Articles


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

—Alexis de Tocqueville

Introduction

In the wake of the Supreme Court’s Citizens United v. Federal Election Commission 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

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


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

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

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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.


sion. However, the myths about Citizens United are as widespread as the criticism. This Article will first shine light 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-


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.


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).

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.\footnote{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 . . . .”).} Freedom of speech, press, assembly, and petition go to the nature of the country itself and why the country was founded.\footnote{See Bopp & Haynie, supra note 7, at 7–10.} 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.\footnote{The issue of “corporate personhood” frequently comes up in debates over \textit{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.}

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.

\section*{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 . . . .”\footnote{McConnell v. FEC, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part), overruled by \textit{Citizens United} v. FEC, 130 S. Ct. 876 (2010).} 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.\footnote{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).} 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”).\footnote{BCRA will be discussed \textit{infra} Part I.C.2.}

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, passed a mere seven years after the Bill of Rights was ratified, were born out of the Federalist-controlled Congress’ fear of Democratic-Republican criticism during a season of political uncertainty. 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 . . . .”

Many people were penalized for violating these Acts. Ironically, the Federalists’ prosecution of dissenters under the Acts only led to more criticism, and the party was defeated in the next election. The Sedition Act “first crystallized a national awareness of the central meaning of the First Amendment.” 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.


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.


30. Volokh, supra note 24, at 312.
Thomas Jefferson and James Madison vehemently opposed the Acts.\textsuperscript{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 leveled 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.\textsuperscript{32}

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

\textsuperscript{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)).


\textsuperscript{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), \textit{in The Jeffersonian Cyclopaedia} 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.” \textit{Stone, supra} note 27, at 64. A group, merely \textit{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.” \textit{Id.} The Federalists chopped down the pole and embarked on a man-hunt for Brown. \textit{Id.} Brown was arrested and pled guilty but Justice Samuel Chase wanted the names of any accomplices. \textit{Id.} Because he refused, Justice “Chase sentenced Brown to a fine of $450 and eighteen months in prison.” \textit{Id.} Even worse, because he could not afford to pay his fine, he was forced to remain in prison for even longer. \textit{Id.} at n.*.

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.

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. (MCFL), 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.” Congress passed the Taft-Hartley Act in 1947. 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.” The Act passed over President Truman’s adamant veto.

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. Because they were able to reach more people, politicians began campaigning constantly. The increased campaigning brought with it an increase of scandal. Notably, even before Water-
gate, then-Senator and Vice Presidential candidate Richard Nixon dealt with accusations of “personal favors.” In 1971, Congress passed an expansive campaign reform act known as the Federal Election Campaign Act (“FECA”). Among other things, this Act required full reporting of campaign contributions and expenditures, laid the foundation for corporate separate segregated funds, 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,” led Congress to pass sub-
stantive amendments to FECA in 1974. 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.

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

_Boyle v. Valeo_, the seminal campaign finance case, involved a constitutional challenge to FECA. The challengers sought in district court declaratory and injunctive relief against several provisions of the new campaign-finance regulations. The Court of Appeals, 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." 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" 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. Reviewing the challenged regulations under constitu-
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

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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-ju? 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.


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.\footnote{84}

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

\section{D. The Climax: Wisconsin Right to Life Challenges BCRA Regulations}

\textit{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 \textit{Federal Election Commission v. Wisconsin Right to Life ("WRTL-II")}.\footnote{87} While \textit{McConnell} held the corporate electioneering candidate’s election or defeat.” \textit{McConnell}, 540 U.S. at 123–24, \textit{overruled by Citizens United}, 130 S. Ct. 876 (citation omitted).

\footnote{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.” \textit{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.}

\footnote{85. \textit{540 U.S. 93 (2003).}}

\footnote{86. For more information on the Supreme Court’s decision in \textit{McConnell}, see James Bopp, Jr. & Richard E. Coleson, \textit{The First Amendment Is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy}, 51 N. Ky. L. Rev. 289, 333–40 (2004). Relevant to the discussion at hand, the article explains that “[e]ven though \textit{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.” \textit{Id. at 291}.}

\footnote{87. \textit{WRTL-II}, 551 U.S. 449; \textit{see also} Bopp & Coleson, \textit{supra note 7}, at Part III; Bopp, La Rue & Kosel, \textit{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 (\textit{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.” This carved out a broad exception to the electioneering communication ban. Even so, three Justices wanted to go further. 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*.

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.” The Court repudiated this, stating that the First Amendment is “[p]remised on mistrust of government power” and that “the FEC’s ‘business is to censor.’” The FEC was not equipped to champion the First Amendment. In practice, the FEC believed its authority to be plenary 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.” 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. The organization also wanted to make and distribute two ten-second and one thirty-second advertisements for the film. 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.
108. *Id.* at 896 (quoting Freedman v. Maryland, 380 U.S. 51, 57–58 (1965)).
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-com-
unication 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 in-
dependent expenditures and electioneering communications,115 over-
ruling Austin v. Michigan Chamber of Commerce116 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 regu-
late independent expenditures and require disclosure.119 The Su-
preme Court restated the fundamental truth that the First
Amendment protects speech, no matter who the speakers are,120 and
therefore, strict scrutiny is required for “[l]aws that burden political
speech.”121

The Court then held that the only permissible interest in restrict-
ing political speech is the anti-corruption interest, which it defined as
the interest in preventing quid pro quo corruption;122 the Court re-
jected 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 elec-
114. Citizens United, 130 S. Ct. at 889–90. For a more detailed explanation of the ap-
peal-to-vote test, see Bopp & Coleson, supra note 7, at 50–51.
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 556–59 (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 lim-
ited 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.” Thus, there is no interest in restricting independent expenditures. 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.”

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. Separate segregated funds, or PACs, are “burdensome alternatives” that are “expensive to administer and subject to extensive regulations.” They have “onerous restrictions,” and corporations may not be able to establish one quickly enough to engage in vital political speech. 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.”

Finally, the Court stated that the mere presence of the corporate form does not give rise to corruption justifying the disparate treatment. “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.’”

### 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

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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.
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.


\(^{139}\) *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

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-
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. 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.

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.” The Center for Responsive Politics found that nonparty groups outspent parties on independent expenditures and electioneering communications in the 2010 midterm election. Early reports showed that the speech specifically opened up by Citizen United’s holding “represented 15 percent of all federal political spending in 2010.”

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.”).


races, candidates won despite a heavy onslaught of Citizens United spending directed at them.  

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. 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. 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.

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/AFZCByiD_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/.


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. 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; 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.

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 reporting as a blank check for overhauling their campaign-finance regimes. 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.

Regarding the second reaction, critics argue that *Citizens United* fatally damaged the disclosure regime and immediate action is necessary. 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. DISCLOSE attempted

155. See supra Part II.
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.
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.

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\(^{163}\) *Citizens United*, 130 S. Ct at 913–16.

\(^{164}\) *Id*.

\(^{165}\) *Id*.

\(^{166}\) *Id*.
