had the power to ban books. *See* Transcript of Oral Argument at 65, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf (last visited Dec. 7, 2011); *see also* *Citizens United*, 130 S. Ct. at 904.

110. *Citizens United*, 130 S. Ct. at 889 (“People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’” (alteration in original)).

111. *Id.* at 886–87.

112. *Id.*

the advertisements would fall into the applicable electioneering-communication window.¹¹³ *Citizens United* sought relief, contending that the movie and the advertisements did not meet *WRTL-II*'s appeal-to-vote test.¹¹⁴ The Supreme Court's handling and disposition of *Citizens United* has been analyzed in many ways. In short, the decision did two significant things: (1) it struck down the federal ban on corporate independent expenditures and electioneering communications,¹¹⁵ overruling *Austin v. Michigan Chamber of Commerce*¹¹⁶ and portions of *McConnell v. Federal Election Commission*,¹¹⁷ and (2) it took away any potential corporate anti-distortion interest in regulating speech.¹¹⁸ The Court explained what governmental interests may justifiably regulate independent expenditures¹¹⁹ and require disclosure.¹²⁰ The Supreme Court restated the fundamental truth that the First Amendment protects *speech*, no matter who the speakers are,¹²¹ and therefore, strict scrutiny is required for "[l]aws that burden political speech."¹²²

The Court then held that the only permissible interest in restricting political speech is the anti-corruption interest, which it defined as the interest in preventing *quid pro quo* corruption;¹²³ the Court rejected all other interests.¹²⁴ Furthermore, the Court found that, as a

113. The window is thirty days before a primary and sixty days before a general election. 2 U.S.C. § 434(f)(3)(A)(i)(II) (2006).

114. *Citizens United*, 130 S. Ct. at 889–90. For a more detailed explanation of the appeal-to-vote test, see Bopp & Coleson, *supra* note 7, at 50–51.

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

116. *Id.* (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

117. *Id.* (overruling portions of *McConnell v. FEC*, 540 U.S. 93 (2003)).

118. *Id.* at 904; see Bopp, La Rue & Kosel, *supra* note 7, at 356–59 (advocating that the rationale of *Citizens United* also means that the government cannot ban corporate contributions).

119. *Citizens United*, 130 S. Ct. at 909–10 (stating that the government's interest is limited to preventing quid-pro-quo corruption).

120. The Court made clear that constitutional disclosure requirements are ones that "do not prevent anyone from speaking." *Id.* at 914 (quoting *McConnell*, 540 U.S. at 201) (internal quotation marks omitted).

121. See *id.* at 882–83.

122. *Id.* at 898. Under strict scrutiny, the government must "prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* (citing *WRTL-II*, 551 U.S. 449, 464 (2007)).

123. *Id.* at 901, 909.

124. The rejected interests include (1) preventing corporate "distortion," *id.* at 903–05, (2) preventing influence or access with candidates, *id.* at 910 ("The fact that speakers may have influence over or access to elected officials does not mean these officials are corrupt The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."), (3) protecting dissenting shareholders, *id.* at 911, and (4) suppressing political speech on the basis of the speaker's corporate identity, *id.* at 913.

matter of law, “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”¹²⁵ Thus, there is no interest in restricting independent expenditures.¹²⁶ This is true even (and especially) during the pre-election period: “[I]t is our law and our tradition that more speech, not less, is the governing rule.”¹²⁷

Because of the non-corrupting nature of independent expenditures, the government may not prohibit a corporation from making them out of its general fund, nor require them to employ a separate segregated fund.¹²⁸ Separate segregated funds, or PACs,¹²⁹ are “burdensome alternatives” that are “expensive to administer and subject to extensive regulations.”¹³⁰ They have “onerous restrictions,” and corporations may not be able to establish one quickly enough to engage in vital political speech.¹³¹ The holding takes back a class of political speech from the stifling hands of the bureaucracy: As the Chief Justice pointed out during oral argument, “we don’t put our First Amendment rights in the hands of . . . bureaucrats.”¹³²

Finally, the Court stated that the mere presence of the corporate form does not give rise to corruption justifying the disparate treatment.¹³³ “Political speech is ‘indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”¹³⁴

III. The Mythology of *Citizens United*

As evidenced from the deluge of criticism and praise after *Citizens United*, it may be the most controversial Supreme Court decision in recent history. However, that honor may not be well-deserved, given

125. *Id.* at 909.

126. *Id.* at 913 (holding that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations”).

127. *Id.* at 911.

128. *Id.* at 897–98, 913.

129. *See supra* note 53.

130. *Citizens United*, 130 S. Ct. at 897.

131. *Id.* at 898.

132. Transcript of Oral Argument at 66, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf.

133. *Citizens United*, 130 S. Ct. at 904–08 (“[T]he First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”).

134. *Id.* at 904 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

that much of the criticism is based on false premises. This Part will examine five of the most common criticisms of *Citizens United*.¹³⁵

A. Myth: “*Citizens United* Is About Corporate Personhood”

One significant criticism of *Citizens United* is that it impermissibly extends certain “individual” rights to corporations.¹³⁶ But *Citizens United* is not about extending rights to corporations (or any speaker)—it is about preserving existing *freedoms*. Debating what rights a corporation may have misses the point. Corporations are associations of *people*. And, if those people have the specific freedom to do something individually, they should have the freedom to pool their resources and do it together.

So, what *Citizens United* actually did was reaffirm the freedom to associate. This freedom is not a new creation; it is “an inseparable aspect” of the First Amendment and refers to the freedom of individuals to form groups in order to “engage in association for the advancement of beliefs and ideas.”¹³⁷ The Supreme Court has previously held that “[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights.”¹³⁸ “The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment.”¹³⁹

B. Myth: “*Citizens United* Benefits the Wealthy”

Critics argue that the Supreme Court’s striking of the corporate prohibitions benefits the wealthy.¹⁴⁰ However, as explained above, corporations are associations of people. Although wealthy individuals may choose to associate, it is people of average or less-than-average means who have to join together in order to have their voices heard.

135. These criticisms are compiled from various sources and presented here in the abstract.

136. See, e.g., Amanda D. Johnson, Comment, *Originalism and Citizens United: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187 (2010).

137. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

138. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

139. Perry v. Schwarzenegger, 591 F.3d 1147, 1152 (9th Cir. 2010).

140. See, e.g., Ron Gettelfinger & Larry Cohen, *Why the Citizens United Decision Undermines Democracy*, HILL (Feb. 2, 2010, 7:42 PM), <http://thehill.com/opinion/op-ed/79373-why-the-citizens-united-decision-undermines-democracy> (“[T]his misguided decision poses a fundamental threat to our democracy and our nation’s ability to pursue policies that will benefit ordinary Americans, rather than just the wealthy, powerful elites.”).

By affirming the freedom of association, *Citizens United* helps average people engage in political speech and make their political viewpoints known. While the word “corporation” may conjure up images of Microsoft and British Petroleum, the truth is that the vast majority of corporations in the United States are small business corporations or ideological corporations.¹⁴¹ The freedom of association is essential to the expression of these people and must withstand changing political controversy.¹⁴²

C. Myth: “*Citizens United* Will Open the Floodgates to Corporate Interference in Elections”

Many critics claim that *Citizens United* will be the end of our democracy as we know it, since corporations will spend millions of dollars to buy elected officials.¹⁴³ This is a fallacious argument for two reasons. First, it implies that corporations may give money directly to candidates. However, corporations remain prohibited from making contributions to, or coordinating expenditures with, candidates or political parties. But, even if corporations could make contributions, such contributions from *associations* of people would not automatically jeopardize the integrity of our elections.¹⁴⁴

Second, there are practical reasons why most corporations will not avail themselves of the ability to make independent expenditures. One reason is the resources needed to comply with the necessary disclaimer, disclosure, and reporting requirements.¹⁴⁵ Many corpora-

141. *Frequently Asked Questions*, U.S. SMALL BUS. ADMIN., <http://web.sba.gov/faqs/faqindex.cfm?areaID=24> (follow “How many small businesses are there?” hyperlink) (last visited Dec. 7, 2011) (“In 2009, there were 27.5 million businesses in the United States, according to Office of Advocacy estimates . . . Small firms with fewer than 500 employees represent 99.9 percent of the total . . . as the most recent data show there were about 18,311 large businesses in 2007.”).

142. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

143. See, e.g., David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Financing*, N.Y. TIMES (Jan. 22, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22donate.html> (“A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your reelection.”).

144. Notably, the critics that worry about corporations buying elections and exercising undue influence over elected officials do not seek measures to weed out those politicians that would avail themselves of such influence. Yet, “[c]orporate money has no purchasing power if nothing is for sale.” Matthew A. Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 97 (2010).

145. Navigating the applicable regulations is not for the faint of heart. Once the corporation hits a specific reporting trigger, for example, the clock begins to run and penalties will be assessed for noncompliance. And the requirements are likely to get more compli-

tions simply cannot afford to navigate the regulatory hurdles in order to make independent expenditures. A second reason is that many corporations do not want to make independent expenditures.¹⁴⁶ Many corporations are comprised of a diverse citizenship, so choosing a “side” on an issue or candidate may alienate some members. Most corporations also are in business to make a profit, and therefore cannot afford to alienate customers or encounter negative press.¹⁴⁷

Looking at the 2010 election, forecasts regarding *Citizen United*'s effect on elections, including “[t]he president’s remarks[,] were not only factually inaccurate . . . but none of the doomsday predictions ha[ve] come true. Thanks in significant part to the [*Citizens United*] decision, the 2010 elections were the most competitive and issue-oriented in a generation.”¹⁴⁸ The Center for Responsive Politics found that nonparty groups outspent parties on independent expenditures and electioneering communications in the 2010 midterm election.¹⁴⁹ Early reports showed that the speech specifically opened up by *Citizen United*'s holding “represented 15 percent of all federal political spending in 2010.”¹⁵⁰ Nevertheless, “[i]n three of the most expensive Senate

ated over time. See Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622 (2010) (providing a brief overview of the myriad disclosure and reporting requirements, followed by an argument for heightened requirements).

146. William T. Allen, Chancellor, Remarks at the Brennan Center for Justice Symposium: Accountability After *Citizens United*, Can Shareholders Save Democracy? (Apr. 29, 2011), http://www.brennancenter.org/content/pages/accountability_after_citizens_united_transcript_section_iii (“[Corporations] don’t want controversy because controversy is going to signal to the product market who it is and for this reason alone I don’t think you’re going to see a corporation wanting to involve themselves very much with corporate funds in political affairs.”).

147. Famously, Target Corporation received significant criticism for its contribution to a Conservative-leaning PAC supporting the Republican-candidate for Governor of Minnesota. Chris Morran, *Target Angers Some Gay Customers with Support of Conservative Politician*, CONSUMERIST (July 28, 2010, 10:15 AM), <http://consumerist.com/2010/07/target-angering-gay-customers-with-support-of-conservative-politician.html>.

148. Bradley Smith, *The Incumbent’s Bane: Citizens United and the 2010 Election*, WALL ST. J., Jan. 25, 2011, at A15 (“Citizens United helped to level, not tilt, the playing field.”).

149. Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.) (May 5, 2011, 11:16 AM), <http://www.open-secrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

150. Beth Fouhy, *Anonymous Donors Spent \$132M on 2010 Campaign Ads*, MSNBC.COM, Dec. 10, 2010, http://www.msnbc.msn.com/id/40608858/ns/politics-decision_2010/t/anonymous-donors-spent-m-campaign-ads/.

racers, candidates won despite a heavy onslaught of Citizens United spending directed at them.”¹⁵¹

D. Myth: “*Citizens United* Harms Shareholders”

Critics decry *Citizens United* as providing a corporation with the ability to act outside of the wishes of its shareholders.¹⁵² This criticism is misleading because it assumes that a corporation’s Board of Directors will act in a way that will harm the shareholders. There are various corporate-law safeguards to assure such things will not happen, including the election-and-removal process for the Board of Directors.¹⁵³ This criticism is also unfounded because it suggests that First Amendment jurisprudence is the best avenue to handle corporate shareholder issues. If, as an unintended consequence, shareholders are weakened by the Court’s ruling in *Citizens United*, the proper solution would be to seek a solution through the existing corporate regulations, rather than restricting speech.¹⁵⁴

151. *Id.*; see also MacColl, *supra* note 149 (“Corporations generally did not directly get involved in political spending but rather donated more than \$15 million to a new type of political group known as a ‘super PAC.’”). “Super PAC” refers to a political action committee that only makes independent expenditures. The term gained notoriety when Comedy Central’s pundit, Stephen Colbert, created the “Colbert Super PAC” and discussed the issues on the air. See Dan Eggen, *Colbert Announces a ‘Super PAC,’* WASH. POST POL. & POL’Y BLOG (April 15, 2011, 12:59 PM), http://www.washingtonpost.com/blogs/44/post/colbert-announces-a-super-pac/2011/04/15/AFZCByjD_blog.html; Danny Yadron, *Stephen Colbert: Fund-Raising or Fun-Raising?*, WALL ST. J. WASH. WIRE BLOG (May 13, 2011, 2:35 PM), <http://blogs.wsj.com/washwire/2011/05/13/stephen-colbert-fund-raising-or-fun-raising/>.

152. See, e.g., John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?* 1 (Harv. L. & Econ., Discussion Paper No. 684, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680861.

153. Robert Jackson, Professor, Columbia Law Sch., Remarks at the Brennan Center for Justice Symposium: Accountability After *Citizens United*, Can Shareholders Save Democracy? (Apr. 29, 2011), http://www.brennancenter.org/content/pages/accountability_after_citizens_united_transcript_section_iii (“[W]hat *Citizens United* doesn’t say is how corporations decide whether or not to use this [political] power, and how it will be used if they do . . . [I]f shareholders don’t like what directors are doing they can simply throw them out over time.”).

154. Andy Kroll, *Citizens United: The Shareholders Strike Back*, MOTHER JONES (June 1, 2011), <http://motherjones.com/politics/2011/05/citizens-united-home-depot-elections> (“[S]hareholders of Home Depot . . . will have their own chance to chip away at Citizens United when they vote on a strongly worded resolution urging the company to disclose all political campaign spending . . . to elect or defeat candidates running for office. The resolution would give shareholders the chance to vote for or against Home Depot’s campaign contributions.”).

E. Myth: “*Citizens United* Encourages/Necessitates Increased Disclosure”

The Supreme Court did approve certain disclaimer and disclosure requirements in one part of the *Citizens United* opinion.¹⁵⁵ Critics have responded to this portion of the decision in two broad ways: (1) by declaring that the Supreme Court has given Congress and the states a blank check to impose disclosure mechanisms;¹⁵⁶ or (2) by fearing that the Supreme Court has vitiated disclosure and Congress and the states need to fill in the gaps to save our elections.¹⁵⁷

Regarding the first reaction, many states are relying on the Supreme Court’s holding regarding the constitutionality of on-ad attribution requirements and simple event-driven reporting¹⁵⁸ as a blank check for overhauling their campaign-finance regimes.¹⁵⁹ Pursuant to this apparent “mandate,” many states are packaging different campaign-finance regulations as “disclosure” even when the regulations have nothing to do with disclosing relevant information.¹⁶⁰

Regarding the second reaction, critics argue that *Citizens United* fatally damaged the disclosure regime and immediate action is necessary.¹⁶¹ Many states enacted legislation in a reactionary response to the decision. Even Congress attempted to fast-track a disclosure bill (“DISCLOSE”) during the summer of 2010.¹⁶² DISCLOSE attempted

155. See *supra* Part II.

156. See, e.g., Ryan J. Reilly, *FEC Chair: ‘We Can Be Doing More on Disclosure’ After Citizens United*, TPMUCKRAKER (June 9, 2011, 3:07 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/06/fec_chair_we_can_be_doing_more_on_disclosure.php.

157. See, e.g., Paul Blumenthal, *Post-Citizens United Disclosure Is Down Significantly*, SUNLIGHT FOUND. (Sept. 20, 2010, 11:08 AM), <http://sunlightfoundation.com/blog/2010/09/20/post-citizens-united-disclosure-is-down-significantly>.

158. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010). There is a distinction between on-ad attribution and event-driven reporting, which the Court found to be permissible, and the PAC-style disclosure, which (for these groups) the Court found not permissible. *Id.* at 898, 913.

159. For a comprehensive overview of the state laws affected by, and the states that have responded to, the decision, see *Life After Citizens United*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=19607> (last updated Jan. 4, 2011).

160. See, e.g., *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 321 (8th Cir. 2011), *vacated and reh’g en banc granted* (8th Cir. July 12, 2011) (Riley, C.J., concurring in part and dissenting in part) (“[C]ertain requirements Minnesota imposes on corporations have nothing or very little to do with disclosure.”).

161. See *supra* note 157.

162. See Press Release, Congressman Chris Van Hollen, Van Hollen, Castle, Jones, Brady Announce DISCLOSE Act to Address Citizens United Ruling (April 29, 2010), *available at* <http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=183368>. The Bill passed in the House but could not get the necessary votes in the Senate. In 2011, Representative Van Hollen sued the FEC over the current disclosure regulations. Press

to cast a wide net, sweeping in many different activities in response to *Citizens United* (including activities outside the scope of the case).

However, these responses fail to see what the Court in *Citizens United* actually did. The Court expressly approved the federal scheme of simple, event-driven reporting of electioneering communications.¹⁶³ In so doing, the Court did not make a blanket statement regarding the constitutionality of all disclosure laws.¹⁶⁴ Instead, it applied exacting scrutiny to *those* requirements and found that *those* requirements were constitutional.¹⁶⁵ The Court applied strict scrutiny to the significantly more burdensome PAC-style restrictions and found those to be unconstitutional.¹⁶⁶ It is going too far to declare that the Court's constitutional analysis either endorsed or necessitated heightened disclosure.

Conclusion

Undoubtedly, the Supreme Court's decision in *Citizens United* is important. However, the reason why it is important is overshadowed by the fearful rhetoric and misunderstandings by its outspoken critics. When it decided *Citizens United*, the Supreme Court was not advancing corporate personhood or attempting to corrupt our elections; it was reinforcing the freedom of speech.

Like *WRTL-II*, *Citizens United* is but a step towards reclaiming essential First Amendment freedoms. The United States has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁶⁷ It is the Supreme Court's job to protect that freedom.

Release, Congressman Chris Van Hollen, Van Hollen Files Lawsuit Challenging FEC Regulations (April 21, 2011), available at <http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=237989>.

163. *Citizens United*, 130 S. Ct at 913–16.

164. *Id.*

165. *Id.*

166. *Id.*

167. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

