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Breaching a Leaking Dam?: Corporate Money and Elections

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BREACHING A LEAKING DAM?: CORPORATE MONEY AND ELECTIONS

*Lloyd Hitoshi Mayer**

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I. INTRODUCTION

Before March 24, 2009, *Citizens United v. FEC*¹ seemed to be on its way to becoming nothing more than a footnote in election law casebooks. While observers carefully noted that the case could be a vehicle for overturning key campaign finance precedents, most commentators focused on the various ways the Court could instead decide the case on narrow statutory interpretation grounds.² Apparently agreeing that the Court would probably not revisit those precedents, groups supporting the existing laws filed only two amicus curiae briefs defending the existing laws as applied by the government to *Citizens United*.³

A lengthy exchange during the March 2009 oral argument raised concerns, however, that a majority of the Court might take a different approach to the case.⁴ In that exchange, the

1. 530 F. Supp. 2d 274 (D.D.C. 2008).

2. See, e.g., Richard L. Hasen, *Can McCain-Feingold Restrict a Corporation's "Video-on-Demand" Candidate Documentary and Advertising?*, 36 PREVIEW U.S. SUP. CT. CAS. 349, 353 (2009) (concluding that it is unlikely the Court would overrule existing precedent especially given the many ways to rule in favor of *Citizens United* without doing so); Isaac Lindbloom & Kelly Terranova, *Citizens United v. Federal Election Commission* (Docket No. 08-205), LEGAL INFO. INST. BULL. (2009), <http://topics.law.cornell.edu/supct/cert/08-205> (concluding that the Court would focus on whether the movie at issue in the case would qualify for exemption from various campaign finance rules and not raising the possibility that the Court could overrule existing precedent); Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/preview-movies-as-political-messages/> (Mar. 22, 2009, 06:04 EDT) (concluding that while it is not unrealistic to believe the Court could overturn long-standing precedent, the Court has a variety of other ways to resolve the case on narrower grounds).

3. See Docket, *Citizens United v. FEC*, No. 08-205 (U.S. Aug. 18, 2009) <http://origin.www.supremecourtus.gov/docket108-205.htm> (briefs filed on Feb. 23 & 24, 2009). This compares to fourteen amicus curiae briefs filed in support of the government after the Court scheduled re-argument. *Id.* (briefs filed on July 29-31, 2009).

4. See, e.g., Bob Bauer, *Something Distinctive About the Speech*, MORE SOFT MONEY HARD LAW, Mar. 28, 2009, <http://www.moresoftmoneyhardlaw.com> (commenting that "[t]he Court in this case, on these facts, could well be moved to keep the campaign finance laws out of the regulation of books and films"); Citizens United: Of Book Banning, Kindles, and the Corporate PAC Requirement, <http://electionlawblog.org> (Mar. 24, 2009, 13:16 PDT) (concluding that this exchange made "it more likely that a majority on the Court . . . will want to say something about the Constitution"); Posting of Lyle Denniston to

government took the position that Congress could, constitutionally, prohibit corporations from paying for a broad range of speech if that speech expressly advocated for the election or defeat of a particular candidate or was the functional equivalent of express advocacy.⁵ In one particularly striking example, the government maintained this position even with respect to a 500-page book that contained a single instance of express advocacy.⁶

Whether triggered by this exchange or by already existing concerns, the Court decided at the end of its Term to shift the focus of the case. In a brief order issued on June 29, 2009, the Court scheduled re-argument and ordered supplemental briefing on the following issue:

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002 2 U.S.C. §441b.⁷

To understand why this one sentence could lead to a significant change in the flow of corporate money affecting federal and state elections, a brief review of the shifting—but for almost all of the past 100 years—gradually tightening laws governing the use of corporate funds in elections is necessary. Part II of this Article covers this history, including the key decision in *Austin v. Michigan Chamber of Commerce* to uphold a

SCOTUSblog, <http://www.scotusblog.com/wp/analysis-campaign-films-may-get-ok/> (Mar. 24, 2009, 10:43 EDT) (leading off with “[b]ecause a government lawyer pushed his argument as far as logic would carry it, an alarmed Supreme Court on Tuesday seemed poised to create a new exception to federal power to regulate what advocacy groups can say during national political campaigns” but then noting there appeared to be little support for a dramatic overruling of existing campaign finance laws).

5. See Transcript of Oral Argument at 26–38, *Citizens United*, No. 08-205 (U.S. Mar. 24, 2009). The Government also made this argument with respect to unions paying for such speech, as the same provisions that apply to unions also apply to corporations. *Id.*

6. *Id.* at 29–30.

7. Order in Pending Case, *Citizens United*, No. 08-205 (U.S. June 29, 2009), <http://www.supremecourtus.gov/orders/courtorders/062909zr.pdf>.

state election law ban on corporations making certain election-related expenditures even though that ban burdened speech.⁸ Part III reviews the specific facts and issues raised in *Citizens United*. Part IV addresses how the Court is likely to answer the new question it has posed. That part concludes that, given the stated and likely positions of the current nine Justices, it is likely that a majority of the current Court believes the Court decided both *Austin* and the relevant part of *McConnell* incorrectly. Given this likely result, the argument that is most likely to convince a majority of the Court not to overturn *Austin* is the doctrine of stare decisis, although that result is far from assured. As detailed in that part, even stare decisis is unlikely to preserve the relevant portion of *McConnell*, however. Finally, Part V addresses the potential ramifications if the Court overrules either or both of the precedents it cited, including the new pressure an overruling of *Austin* would place on seemingly unrelated federal tax laws governing tax-exempt, nonprofit corporations.

As the title of this Article indicates and the discussion below will make clear, the existing prohibitions on corporate money in elections do not prevent all corporate spending that may influence who is elected. That said, a significant amount of corporate expenditures that might otherwise occur is currently barred. The question now effectively posed by the Court in raising the continued viability of the *Austin* and *McConnell* precedents is what will be the results of breaching the dam holding back much of this spending. In one view, such a breach will result in a flood of corporate money that will drown out the influence of individual voters, unduly influence candidates when they reach public office, and undermine our democracy to such an extent that the infringement on speech by the current prohibitions on corporate spending are justified constitutionally.⁹ Another view is that such a breach will allow speech to flow that should never have been barred in the first place and that will enrich the electoral process, and that the harm to free speech of

8. 494 U.S. 652, 658–61 (1990).

9. See, e.g., *FEC v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. ___, 127 S.Ct. 2652, 2688–89 (2007) (Souter, J., dissenting).

allowing the current prohibitions to remain intact more than justifies overturning these precedents, even taking stare decisis into account.¹⁰ This Article explores these sharply different views as they come to bear on the *Citizens United* case.

II. A BRIEF HISTORY OF CORPORATE MONEY & ELECTIONS

Both the public and politicians have long been uneasy with spending by corporations to influence elections, and not without reason.¹¹ This uneasiness has led to a series of attempts to limit this influence, which have increasingly blocked the flow of corporate funds over time. At the same time, the Supreme Court has had to address numerous constitutional challenges to these restrictions, of which the *Citizens United* case is the most recent. The litigants bringing these challenges have primarily argued that these restrictions restrict speech without sufficient justification, thereby violating the Constitution's speech protections, denying the public important information about candidates, and unduly protecting incumbent politicians.¹²

A. Election-Related Spending by Corporations

To understand this history, it is necessary to distinguish the three primary ways that corporations—or other types of organizations or individuals—can spend money to influence the election of candidates. One way is to make campaign

10. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 273–75 (2003) (Thomas, J., dissenting); *Id.* at 322–23 (Kennedy, J., dissenting).

11. See generally ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-52 (1988) (describing the pre-Watergate influence of corporations on federal elections and the concerns it raised with members of both the public and Congress).

12. See, e.g., Brief for Appellants at 7–14, *Nat'l Rifle Ass'n v. FEC*, 540 U.S. 93 (2003) (No. 02-1675) (arguing in a case consolidated with *McConnell v. FEC*, that BCRA § 203 is unconstitutional on these grounds); Brief of Appellee at 8–9, *Austin*, 494 U.S. 652 (1990) (No. 88-1569) (arguing that the ban on corporate independent expenditures is unconstitutional on these grounds, except not mentioning incumbent politicians); Reply Brief of the Appellants at 30-31, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437) (arguing that expenditure limits are unconstitutional on these grounds).

contributions, i.e., to contribute funds to a candidate's campaign. Such contributions can be made either directly by simply writing a check to the candidate's campaign committee or indirectly by following the candidate's instructions with respect to spending money. For example, a candidate could ask a corporation interested in supporting the candidate to write a check to a television station to pay for one of the candidate's ads. Such indirect contributions have come to be known as *coordinated expenditures*, and under current law, such expenditures are treated the same as direct contributions.¹³

Second, a corporation can contribute to an entity that is closely tied to a candidate and will support that candidate or other candidates. The most obvious such entity would be the candidate's political party. Another common entity of this type is a *leadership PAC*, which is an entity formed and controlled by a current or former politician to support the election of candidates other than the founding individual, thereby garnering favor with the candidates supported.¹⁴

Third and finally, a corporation can spend money on activities that support (or oppose) a candidate independently of the candidate, i.e., without any previous agreement with or direction from the candidate. In other words, instead of *contributing* to the candidate or an entity closely tied to a candidate, the corporation is making its own *independent expenditures*. Such independent expenditures could be made directly or by contributing to another organization, not affiliated with a candidate, that then makes the expenditures.

B. Prohibiting Corporate Campaign Contributions

The first major limitation enacted by Congress was the 1907 prohibition on corporations making campaign contributions to

13. See 11 C.F.R. §§ 100.52(a), (d)(1), 109.20(b), 109.21(b)(1) (2009). The FEC is currently revising 11 C.F.R. § 109.21 in light of a court holding that portions of that section violated the Administrative Procedure Act. See *Shays v. FEC*, 528 F.3d 914, 924–29 (D.C. Cir. 2008).

14. See Trevor Potter, *The Current State of Campaign Finance Law*, in *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 48, 52 (2005) (describing leadership PACs).

federal candidates.¹⁵ Stung by public revelations of substantial corporate contributions to the Republican National Committee during congressional hearings, President Theodore Roosevelt in 1905 called for such a prohibition during his annual address to Congress.¹⁶ After much political maneuvering, and another call for action by President Roosevelt in his 1906 annual address, Congress passed the prohibition.¹⁷ The limited history available indicates that only two members of Congress raised free speech objections, claiming that corporations had the same rights as individuals.¹⁸ And in contrast to more recent campaign finance laws, the issue of the prohibition's constitutionality did not reach the Supreme Court for many decades (and was upheld when it did).¹⁹

The corporation campaign contribution prohibition still exists today, and almost all states either prohibit or limit contributions by corporations to state and local candidates.²⁰ This campaign contribution prohibition did not, however, prevent corporations

15. See Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (codified at 2 U.S.C. § 441b(a) (2006)). Congress extended this prohibition to unions in 1943, see War Labor Disputes Act, ch. 144, sec. 9, § 313, 57 Stat. 163, 167–68 (1943), and similar prohibitions now apply to government contractors, 2 U.S.C. § 441c(a)(1) (2006), and foreign nationals who are not permanent residents, *id.* § 441e.

16. MUTCH, *supra* note 11, at 2–4; Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 10–12 (2005).

17. MUTCH, *supra* note 11, at 5–7; Corrado, *supra* note 16, at 12; see also *United States v. Int'l. Union United Auto., Aircraft, & Agric. Implement Workers of Am.*, 352 U.S. 567, 570–75 (1957) (describing this history); Brief of Campaign Finance Scholars as Amicus Curiae at 7–10, *Citizens United v. FEC*, No. 08-205 (U.S. July 31, 2009) (criticizing certain aspects of this Supreme Court case's account of this history).

18. MUTCH, *supra* note 11, at 7.

19. See *FEC v. Beaumont*, 539 U.S. 146 (2003) (finding the prohibition on corporate campaign contributions to be constitutional even as applied to nonprofit corporations and citing previous decisions as strongly suggesting this result); see also *Mariani v. United States*, 212 F.3d 761, 771–73 (3d Cir. 2000) (concluding, before *Beaumont*, that no Supreme Court precedent has directly addressed the constitutionality of the corporate campaign contributions prohibition, but finding that prohibition constitutional and citing other federal appellate court decisions to the same effect).

20. See *supra* note 15; National Conference of State Legislatures, *State Limits on Contributions to Candidates* (2009), available at http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.

from making contributions to political parties or other candidate-affiliated entities. It also left corporations free to make independent expenditures.

C. Prohibiting Independent Expenditures

Forty years later, Congress sought to close off the latter of these alternate channels by prohibiting independent expenditures by corporations (and unions).²¹ That prohibition proved largely ineffective, however, because there were no effective disclosure or enforcement mechanisms.²² It was not until the post-Watergate amendments to the Federal Election Campaign Act (FECA) that Congress made serious efforts to address both of these problems.²³ FECA, as amended, strengthened the prohibition on corporations making independent expenditures both by eliminating loopholes and by establishing a dedicated enforcement agency in the form of the Federal Election Commission (FEC).²⁴ In contrast to the ban on corporate contributions, however, a majority of states do not prohibit corporations (or unions) from making independent expenditure, although they do generally require public disclosure of such expenditures.²⁵

21. See Labor-Management Relations (Taft-Hartley) Act, 1947 § 304, 61 Stat. 136, 159–60 (1947) (codified at 2 U.S.C. § 441b(a) (2006)); MUTCH, *supra* note 11, at 155–57.

22. MUTCH, *supra* note 11, at 40–42, 165–66; FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 32–33 (1988).

23. MUTCH, *supra* note 11, at 42, 49.

24. See *Buckley v. Valeo*, 519 F.2d 821, 836–37, 904–07 (D.C. Cir. 1975) (briefly summarizing the history of federal election law and the reasons for the FECA amendments), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976); MUTCH, *supra* note 11, at 87–88 (describing the creation of the FEC). That is not to say that the FEC has been unanimously viewed as a model regulatory or enforcement agency; far from it. See, e.g., BROOKS JACKSON, BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED (1990); Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1895–96 (1999) (summarizing the concerns of FEC critics); Trevor Potter & Glen Shor, *Lessons on Enforcement from McConnell v. FEC*, 3 ELECTION L.J. 325, 330–32 (2004) (citing *McConnell* as an indictment of the FEC's performance in interpreting the election laws).

25. See Supplemental Brief of Senator John McCain et al. as Amici Curiae Supporting Appellee at 1a–8a, *Citizens United v. FEC*, No. 08-205 (U.S. July

The effectiveness of the federal prohibition was, however, reduced by the results of litigation challenging FECA, primarily on First Amendment grounds. Unlike the corporate campaign contribution prohibition, which did not result in a constitutional challenge for many years,²⁶ the FECA amendments immediately triggered far-ranging litigation that culminated in the Supreme Court's decision in *Buckley v. Valeo*.²⁷ While that decision focused primarily on the restrictions imposed on individuals, it had two important ramifications for corporate spending.

First, *Buckley* created a fundamental divide between how *contributions* to candidates are treated and how *expenditures* by candidates, political parties, and individuals are treated.²⁸ The Court found that the government had a weighty interest in preventing corruption and the appearance of corruption, and that the FECA-imposed limits on the amount that any given individual could contribute to a candidate per election were sufficiently tailored to that interest to justify the resulting burden on speech under the First Amendment.²⁹ The Court also concluded, however, that FECA's limits on the total amount of

31, 2009) (listing state statutes prohibiting corporate independent expenditures); Public Citizen, *State Prohibitions on Campaign Spending from Corporate And Union Treasuries for State Candidates*, 2009, http://www.citizen.org/documents/Corporate_spending_on_state_candidates.pdf (last visited Sept. 18, 2009); National Conference of State Legislatures, *State Campaign Finance Laws: An Overview* 3 (2009), available at <http://www.ilga.gov> (follow "Joint Committee on Government Reform" hyperlink; then follow "Documents" hyperlink; then follow "State Campaign Finance Laws, An Overview" hyperlink under "Submitted March 17, 2009") (summarizing state independent expenditure disclosure laws).

26. See *FEC v. Beaumont*, 539 U.S. 146 (2003) (finding the prohibition on corporate campaign contributions to be constitutional even as applied to nonprofit corporations and citing previous decisions as strongly suggesting this result); see also *Mariani v. United States*, 212 F.3d 761, 771–73 (3d Cir. 2000) (concluding, before *Beaumont*, that no Supreme Court precedent has directly addressed the constitutionality of the corporate campaign contributions prohibition, but finding that prohibition constitutional and citing other federal appellate court decisions to the same effect).

27. 424 U.S. 1 (1976).

28. See *id.* at 58–59 (summarizing the Court's contrasting conclusions with respect to contribution limits and expenditure limits).

29. *Id.* at 26–29; see also *id.* at 35–36 (finding constitutional the limits on contributions to political committees); *id.* at 38 (finding constitutional the limit on total contributions by a single individual during any calendar year).

expenditures by a candidate, political committee, political party, or individual in a given election cycle were not sufficiently tailored to serve this interest, and therefore found those limits to be an unconstitutional restriction of speech.³⁰ In doing so, the Court rejected the view that limits on contributions and expenditures should be viewed primarily as limitations on conduct (i.e., spending money) and only incidentally as restrictions on speech and so outside the protection of the First Amendment (as the appellate court had reasoned).³¹

In other words, while Congress could constitutionally prohibit an individual from giving more than \$1,000 per election, primary or general, to a candidate for federal office, Congress could not constitutionally limit the amount that the candidate could spend.³² Moreover, Congress also could not limit how much any individual could spend of his or her own funds on independent expenditures, including expenditures to support his or her own candidacy—hence the existence of self-funded political campaigns by candidates such as Ross Perot and Mitt Romney.³³

In reaching this conclusion, the Court explicitly rejected the assertion that ensuring some level of financial equality among candidates or other electoral voices was a legitimate ground for overcoming First Amendment protections, much less a sufficiently strong governmental interest to justify FECA's expenditure limitations.³⁴ It stated:

But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which

30. *Id.* at 55–56.

31. *Id.* at 16–17. *But see* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

32. *See Buckley*, 424 U.S. at 23–24 (describing the limit on contributions to candidates).

33. *See id.* at 45, 46 n.53, 47, 53; FEC, Presidential Pre-Nomination Campaign Receipts Through December 31, 2008 (2009), http://www.fec.gov/pres/pres2009/20090608Pres/2_2008PresPrimaryCmpgnRcpts.pdf (reporting that Perot contributed over \$63 million to his own presidential campaign and listing Romney as having provided over \$44 million in contributions and loans to his own presidential campaign); HERBERT E. ALEXANDER & ANTHONY CORRADO, FINANCING THE 1992 ELECTION 128 (1995).

34. *Buckley*, 424 U.S. at 48–49, 54, 56.

was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.³⁵

The ironic aspect of *Buckley's* contribution-expenditure divide is that it appears a majority of Supreme Court Justices now agree it is wrong, but they disagree over whether limits on contributions and on expenditures are both constitutional or both unconstitutionally infringe on speech.³⁶ The effect of this disagreement is that it leaves the contributions-expenditure divide in place, at least for now.

Second, to avoid unconstitutional vagueness the Court narrowed the definition of what qualified as an independent expenditure to include only communications that *expressly advocated* for the election or defeat of a clearly identified candidate.³⁷ It arguably further narrowed this definition by listing examples of what came to be known as the "magic words" that would trigger express advocacy treatment.³⁸ While the FEC

35. *Id.* at 48–49 (citations omitted).

36. See *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring) (expressing skepticism regarding *Buckley*); *id.* at 266–67 (Thomas, J., concurring) (reiterating his view that the Court erred in *Buckley* by not also holding contribution limits unconstitutional) (joined by Scalia, J.); *id.* at 274 (Stevens, J., dissenting) (disagreeing with *Buckley's* holding on expenditure limits); *id.* at 283–84 (Souter, J., dissenting) (while not explicitly disagreeing with *Buckley's* rationale, suggesting that three decades of experience might provide sufficient grounds for upholding at least some expenditure limits as constitutional) (joined by Ginsburg, J.); see also *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2782–83 (2008) (Ginsburg, J., concurring in part and dissenting in part) (choosing not to join Justice Stevens criticism of *Buckley* because she "would leave reconsideration of *Buckley* for a later day and case") (joined by Breyer, J.); *Randall*, 548 U.S. at 264 (Alito, J., concurring) (neither endorsing nor criticizing *Buckley*); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409–10 (2000) (Kennedy, J., dissenting) (stating that he would overrule *Buckley* but would not necessarily find all campaign finance limitations to be unconstitutional as a result). Cf. Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095 (2002).

37. *Buckley*, 424 U.S. at 43–44, 80.

38. *Id.* at 44 n.52 ("This construction would restrict the application of

has repeatedly sought to push the boundaries of this latter limitation, those attempts have generally been unsuccessful.³⁹ *Buckley* did not expressly apply this holding to the prohibition on independent expenditures by corporations (and unions), but the Supreme Court later made it clear that this narrowed definition of such expenditures also applies to that prohibition.⁴⁰

While *Buckley* did not directly address the FECA-imposed limits on corporate spending, two later Supreme Court decisions did. The first was *FEC v. Massachusetts Citizens for Life, Inc.*⁴¹ (*MCFL*), where a nonprofit corporation brought an as applied challenge to the application of the corporate independent expenditure prohibition.⁴² Recognizing a difference between for-profit corporations and at least some nonprofit corporations, the Court determined that the Constitution required a limited exception to the prohibition.⁴³ It concluded that a nonprofit organization like Massachusetts Citizens for Life, which was not established by and does not accept funds from business corporations and unions, does not have shareholders or other persons with a claim on its assets or earnings, does not engage in business activities, and has an explicit political agenda, had to be permitted to make independent expenditures as a constitutional matter.⁴⁴ The Court also held, however, that such corporations

[FECA] § 608(e)(1) to 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.'").

39. See, e.g., 11 C.F.R. § 100.22(b) (2009) (defining express advocacy as including communications that "[w]hen taken as a whole and with limited reference to external events . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)"); *N.C. Right to Life v. Leake, Inc.*, 344 F.3d 418, 426 (4th Cir. 2003) (rejecting this broader definition of express advocacy as adopted by one federal appellate court and listing other federal appellate court decisions also rejecting a broader definition), *vacated on other grounds*, 541 U.S. 1007 (2004); see generally Trevor Potter & Kirk L. Jowers, *Speech Governed by Federal Election Laws in THE NEW CAMPAIGN FINANCE SOURCEBOOK*, 205, 213–17 (2005).

40. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 249 (1986).

41. 479 U.S. 238 (1986).

42. *Id.* at 238.

43. *Id.* at 263–64.

44. *Id.*

are still subject to the FECA-imposed disclosure requirements imposed on those who make independent expenditures, including the filing of publicly available reports detailing both their significant sources of contributions and their expenditures.⁴⁵

These so-called MCFL corporations are likely a relatively small group in practice both because of the Supreme Court-imposed requirements and the additional requirements imposed by the FEC in its interpretation of the case. Under current FEC-issued regulations, not only must a nonprofit corporation meet the requirements described by the Supreme Court, but it must also meet two additional, arguably more stringent requirements (both of which MCFL itself apparently met).⁴⁶ First, to fall within this exception the nonprofit corporation must be tax-exempt under Internal Revenue Code section 501(c)(4), which provides exemptions for “social welfare” organizations and covers many advocacy groups such as the National Rifle Association and the Sierra Club.⁴⁷ Second, the corporation must not offer or provide any benefit, such as insurance or training programs not necessary to promoting the corporation’s political ideas, that is a disincentive to persons disassociating themselves from the organization.⁴⁸ It is therefore relatively easy to be disqualified from this status; for example, Citizens United does not fall within this status because it receives a relatively small amount of its support from business corporations.⁴⁹

Second, the Court squarely faced the issue of whether the

45. *Id.* at 262.

46. *See* 11 C.F.R. § 114.10(c) (2009).

47. *See id.* § 114.10(c)(5); PUBLIC CITIZEN, THE NEW STEALTH PACS: TRACKING 501(C) NON-PROFIT GROUPS ACTIVE IN ELECTIONS 109, 118 (2004) (identifying the National Rifle Association and the Sierra Club as Internal Revenue Code section 501(c)(4) organizations), *available at* <http://www.stealthpacs.org/documents/StealthPACs.pdf>.

48. 11 C.F.R. § 114.10(c)(3).

49. *See* Brief for the Appellee at 30, *Citizens United v. FEC*, No. 08-205 (U.S. Feb. 17, 2009) (noting that in its complaint Citizens United stated it was not an MCFL corporation because it received corporate donations and engaged in business activities); Brief for Appellant at 32–33, *Citizens United*, No. 08-205 (U.S. Jan. 8, 2009) (while arguing for application of the MCFL exception, admitting that a very small (less than one percent) of the funding for the movie at issue came from for-profit corporations and not stating to what extent for-profit corporations provided financial support to Citizens United generally).

prohibition on corporate, as opposed to individual, independent expenditures is constitutional in the first case mentioned in the Court's recent order: *Austin v. Michigan Chamber of Commerce*.⁵⁰ That case involved whether a state law prohibition on such expenditures, modeled on FECA, could survive scrutiny under the First Amendment's Freedom of Speech Clause.⁵¹ The case was further complicated by the fact that the Court had, in the interim, decided that a state law prohibition on certain corporate paid speech in connection with ballot initiative elections was unconstitutional.⁵²

In *First National Bank v. Bellotti*,⁵³ the Court held that the fact the speaker is a corporation instead of an individual was irrelevant to the constitutional free speech analysis.⁵⁴ In doing so, it took the position that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual,"⁵⁵ and that the government could not limit a corporation's speech to speech the corporation could prove had a material effect on its business or property.⁵⁶ Having found that corporate-funded speech was as deserving, at least in the ballot initiative context, as individual speech, the Court then went on to conclude that the prohibition did not sufficiently serve an important governmental interest to justify the speech restriction, because it found that there was no risk of corruption present in a vote on a public issue as opposed to a vote on candidates.⁵⁷ Only then-Justice Rehnquist disagreed with the Court's position that the type of speaker was irrelevant, and he appears to have later abandoned that position.⁵⁸

50. 494 U.S. 652 (1990).

51. *Id.* at 654–55 & n.1.

52. *Id.* at 699–700.

53. 435 U.S. 765 (1978).

54. *Id.* at 776–77.

55. *Id.* at 777.

56. *Id.* at 784.

57. *Id.* at 790.

58. See *McConnell v. FEC*, 540 U.S. 93, 328 (2003) (Kennedy, J., concurring in part and dissenting in part) ("Continued adherence to *Austin*, of course, cannot be justified by the corporate identity of the speaker.") (joined by

Nevertheless, in *Austin* the Court upheld the state law prohibition on corporate independent expenditures. It did so by applying what is now commonly referred to as the “non-distortion” theory: that the government has a strong interest in preventing the large accumulations of wealth made possible by the special legal benefits available to corporations—separate legal status, limited liability for owners, etc.—from distorting elections for public office.⁵⁹ The Court further supported this rationale by noting corporations generally accumulated wealth for reasons unrelated to their political positions.⁶⁰ The Court distinguished *Bellotti* on the grounds that in that case the Court only considered quid pro quo corruption and not the distorting corruption accepted as a governmental interest in *Austin*.⁶¹ Several of the Justices felt, however, that the non-distortion theory was a stretch from the prevention of corruption and the appearance of corruption rationale applied in *Buckley* and dangerously close to the equalization of speakers rationale rejected in that case.⁶² Despite these concerns, *Austin* has remained the controlling precedent for almost twenty years, subject only to the previously created *MCFL* exception.

It should be noted that corporations were, and still are, also permitted to create political committees or PACs of their own and to pay the administrative and fundraising costs of those PACs, but those PACs can only receive contributions from individuals who have certain connections to the corporation and only up to certain dollar limits per individual per election cycle.⁶³ (A

Rehnquist, C.J.); *Bellotti*, 594 U.S. at 828.

59. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). For a fascinating account of the *Austin* opinion drafting process, written by the “clerk with primary responsibility to work with Justice Marshall on this opinion,” see Elizabeth Garrett, *New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics*, 52 HOWARD L.J. 655, 669–78 & n.70 (2009).

60. *Austin*, 494 U.S. at 659–60.

61. *Id.*

62. *Id.* at 684 (Scalia, J., dissenting) (criticizing the majority for expanding the concept of corruption); *id.* at 705–06 (Kennedy, J., dissenting) (criticizing the majority for apparently accepting that government has a legitimate interest in equalizing the relative influence of speakers) (joined by O’Connor, J. and Scalia, J.).

63. See generally FEC, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR

political committee, commonly known as a PAC, is generally an entity formed for the major purpose of influencing federal elections and that either receives at least a \$1,000 of contributions for that purpose or makes at least a \$1,000 of expenditures for that purpose.⁶⁴) This means that the funds these PACs can spend to influence federal elections, whether by making contributions to candidates or by paying for independent expenditures, cannot come from the general treasury of their affiliated corporations, but only from individuals related to the relevant corporation, such as senior executives, shareholders, and, for nonprofit corporations, members.⁶⁵

FECA, as interpreted by the Court, therefore left two significant ways for corporations to spend their general treasury funds to influence elections. First, while FECA prohibited corporate contributions to candidates and PACs, including leadership PACs, it did not reach some types of contributions to political parties: funds not raised specifically to influence federal elections.⁶⁶ Such funds, along with all other funds not subject to FECA's limitations on sources and amounts of contributions, are commonly known as "soft money;" "hard money," in contrast, is subject to those limitations and so is harder to raise.⁶⁷ The parties eventually realized they could use these soft money contributions for non-express advocacy advertising and other activities relating to federal elections but that did not fall under FECA, and that corporations generally remained free to provide these soft money contributions.⁶⁸ Second, because of the Court's

ORGANIZATIONS (2007), available at <http://www.fec.gov/pdf/colagui.pdf>.

64. See 11 C.F.R. § 100.5 (2009) (establishing the contribution and expenditure thresholds); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (adding the requirement that to be classified as a political committee, an entity must either be controlled by a candidate or have "the major purpose" of nominating or electing a candidate).

65. FEC, *supra* note 63, at 5, 20–23.

66. See Corrado, *supra* note 16, at 32–33 (describing the growth of such contributions and expenditures).

67. See *id.* at 29.

68. *Id.* at 32–33; Diana Dwyre & Robin Kolodny, *National Political Parties After BCRA*, in *LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS* 83, 84 (Michael J. Malbin ed., 2003); see also Robert G. Boatright et al., *BCRA's Impact on Interest Groups and Advocacy*

narrow express advocacy definition, corporations also remained free to spend money independently as long as such spending did not fall within that definition.⁶⁹ For example, an oft-repeated example of a communication that did not constitute express advocacy but certainly left the listener with few doubts about whether to vote for the candidate mentioned is this ad that aired shortly before a 1996 Montana congressional election:

Who is Bill Yellowtail? He preaches family values, but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks of law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.⁷⁰

While it took almost twenty years for candidates, political parties, and corporations to identify and begin to significantly utilize these channels, substantial funds eventually began to flow through these holes in the corporate spending dam, leading Congress to try to block them.⁷¹

D. Prohibiting Soft Money Contributions to Political Parties and Expenditures for "Electioneering Communications"

In 2002, six years of concerted efforts by members of Congress to place tighter restrictions on these two remaining flows of corporate money into federal elections finally bore fruit.⁷² The Bipartisan Campaign Reform Act (BCRA) prohibited corporate contributions to political parties for federal election activities (now defined broadly) and prohibited corporate funding

Organizations, in *LIFE AFTER REFORM*, *supra*, at 43, 49–51 (describing the scale and sources of soft money contributions to political parties).

69. See Boatright, *supra* note 68, at 52–56 (describing such "issue advertising" efforts).

70. *McConnell v. FEC*, 540 U.S. 93, 194 n.78 (2003).

71. See Michael J. Malbin, *Thinking about Reform*, in *LIFE AFTER REFORM*, *supra* note 68, at 3, 4–6.

72. See Anthony Corrado, *The Legislative Odyssey of BCRA*, in *LIFE AFTER REFORM*, *supra* note 68, at 21.

of some, but not all, communications relating to candidates in the days shortly before an election.⁷³ More specifically, § 203 of BCRA prohibited corporations from paying for so-called “electioneering communications”: broadcast, cable, or satellite communications that clearly identified a candidate, which aired within sixty days of the general election (thirty days for primary elections), and which reached at least 50,000 people in the relevant electorate.⁷⁴ BCRA also required disclaimers on such communications which identified the party paying for them, and public disclosure of contributions to that party and expenditures by it relating to such communications above certain dollar thresholds.⁷⁵ BCRA did not, however, reach other forms of communication, such as newspaper ads, telephone phone banks, direct mail, or Internet communications, although its supporters had originally hoped for a broader scope.⁷⁶

Numerous plaintiffs, including Citizens United, challenged the BCRA-imposed restrictions on constitutional grounds, including as violations of the First Amendment’s speech protection.⁷⁷ In *McConnell v. FEC*,⁷⁸ however, the Supreme Court upheld all of BCRA’s major provisions, including the ban on corporate contributions to political parties for federal election activity and on corporate funding of electioneering

73. Bipartisan Campaign Reform Act (BCRA) of 2002 §§ 101, 203, 116 Stat. 81, 82–86, 91–92 (codified at 2 U.S.C. §§ 431, 441b, 441i (2006)).

74. See BCRA § 201, 116 Stat. at 89-90 (codified at 2 U.S.C. § 434(f)(3) (2006)) (defining “electioneering communication”).

75. See BCRA §§ 201, 311, 116 Stat. at 88–89, 105–06 (codified at 2 U.S.C. §§ 434(f) (disclosure provisions covering contributors who contribute \$1,000 or more in aggregate and disbursements of more than \$200), 441d(a) (disclaimer provisions) (2006)).

76. See, e.g., Bipartisan Campaign Finance Reform Act of 1999, H.R. 417, 106th Cong. § 201(b)(20)(A)(iii) (1999) (expanding the definition of express advocacy to include any communication “expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events”).

77. *McConnell v. FEC*, 251 F. Supp. 2d 176, 220–21 n.55 (D.D.C. 2003) (listing the seventy-seven plaintiffs, including Citizens United), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003); Supplemental Brief for the Appellee at 5, *Citizens United v. FEC*, No. 08-205 (U.S. July 24, 2009).

78. 540 U.S. 93 (2003).

communications, albeit by five-to-four votes with respect to these holdings.⁷⁹ The majority opinion finding BCRA § 203 constitutional on its face explicitly relied on *Austin* for its conclusion and *Austin*'s anti-distortion rationale.⁸⁰

As was the case with *Buckley*, *McConnell* has not been the last word with respect to the constitutionality of BCRA's provisions, and BCRA's opponents have scored two partial victories in later decisions on free speech grounds. In an as applied challenge to the § 203 corporate funding ban for electioneering communications, a nonprofit corporation convinced the Court that the First Amendment required that the definition of electioneering communications be limited. In *FEC v. Wisconsin Right to Life, Inc.*⁸¹ (*WRTL*), the principal opinion, authored by Chief Justice Roberts, held that for these purposes the prohibition could apply only to electioneering communications that were the "functional equivalent" of express advocacy in that they were not susceptible to any reasonable interpretation except as an appeal to vote for or against a specific candidate.⁸² The opinion, which Justice Alito joined, rejected a broader definition of electioneering communications, concluding that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."⁸³ Commentators and seven of the nine Justices have taken the view that this narrowing of the constitutionally permitted definition for electioneering communications effectively overruled *McConnell* with respect to its BCRA § 203 holding, although the principal opinion did not explicitly do so.⁸⁴ The Court did not,

79. *Id.* at 93, 142–89 (2003) (upholding the constitutionality of the soft money provisions), 203–09 (upholding the prohibition on corporate (and union) funding of electioneering communications).

80. *Id.* at 205 (quoting the non-distortion theory as stated in *Austin*).

81. 551 U.S. ___, 127 S. Ct. 2652 (2007).

82. *Id.* at 2667, 2674.

83. *Id.* at 2669 (citation omitted).

84. *Id.* at 2684 (Scalia, J., concurring) (asserting that the principal opinion effectively overrules *McConnell* without saying so) (joined by Kennedy, J. and Thomas, J.); *Id.* at 2699 (Souter, J., dissenting) (concluding that the principal opinion reaches the "unacknowledged" result of overruling *McConnell*'s holding that BCRA § 203 is facially constitutional) (joined by Stevens, J., Ginsburg, J.,

however, reach the issue of whether this narrowed definition also applied for purposes of the disclaimer and disclosure requirements imposed on persons who pay for electioneering communications, as the plaintiff had not apparently raised this issue.⁸⁵

Second, the Court struck down as unconstitutional BCRA's so-called "millionaire's amendment" that had raised the contribution limits for donations to candidates facing certain self-funded opponents.⁸⁶ In reaching this latter conclusion in *Davis v. FEC*, the Court, in an opinion written by Justice Alito, reiterated the position taken over thirty-five years earlier in *Buckley*: Equalizing the financial position of election voices is not sufficiently important to justify infringement on speech.⁸⁷ This reasoning is important, as it could be critical in the *Citizens United* case, which is the next challenge to the limitations on corporate spending with respect to federal elections to be considered by the Court.

III. *CITIZENS UNITED V. FEC*

Citizens United is a nonprofit membership corporation that is tax-exempt under Internal Revenue Code § 501(c)(4).⁸⁸ As mentioned previously, while it receives the bulk of its funding from individual donors, it also receives a relatively small amount of contributions from for-profit corporations and so does not qualify as a MCFL corporation under the existing FEC-issued regulations implementing the *MCFL* decision.⁸⁹ In 2007, Citizens United produced a 90-minute movie titled *Hillary: The Movie*, that to put it mildly, was not supportive of then-Senator

and Breyer, J.); Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wis. Right to Life*, 92 MINN. L. REV. 1064, 1096–1103 (2008) (explaining why, as a practical matter, *WRTL* effectively overruled *McConnell* with respect to BCRA § 203).

85. *WRTL*, 551 U.S. ___, 127 S. Ct. at 2661 (2007).

86. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2765 (2008).

87. *Id.* at 2773–74.

88. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008) (denying motion for preliminary injunction).

89. *See supra* note 49.

Clinton's candidacy for the presidency.⁹⁰ The movie apparently did not constitute "express advocacy," however, and so could generally be funded by corporate funds.⁹¹

What brought Citizens United to court was a proposed use of the movie and planned advertisements. The proposed use was making the movie available nationwide through on-demand cable television at a time that would fall within the thirty-day pre-primary election electioneering communications window in many states.⁹² The planned advertisements, which would be broadcast on television, would also fall within one or more of the electioneering communications windows, but the FEC did not assert that these advertisements were functionally equivalent to express advocacy.⁹³ It therefore did not object to Citizens United paying for such ads, but only to Citizens United refusing to attach a disclaimer to those ads and disclosing its donors.⁹⁴ This objection arises from the FEC's position that *WRTL* did not narrow the definition of "electioneering communications" for purposes of either the disclaimer requirement or disclosure requirements.⁹⁵

A three-judge district court panel first heard Citizens United's motion for preliminary injunction—which it denied⁹⁶—

90. *Citizens United*, 530 F. Supp. 2d at 279–80 & n.12 (describing the movie's contents, quoting various excerpts, and ultimately concluding that it could not be reasonably interpreted as anything other than an appeal to vote against presidential candidate Clinton); *see also* Brief for Appellant, *supra* note 49, at 35–38 (arguing that the movie is not an appeal to vote, not contesting that it is critical of Hillary Clinton and noting it contains comments that are highly critical of her qualifications for the presidency).

91. While the Government has not completely conceded this point, its choice to focus solely on the argument that the movie is the functional equivalent of express advocacy under the *WRTL* test as opposed to actual express advocacy under the *Buckley* test strongly suggests the Government believes proving the movie was express advocacy would be difficult at best. *See* Brief for the Appellee, *supra* note 49, at 16–22 & n.6.

92. *Citizens United*, 530 F. Supp. 2d at 275.

93. *Id.* at 280.

94. *Id.*

95. Electioneering Communications, 72 Fed. Reg. 72,899, 72,901 (Dec. 26, 2007) (to be codified at 11 C.F.R. pts. 104, 114).

96. *Citizens United*, 530 F. Supp. 2d at 282 (denying Citizen United's motion for preliminary injunction).

and then cross motions for summary judgment, which it decided by granting the FEC's motion and denying Citizen United's.⁹⁷ While the timing of the summary judgment decision—July 2008—made the on-demand use and ads at issue in the case moot given then-Senator Barack Obama's nomination, the panel apparently recognized that the issues raised by Citizens United were capable of repetition and so should be addressed.⁹⁸ The panel concluded, based on its reasoning in its opinion denying the motion for preliminary injunction, that the FEC should prevail, finding that the movie was the functional equivalent of express advocacy, concluding that on-demand cable distribution was within the "broadcast, cable or satellite" communications definition of electioneering communications in BCRA as interpreted by the FEC, and agreeing with the FEC that *WRTL* did not control with respect to the disclaimer and disclosure requirements.⁹⁹ Citizens United then exercised its right to appeal the decision to the Supreme Court.¹⁰⁰

Both the parties' briefs and the briefs of the numerous amici curiae assumed for the most part that the Court would decide the appeal on relatively narrow grounds. For example, Citizens United stated the questions presented as whether the corporate funding prohibition for electioneering communication *as applied* to the movie was constitutional and whether the disclaimer and disclosure requirements *as applied* to the advertisements were constitutional.¹⁰¹ That is, Citizens United did not explicitly challenge either the prohibition or the requirements on their face but only with respect to these specific applications. And while Citizens United did attack *Austin*, it did so using only slightly

97. *Citizens United v. FEC*, No. 07-2240, Mem. Op. at 1 (D.D.C. July 18, 2008) (granting FEC's motion for summary judgment).

98. See Brief for Appellee, *supra* note 49, at 14 n.3 (agreeing that the appeal is not moot); see also *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2662–64 (2007) (discussing why the Court concluded the case fell within the disputes capable of repetition exception to mootness).

99. See *Citizens United*, No. 07-2240, *supra* note 97, at 1 (incorporating the reasoning of its prior opinion denying Citizens United's motion for preliminary injunction); *Citizens United v. FEC*, 530 F. Supp. 2d 274, 277 n.6, 280–81 (D.D.C. 2008).

100. See BCRA § 403(a)(3), 116 Stat. 81, 114 (2002).

101. Brief for Appellant, *supra* note 49, at i.

more than a page of its opening brief.¹⁰² The Government's brief was similarly limited, only briefly responding to the attack on *Austin* and taking the *McConnell* decision with respect to corporate funding of electioneering communications as a given, while focusing primarily on the as applied challenges to BCRA's applicability in this specific context.¹⁰³ As for the thirteen amici curiae briefs, eleven of which supported one or more aspects of Citizens United's case, only two criticized the holding in *Austin* and then did so only in passing.¹⁰⁴

It was therefore reasonable for most observers to conclude that while *Austin* was in theory on the table, even a decision in Citizens United's favor would likely turn on narrower issues.¹⁰⁵ In the wake of the oral argument, however, the Court had a different view, ordering re-argument and supplemental briefing on the continued validity of both *McConnell's* holding with respect to BCRA § 203 and *Austin*. Thus, the Court set the stage for striking down on free speech grounds the over sixty-year-old ban on corporate funding of independent expenditures or, less dramatically but still significantly, striking down the more recent ban on corporate funding of electioneering communications that the Court had found constitutional only six years earlier.¹⁰⁶ The next part discusses what the Court may in fact choose to do.

IV. WILL THE COURT OVERRULE *AUSTIN* OR (IN PART) *MCCONNELL*?

As the above summary indicates, *Citizens United* presents a host of legal issues and a similarly large number of paths that the Court could take to resolve the question it posed on June

102. *Id.* at 30–31.

103. See Brief for the Appellee, *supra* note 49, at 33–36.

104. See Brief of the American Civil Rights Union as Amicus Curiae Supporting Appellant at 19, *Citizens United v. FEC*, No. 08-205 (U.S. Jan. 15, 2009) (criticizing the holding in *Austin* in a single paragraph); Brief of Chamber of Commerce of the United States as Amicus Curiae Supporting Appellant at 24–25, *Citizens United*, No. 08-205 (U.S. Jan. 15, 2009) (arguing, in a little over a page and in its second-to-last point, that *Austin* should be overruled or at least not extended).

105. See *supra* note 2.

106. See Order in Pending Case, *supra* note 7.

29th. It therefore is helpful to first set aside the possible but, given its actions to date and the known positions of its various members with respect to campaign finance issues, unlikely ways that the Court could rule.

A. Avoiding the Issue

First, the Court could decide the case—whether for appellant *Citizens United* or appellee FEC—on relatively narrow, technical grounds that leave the fundamental structure of the nation’s campaign finance laws unchanged. For example, the Court could conclude that a ninety-minute long movie that is only available on demand is not the kind of cable communication that Congress intended to bar corporations from funding under BCRA § 203. Such a result would be consistent with the general statutory interpretation canon of constitutional avoidance.¹⁰⁷ Alternatively, the Court could conclude that regardless of Congress’s intent, BCRA § 203 cannot constitutionally be applied to this type of communication.¹⁰⁸ Or the Court could instead incrementally expand the *MCFL* exception to include ideological nonprofit corporations that receive only a relatively small portion of their support from business corporations or to permit such entities to pay for such communications up to the amount of their donations from individuals and leave the larger question of *Austin*’s continued viability with respect to for-profit corporations for another day, as urged by several amici and commentators.¹⁰⁹

107. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. ___, 129 S. Ct. 2504, 2513 (2009) (relying on the principle of constitutional avoidance); see generally Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance on the Roberts Court*, 4–10 (Loyola-LA Legal Studies Paper, Working Paper No. 2009-23, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436669.

108. See Brief for Appellant, *supra* note 49, at 22–29 (arguing that BCRA § 203 is unconstitutional as applied to a feature-length movie that is only available on demand).

109. Supplemental Brief for The American Civil Rights Union as Amicus Curiae Supporting Appellant at 2–3, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Brief of California First Amendment Coalition as Amicus Curiae Supporting Appellant at 2, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Brief of Independent Sector as Amicus Curiae Supporting Neither Party at 11–13, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Brief of National Rifle

The Government in fact argues that the Court must decide the case on one of these narrow grounds because, even with supplemental briefing, the validity of these precedents is not properly before the Court at this time because of the limited scope of the questions *Citizens United* presented in both its jurisdictional statement and initial brief.¹¹⁰ This result seems unlikely since the Court could have decided the case on such narrow grounds without ordering re-argument and supplemental briefing if it was so inclined or felt it had no choice but to do so.¹¹¹ That conclusion is reinforced by the fact that it appears such an order required the support of a majority of the Court, indicating that a majority of the Court is interested in reaching the more foundational issues raised by the precedents listed in the order.¹¹²

B. The Known and Possible Views of the Justices

It is therefore more likely that the Court will choose to address the continuing validity of *Austin* and the applicable part

Association as Amicus Curiae Supporting Appellant at 2–3, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Stuart Taylor Jr., *The Justices Should Excise the Unconstitutional Wellstone Amendment While Leaving the Restrictions on Business Corporations and Unions Intact*, THE NATIONAL JOURNAL, July 11, 2009; Kausfiles Blog, <http://www.slate.com/blogs/blogs/kausfiles> (June 30, 2009, 19:17 EDT); see also Brief of the American Civil Liberties Union as Amicus Curiae in Support of Appellant at 18–19, *Citizens United*, No. 08-205 (U.S. July 31, 2009) (urging the Court, in the alternative, to expand the *MCFL* exception if the Court does not overrule *Austin* entirely).

110. Supplemental Brief for Appellee at 3–5, *Citizens United*, No. 08-205 (U.S. July 24, 2009); see also *supra* note 101 and accompanying text (describing the questions presented by *Citizens United*).

111. See Richard L. Hasen, *Free Speech v. Campaign Finance Laws: The Reargument*, 36 PREVIEW U. S. SUP. CT. CAS. 472 (2009) (making this point).

112. This conclusion is based on the assumption that unless otherwise stated in the Rules of the Supreme Court, consent of a majority of the Court is needed to issue orders. There is, however, apparently a confidential internal handbook of procedures that could provide a different rule. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 272–73 (2009) (stating that the number of votes at conference required to call for the views of the Solicitor General is reportedly listed in this handbook, and public reports state that only four or possibly three votes are required).

of *McConnell* directly. With respect to these two topics, we have strong evidence regarding the views of most, but not all, of the Justices. Three Justices—Stevens, Ginsburg, and Breyer—continue to agree with the reasoning of *Austin* and that the existing limitations on corporate spending are constitutional.¹¹³ Three other Justices—Scalia, Kennedy, and Thomas—have flatly and repeatedly stated that the Court incorrectly decided both *Austin* and the relevant portion *McConnell*.¹¹⁴ Unless one or more of these Justices change their views, the views of the three most recently appointed Justices will likely decide this case.

Starting with Chief Justice Roberts, in *WRTL* he discussed the rationales that supported the conclusions in *Austin* and *McConnell* relating to corporate funding of express advocacy and the functional equivalent of express advocacy, but appeared only to accept those rationales as a given while refusing to extend them to communications that fall outside of these categories because such communications could be reasonably interpreted as having a purpose other than to influence the election of the identified candidate.¹¹⁵ He also carefully noted in *WRTL* that the

113. See, e.g., *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2781 (2008) (Stevens, J., concurring) (citing *Austin* with approval) (joined by Souter, J., Ginsburg, J., and Breyer, J.); *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting) (citing *Austin* with approval) (joined by Stevens, J., Ginsburg, J., and Breyer, J.); *id.* at 2692 (distinguishing *Austin* from *Bellotti*); *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (opinion by Stevens, J. and O'Connor, J.) (citing *Austin* with approval and in support of finding BCRA § 203 constitutional on its face) (joined by Souter, J., Ginsburg, J., and Breyer, J.); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring).

114. *WRTL*, 551 U.S. ___, 127 S. Ct. at 2679 (“*Austin* was a significant departure from ancient First Amendment principles. In my view, it was wrongly decided.”); *id.* at 2684 (Scalia, J., concurring) (“Today’s cases make it apparent . . . that *McConnell*’s holding concerning § 203 was wrong.”) (joined by Kennedy, J., and Thomas, J.); *McConnell*, 540 U.S. at 273–75 (Thomas, J., concurring in part and dissenting in part) (arguing BCRA § 203 is unconstitutional and that “I would overturn *Austin*”) (joined by Scalia, J.); *id.* at 323 (Kennedy, J., concurring in part and dissenting in part) (arguing BCRA § 203 is unconstitutional and stating “[i]nstead of extending *Austin* . . . I would overrule it”) (joined by Scalia, J.); *Austin*, 494 U.S. at 695–713 (Kennedy, J., dissenting) (joined by O’Connor, J. and Scalia, J.).

115. *WRTL*, 551 U.S. ___, 127 S. Ct. at 2071–74.

Court had “no occasion to revisit” the *McConnell* holding.¹¹⁶ Similarly, Justice Alito, while also being careful not to speak directly to the correctness of *Austin* or *McConnell*, raised in his *WRTL* concurrence the possibility that even the relatively narrow definition of electioneering communications established in that case might “impermissibly chill[] political speech” which would lead to the Court “presumably be[ing] asked in a future case to reconsider the holding in [*McConnell*] that [BCRA] § 203 is facially constitutional.”¹¹⁷ Justice Alito further stated, in the opinion for the Court in the *Davis* “millionaire’s amendment” case joined by Chief Justice Roberts, that providing “level electoral opportunities for candidates of different personal wealth” and reducing “*the natural advantage* that wealthy individuals possess in campaigns for federal office” are not legitimate government objectives, much less ones sufficiently important to justify restricting speech.¹¹⁸ The care taken to avoid commenting on the correctness of the *Austin* and *McConnell* decisions, combined with the skepticism of Justice Alito’s opinion in *Davis* about reducing wealth-driven inequalities in politics being even a legitimate government interest, suggest that both these members of the Court would be skeptical of claims based upon the reasoning in *Austin* and the portion of *McConnell* addressing BCRA § 203.

The position of Justice Sotomayor is less clear. She, not surprisingly, refused to address specific campaign finance issues, particularly relating to the *Citizens United* case, during her recent confirmation hearings.¹¹⁹ As a judge, she was involved in relatively few election law cases, only one of which squarely involved campaign finance issues, and in that case only as one of

116. *Id.* at 2674.

117. *Id.* (Alito, J., concurring).

118. *Davis*, 554 U.S. ___, 128 S. Ct. at 2773.

119. *See, e.g.*, The Nomination of Sonia Sotomayor to be an Associate of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009), available at <http://www.nytimes.com/2009/07/15/us/politics/15confirmt-text.html> (follow “Russ Feingold” hyperlink) (exchange with Senator Russ Feingold in which Judge Sotomayor declined to answer questions about the *Citizens United* case).

many judges voting to refuse en banc consideration.¹²⁰ While the effect of that vote was to leave in place Vermont's relatively strict campaign finance law limitations—limitations the Supreme Court ultimately ruled were unconstitutional infringements on speech¹²¹—it would be unwise to read too much into what was on its face a procedural, not a substantive, vote.¹²² Judge Sotomayor also served on the New York City Campaign Finance Board from 1988 through 1992, but since the opinions issued by that body were both highly dependent on local law and, for the most part, issued by the Board as a whole, little can be drawn from the Board's materials.¹²³ Perhaps the most telling piece of evidence is her questioning of whether the amount of private money in election campaigns is unduly influencing elected officials in a speech later published in a law review, but even that statement is from more than a dozen years ago and was a small part of a much broader discussion.¹²⁴ So while it appears, as most observers predict, that she will in general be to the "center-left" when it comes to election law issues, i.e., not necessarily dissimilar from now retired Justice Souter, that prediction is in

120. See Election Law Blog, <http://electionlawblog.org> (May 27, 2009, 22:05 PDT) (analyzing these cases).

121. *Randall v. Sorrell*, 548 U.S. 230 (2006).

122. See *Landell v. Sorrell*, 406 F.3d 159, 165–67 (2d Cir. 2005) (Sack, J. and Katzmann, J., concurring in decision to deny rehearing en banc) (stating the issue is not whether the panel majority or the dissent was right but whether the decision was of "exceptional importance" that justified the extraordinary step of an en banc rehearing, and whether such a rehearing would be a significant aid to the Supreme Court in the event it decided to consider the case) (joined by Sotomayor, J. and Parker, J.).

123. At least some commentators have tried with mixed results. Compare Charlie Savage, *A Long Record on Campaign Finance, Often in Support of Regulations*, N.Y. TIMES, May 30, 2009, at A8 (analyzing her views on campaign finance laws and attempting to draw conclusions from the limited public information about her role on the Board), and Posting of Kenneth P. Vogel to POLITICO, <http://dyn.politico.com> (May 28, 2009, 19:40 EDT) (same in post titled "Sotomayor no fan of campaign cash"), with Posting of Charlie Savage to The Caucus, <http://thecaucus.blogs.nytimes.com> (July 13, 2009, 21:15 EDT) (based on additional materials from the Board, noting that Sotomayor defended an interpretation of the law based on its plain meaning even in the face of objections that it would undermine campaign spending limits).

124. See Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 42 (1996).

many ways an educated guess.¹²⁵

So that leaves the Court with three *Austin* and *McConnell* supporters, three *Austin* and *McConnell* opponents, one possible additional supporter, and two probable additional opponents. Does this necessarily mean that both *Austin* and the relevant portion of *McConnell* are doomed? The answer to that question depends on whether one of the probable opponents, who have not as of yet flatly stated they would overrule *Austin* or *McConnell*, can be convinced there is a valid rationale for supporting the continued validity of those cases. There are several candidates for such a rationale, but the most persuasive for the probable opponents is ironically at risk of being undermined by some *Austin* and *McConnell* supporters: the doctrine of stare decisis. But first I will consider the other rationales.

C. Grounds for Upholding *Austin* and *McConnell*

The most obvious candidate, but also probably the least convincing one for the probable opponents, is the non-distortion theory asserted in *Austin* and relied upon in *McConnell*.¹²⁶ Both Chief Justice Roberts and Justice Alito have been careful not to directly criticize this theory, but both have limited its application and given other indications that they do not favor it.¹²⁷ In *WRTL*, Chief Justice Roberts, joined by Justice Alito, acknowledged this theory but refused to apply it to communications that were not considered either express advocacy or the functional equivalent of express advocacy under

125. See *supra* notes 120 & 123.

126. See *supra* notes 59, 80 and accompanying text.

127. In contrast, Justices Stevens, Ginsburg, and Breyer have not only endorsed it but indicated support for its extension. See *supra* note 113; *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2781 (Stevens, J., dissenting) (“There is no reason that . . . concerns about the corrosive and distorting effects of wealth on our political process . . . is not equally applicable in the context of individual wealth.”) (joined by Souter, J., Ginsburg, J., and Breyer, J.) (2007); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (Breyer, J., concurring) (citing the goal of “democratiz[ing] the influence that money itself may bring to bear upon the electoral process” as justifying contribution limits that infringed on speech) (joined by Ginsburg, J.) (2000).

that decision's relatively narrow definition of the latter term.¹²⁸ Similarly, Justice Alito, writing for the Court in *Davis*, refused to accept equalization of financial influence as a legitimate, much less compelling, governmental interest, citing Justice Kennedy's dissent in *Austin* as supporting that conclusion.¹²⁹ Moreover, both Justices also appear favorably inclined to the view that "corruption" for these purposes refers only to a quid pro quo arrangement, which is certainly the view of Justices Kennedy, Scalia, and Thomas.¹³⁰ In the *Davis* opinion joined by Chief Justice Roberts, Justice Alito cited with approval the earlier statement of Justice Thomas that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."¹³¹ Finally, Justice Alito has indicated a reluctance to permit relatively vague governmental interests to be the grounds for infringing on speech even in the special context of public schools.¹³² Likely for some or all of these reasons, the Government has chosen not to rely on the non-distortion theory in its supplemental brief but to instead argue that corporate spending on election-related communications in fact creates a significant risk of actual or perceived quid pro quo corruption.¹³³

The problem with the quid pro quo corruption approach is that it requires accepting the proposition that even truly independent activity—assuming that the new coordination rules enacted in the wake of BCRA in fact ensure that such activity is

128. *FEC v. WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2672–73 (2007).

129. *Davis*, 554 U.S. at ___, 128 S. Ct. at 2773.

130. *See WRTL*, 551 U.S. ___, 127 S. Ct. at 2671–72 (principal opinion) (characterizing this interest as "the quid-pro-quo corruption interest"); *id.* at 2676 (Scalia, J., concurring) (taking the position that the corruption referred to in *Buckley* "was of the 'quid pro quo' variety, whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official") (joined by Kennedy, J., and Thomas, J.).

131. *Davis*, 554 U.S. at ___, 128 S. Ct. at 2773 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428 (2008) (Thomas, J., dissenting)).

132. *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618, 2636–37 (2007) (Alito, J., concurring).

133. Supplemental Brief for the Appellee, *supra* note 110, at 8–12; *see also* Supplemental Reply Brief for Appellant at 1, *Citizens United v. FEC*, No. 08-205 (U.S. Aug. 19, 2009) (highlighting this aspect of the Government's brief).

not coordinated in any way with candidates or political parties¹³⁴—raises a sufficient risk of actual or perceived quid pro quo arrangements. This is an argument that appears only to have been explicitly agreed to by one Justice to date, Justice Stevens.¹³⁵ There is, however, some evidence of such a risk in the legislative history of BCRA, at least with respect to corporate independent activities.¹³⁶ The certain opponents implicitly rejected the sufficiency of this evidence, however, when they dissented in *McConnell*, and there is no indication that the probable opponents will be more open to it.¹³⁷ The Government recognizes this concern in its brief by suggesting that if the Court finds that previously gathered evidence insufficient, the proper resolution is a remand to the district court for discovery on this point.¹³⁸ Such a result seems unlikely, however, given the apparent interest of a majority of the Court in resolving these constitutional issues now (i.e., before the start of the next federal election primary season), as indicated by the scheduling of reargument for September 9, 2009, before the usual October start date for the Supreme Court's Term.¹³⁹

The quid pro quo approach also, like the non-distortion approach in *Austin*, requires that the Court be willing to distinguish between individual speakers—whom *Buckley* held Congress could not limit even with respect to their independent

134. See *supra* note 13 and accompanying text.

135. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring); see also *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (stating that independent expenditures are significantly less likely than contributions to be provided as a quid pro quo for improper commitments from a candidate); Supplemental Reply Brief for the Appellee 8–9, *Citizens United*, No. 08-205 (U.S. Aug. 2009) (arguing this statement from *Buckley* does not apply to “modern business corporations”).

136. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 555–60, 622–24 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part) (reviewing this legislative history), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

137. *McConnell*, 540 U.S. at 259 (Scalia, J., concurring in part and dissenting in part); *id.* at 273–75 (Thomas, J., concurring in part and dissenting in part); *id.* at 323 (Kennedy, J., concurring in part and dissenting in part).

138. Supplemental Brief for the Appellee, *supra* note 110, at 11–12.

139. See Order in Pending Case, *supra* note 7 (scheduling reargument for Sept. 9, 2009).

expenditures for express advocacy¹⁴⁰—and corporate speakers. In other words, as Richard Pildes has commented, perhaps the way to resolve this case is to reject applying to the candidate-election context *Bellotti*'s conclusion that the identity of the speaker is irrelevant.¹⁴¹ Pildes notes that existing law already makes this distinction in another way: foreign nationals who are not permanent residents cannot make contributions to candidates or fund their own independent expenditures.¹⁴² While these restrictions on foreign nationals have not been subject to constitutional challenge, if it is assumed they would be upheld the most likely rationale for doing so would be that the identity of the speaker does matter for constitutional purposes in the candidate-election context, even if it does not in *Bellotti*'s ballot initiative election context.¹⁴³ If that is the case, then it is plausible to at least consider whether the fact that the speaker is an individual or a corporation should also matter, given the different characteristics inherent in these two types of entities.¹⁴⁴

In *Austin*, the Court found that the legal advantages corporations enjoy—"limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets"—give corporations a political advantage over individuals, particularly since the accumulation of wealth aided by these advantages is "not an indication of popular support for the corporation's political idea."¹⁴⁵ In the Court's view, it was this

140. See *supra* note 33 and accompanying text. Despite the skepticism of perhaps a majority of the Court toward the *Buckley* contribution-expenditure divide, see *supra* note 36, *Buckley*'s continued viability is not at issue in *Citizens United*.

141. See Posting of Rick Pildes to Election Law Blog, http://electionlawblog.org/archives/2009_07.html (July 8, 2009, 8:25 PDT) (guest post by Rick Pildes, cited with permission).

142. *Id.*; see also 2 U.S.C. § 441e (2006).

143. See 2 U.S.C.A. § 441e (West 2009), Notes of Decisions (not listing any constitutional challenges to the prohibition on campaign contributions and independent expenditures by non-resident foreign nationals).

144. See *infra* notes 145–46, 154 and accompanying text; *supra* note 44 and accompanying text.

145. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658–59 (1990) (citation omitted). For a discussion of the more fundamental views of corporations that are arguably implicit in the positions of the various Justices in *Bellotti* and *Austin*, see Charles D. Watts, Jr., *Corporate Legal Theory Under*

aspect of corporations that lead to the risk of “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth,” the prevention of which provides a sufficiently important governmental interest to justify the prohibition on corporate independent expenditures.¹⁴⁶ It could similarly be argued the same distinctive, corporate characteristics create a risk of quid pro quo corruption or appearance of such corruption that does not exist with individuals who pay for express advocacy or its functional equivalent. While it would be hyperbole to say *all* for-profit corporations share this risk—there are, of course, many unsuccessful corporations—it is a plausible argument that the tendency for such corruption or at least the appearance of such corruption is significantly greater for corporations as compared to for individuals generally. As for nonprofit corporations that likely do not share these for-profit corporation characteristics, the Court has already exempted some of them in the *MCFL* case and could, as some have urged, expand that exemption at least for nonprofit corporations that create little risk of serving as conduits for for-profit corporation spending.¹⁴⁷

If the Court were writing on a blank slate, this is a potentially convincing rationale that might sway one or both of the probable opponents. Any hope *Austin* supporters might have for this result is foreclosed, however, by the continued vitality of *Bellotti*. Neither Chief Justice Roberts nor Justice Alito seems inclined to question *Bellotti*. In *WRTL*, Roberts stated “[a]ccepting the notion that a ban on campaign speech could also embrace issue advocacy would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights.”¹⁴⁸ And in *Davis*, Justice Alito cited *Bellotti* favorably with respect to its statements

the First Amendment: Bellotti and Austin, 46 U. MIAMI L. REV. 317, 362 (1991). For the sake of brevity, this Article does not discuss the related but separate issue of the exception for news stories and other media communications, including such communications paid for by media corporations. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i) (2006).

146. *Austin*, 494 U.S. at 660.

147. See *supra* note 109 and accompanying text.

148. *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2673 (2007).

holding that the government generally cannot choose what speakers are permissible and what speakers are not.¹⁴⁹

It is true that the Court in *Bellotti* carefully noted that its decision did not reach the prohibition on both corporate campaign contributions and corporate independent expenditures also contained in the statute at issue but not challenged by the appellants.¹⁵⁰ The Court's basis for distinguishing that prohibition was, however, merely that

our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.¹⁵¹

For reasons already discussed, the evidence Congress has been able to muster is unlikely to be persuasive to a majority of the Court, nor is that majority likely to be open to waiting on the accumulation of more such evidence.¹⁵²

While it could also be argued—and the Government does in fact argue¹⁵³—that investors in for-profit corporations do not, at least usually, invest because of the political stands of a for-profit corporation and so are at risk of having their funds “hijacked” for a political activity not of their choosing, the Court in *Bellotti*

149. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2773–74 (2008).

150. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 787–88 & n.26 (1978). *But see* JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 185–88 (2003) (supporting limits on corporate spending with respect to elections but concluding that *Bellotti* is probably inconsistent with such limits even for candidate elections).

151. *Bellotti*, 435 U.S. at 788 n.26 (citations omitted).

152. *See supra* notes 136–39 and accompanying text; *WRTL*, 551 U.S. ___, 127 S. Ct. at 2678 n.4 (Scalia, J., dissenting) (rejecting reliance on this footnote in *Bellotti* by stating “[n]o one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures”). It appears, however, that Justice Stevens does seriously believe exactly this. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring).

153. Supplemental Reply Brief for the Appellee, *supra* note 135, at 7–8; Supplemental Brief for the Appellee, *supra* note 110, at 12–13.

rejected such concerns because it found the prohibition at issue in that case both under- and over-protected shareholders.¹⁵⁴ The same criticism applies to the prohibitions at issue in the current case: many potentially objectionable political expenditures are not covered by the prohibitions—e.g., communications that are the functional equivalent of express advocacy but are not covered by BCRA § 203 because they are made through media other than broadcast, cable, or satellite communications—while a corporation with politically united shareholders who authorized the corporate electioneering communication or express advocacy would still be prohibited from paying for such communications.¹⁵⁵ Finally as noted previously, the different treatment of foreign nationals who are not permanent residents has never been tested in court (and may be constitutionally permitted for reasons that are not applicable to corporations even if it were so tested), and the sole dissenter from *Bellotti*'s reasoning that the identity of the speaker is irrelevant appears to have later abandoned that view (and is no longer on the Court).¹⁵⁶ And unlike *Austin*, none of the current Justices appears to have ever questioned the reasoning of *Bellotti*, only whether that reasoning applies in the candidate-election context.¹⁵⁷ For all of these reasons, therefore, it appears unlikely that this argument will win the day.

Is there another rationale that has not yet been considered by the Court for distinguishing corporations from individuals that could support the holdings if not the reasoning in *McConnell*

154. *Bellotti*, 435 U.S. at 793–94. *But see* *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (citing this reason as supporting the ban on corporate campaign contributions).

155. This reasoning parallels the reasoning provided in *Bellotti*.

156. *See supra* note 58 and accompanying text; *supra* notes 142–43.

157. *See, e.g., WRTL*, 551 U.S. at ___, 127 S. Ct. at 2673; *see also* *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2773–74 (2008) (showing instances where Chief Justice Roberts and Justice Alito cited *Bellotti* favorably); *WRTL*, 551 U.S. ___, 128 S. Ct. at 2677 (Scalia, J., dissenting) (citing *Bellotti* favorably); *id.* at 2692 n.7 (Souter, J., dissenting) (distinguishing *Bellotti* from *Austin* on the grounds that *Austin* applied to the candidate-election, but not suggesting that the Court wrongly decided *Bellotti*). Some scholars have, however, asserted that *Bellotti* is out-of-line with both the First Amendment and the Court's previous cases and so should be overruled. *See, e.g.,* RASKIN, *supra* note 150, at 186–94; Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361 (2004).

and *Austin*? It could be argued that another ground for making this distinction is that, unlike individuals, corporations are not voters and so have no inherent right to influence elections. The main problems with this argument are that it both runs contrary to the holding in *Bellotti* given that corporations have no more right to vote for ballot initiatives than for candidates. It thus appears unlikely that this voter-based argument would be persuasive to a majority of the Court.

Even if, as it appears likely, there are five Justices who reject the non-distortion rationale for treating corporate speakers differently from individual speakers, the Government's quid pro quo corruption rationale for doing the same, and other grounds for treating corporate speakers differently from individual speakers, there is one remaining argument for at least leaving *Austin*, however. That rationale is the doctrine of stare decisis.

D. Stare Decisis

Stated briefly, the doctrine of stare decisis provides that courts should follow their own, previous decisions unless there are sufficient reasons to do otherwise.¹⁵⁸ Reasons for the doctrine include that it "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."¹⁵⁹ Relevant considerations include not only the correctness of the previous case's reasoning, but its age, the reliance interests at stake, and the workability of the decision in practice.¹⁶⁰ Other valid considerations include whether there has been an important change in circumstances, whether the decision has been undermined by later decisions, and whether constitutional issues are at stake.¹⁶¹ Applying the

158. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), stating that even when constitutional rights are at issue a departure from precedent requires some "special justification" (citation omitted)).

159. See *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (citations omitted) (2006).

160. See *Montejo v. Louisiana*, 556 U.S. ___, 129 S. Ct. 2079, 2088–89 (2009).

161. See *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 1728 (2009) (Alito,

doctrine can be difficult, however, because, perhaps not surprisingly, not only do the Justices often disagree over the strength of the underlying facts relating to each of these considerations in a given case but also with respect to the relative weight to be accorded each of the considerations.¹⁶² Furthermore, none of the three certain opponents is likely to be swayed by a stare decisis argument given each has already clearly taken the position that *Austin* and the relevant portion of *McConnell* should be overruled.¹⁶³

That said, there is reason to believe that at least Justice Alito could be swayed by a stare decisis argument. In a recent search and seizure case, Justice Alito wrote an extensive dissent chiding the majority for failing to respect past precedent and carefully walking through the relevant factors for applying stare decisis.¹⁶⁴ He also criticized some of his colleagues for their alleged selective use of stare decisis when they chose to rely on it in a later case (involving criminal procedure) even though they had rejected its application in the earlier search and seizure case.¹⁶⁵ At the same time, he criticized Justice Scalia's "narrow view" of stare decisis in the earlier case.¹⁶⁶ That view was essentially that bad reasoning leading to incorrect results is by itself sufficient grounds for overruling precedent.¹⁶⁷ Assuming, as these opinions

J., dissenting).

162. For the most recent examples of sharp disagreements between the Justices regarding the applicability of stare decisis, see the various opinions in *Montejo*, 556 U.S. ___, 129 S. Ct. 2079, and *Gant*, 556 U.S. ___, 129 S.Ct. 1710.

163. *Supra* note 114; see also *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2685-86 (2007) (Scalia, J., concurring) (concluding that stare decisis considerations are not sufficient to justify leaving *McConnell*'s holding with respect to BCRA § 203 in place) (joined by Kennedy, J., and Thomas, J.).

164. *Gant*, 556 U.S. ___, 129 S. Ct. at 1726-32 (Alito, J., dissenting).

165. *Montejo*, 556 U.S. ___, 129 S. Ct. at 2093-94 (Alito, J., concurring). Justice Alito's position in this case appears to be that contrary to the dissent's assertions, the Court did in fact correctly determine that stare decisis should not control. See *id.* at 2088-91 (majority opinion) (explaining why stare decisis does not require upholding the precedent under discussion) (joined by Alito, J.).

166. *Id.* at 2093.

167. *Gant*, 556 U.S. ___, 129 S. Ct. at 1725 (Scalia, J., concurring) (stating in the face of Justice Alito's appeal to stare decisis, stating that there is "ample reason" to abandon prior precedent when "the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results"); see also *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618, 2634-36 (2007) (Thomas, J.,

indicate, that Justice Alito is likely to give serious consideration to *stare decisis* and not likely to accept the position that poor reasoning is by itself sufficient grounds to overrule a precedent, the question is then whether application of that doctrine will garner his critical fifth vote to uphold either *Austin* or *McConnell*.¹⁶⁸

With respect to overturning *Austin*, four factors militate towards upholding it: (1) the age of *Austin* and the law it supports, which is traceable back over 60 years; (2) the fact that political actors have adjusted their behavior due to the law in *Austin*;¹⁶⁹ (3) the fact that *Bellotti*, which seemingly cuts against *Austin*, was decided prior to *Austin* and therefore does not impact *Austin*'s authority; and (4) the fact that there have been no changes in the relevant circumstances that would warrant a review of *Austin*'s justification even if one believes its reasoning is correct (as Justice Alito likely does¹⁷⁰). The other commonly considered *stare decisis* factor is reliance, and it is less clear how that factor cuts. It could be argued that given the ever-changing political (and indeed campaign finance law) landscape election-participants and corporations could easily adjust their activities in the next round of elections to reflect an overruling of *Austin*. It could and in fact has been argued, however, that not only have election-participants made plans based on the continued viability of *Austin* but both Congress and the state legislatures that have enacted bans on corporate funding of independent expenditures have structured their campaign finance laws at least in part in reliance on *Austin* being good

concurring) (appearing to suggest that the longstanding student free speech precedent of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) should be overruled simply because it is wrong).

168. Assuming Justice Sotomayor votes to uphold these decisions, as seems likely. See *supra* note 120, 123 and accompanying text. Such serious consideration does not, of course, guarantee that precedent will be upheld. See, e.g., *Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808, 816–18 (2009) (Justice Alito, writing for a unanimous Court, concluding after consideration of *stare decisis* that a precedent should be overruled because of a lack of reliance, inconsistent application by the lower courts, and repeated criticism from members of the Court.).

169. See *infra* note 175.

170. See *supra* note 118 and accompanying text.

law.¹⁷¹ Given this at least modest amount of reliance, as well as the other considerations already cited, there therefore appears to be a reasonably strong argument for upholding *Austin* on stare decisis grounds.

As Ned Foley has pointed out, however, the application of the doctrine to defend *Austin* is complicated not only by the fact that a constitutional interpretation is at issue—which tends to weaken the case for observing stare decisis¹⁷²—but also by the fact that unlike many other Supreme Court precedents that affect only a relatively narrow range of activities, campaign finance precedents such as *Austin* potentially implicate the very functioning of our democratic system.¹⁷³ The constitutional harm from leaving an erroneous *Austin* decision in place is therefore, at least potentially, substantial in way that leaving other erroneous precedents in place may not be.¹⁷⁴ But there are strong reasons to conclude that potential has not been realized.

First, it is important to remember that the existing prohibition on corporate funding of independent expenditures and electioneering communications only reaches a relatively narrow range of election-related activities (although the potential amount of affected speech may be large in an absolute sense). As Congress documented while considering BCRA, many apparently effective election-related communications are not considered express advocacy and so, prior to BCRA, could still be funded by corporations.¹⁷⁵ While BCRA forbids corporate (and union)

171. Several of the amicus curiae briefs supporting *Austin* make similar points. See, e.g., Brief of Campaign Legal Center et al. as Amici Curiae at 19-22, *Citizens United v. FEC*, No. 08-205 (U.S. July 31, 2009); Supplemental Brief of Senator John McCain, *supra* note 25, at 4-7; Brief of the States of Montana, et al. at 5-13, *Citizens United*, No. 08-205 (U.S. July 31, 2009). But see Suppl. Brief of Cato Institute as Amicus Curiae at 17-20, *Citizens United*, No. 08-205 (U.S. July 31, 2009) (arguing against the application of stare decisis).

172. See *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

173. See Edward B. Foley, *Citizens United, Stare Decisis, and Democracy*, FREE & FAIR, July 31, 2009, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=6631>.

174. Some might disagree with Foley's use of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), as one example of upholding precedent that only relates to a narrow field of social policy. See Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

175. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 526-32 (D.D.C. 2003)

funding of some of those communications, it only reached certain specific broadcast, cable, and satellite communications, not communications through other media, and not communications outside of the relevant time windows.¹⁷⁶ And the reach of BCRA was further limited by the *WRTL* decision.¹⁷⁷ Therefore, there appears to still be a relatively broad range of election-related communications that corporations can, and in fact have, funded even with the *Austin*- and *McConnell*-backed prohibitions in place.

Some of the supporters of *Austin*, however, risk undermining this argument by predicting an electoral meltdown if the Court overrules *Austin*. For example, various amici curiae predict that “[o]verturning *Austin* [w]ould [r]adically [a]lter [h]ow [e]lections [a]re [c]onducted and [f]inanced,”¹⁷⁸ “will dramatically alter the campaign finance landscape,”¹⁷⁹ and will “transform the conduct of elections in this country.”¹⁸⁰ If I am correct that the stare decisis argument is the most likely one to garner a fifth vote to uphold *Austin* given that a majority of the Court probably believes *Austin* was wrongly decided, such statements only serve to make a case for how big an effect *Austin* had on speech and so on First Amendment rights. Such “sky is falling” statements also appear to be wrong, for reasons described in Part V below based on both the pre-BCRA environment and the situation in states which do not prohibit corporate-funded independent

(reviewing this legislative history) (Kollar-Kotelly, J.), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003).

176. See *supra* notes 74, 76 and accompanying text.

177. See *supra* notes 81–84 and accompanying text.

178. Brief of Campaign Legal Center et al. as Amici Curiae, *supra* note 171, at 6; see also *id.* at 7 (comparing the total net worth of U.S. corporations and their total annual profits to the amount of campaign funds raised by the Democratic presidential nominee, implying that a substantial portion of the former amounts would find their way into the electoral process if the Court overruled *Austin*).

179. Supplemental Brief of the Center for Political Accountability et al. as Amici Curiae in Support of Appellee at 4, *Citizens United v. FEC*, No. 08-205 (U.S. July 30, 2009); see also *id.* at 8 (citing ExxonMobil’s profits).

180. Supplemental Brief of Representatives Chris Van Hollen et al. as Amici Curiae in Support of Appellee at 3, *Citizens United*, No. 08-205 (U.S. July 31, 2009).

expenditures.¹⁸¹ If these statements are in fact wrong, that fact provides further support for the application of stare decisis to preserve *Austin* even if, as a majority Court seems likely to conclude, it was wrongly decided.

The stare decisis argument is less compelling with respect to the relevant portion of *McConnell*, however. Both the decision itself and BCRA § 203 have only been in place for three federal election cycles, and the Court has already significantly limited the effect reach of this portion of *McConnell* in the subsequent *WRTL* decision.¹⁸² Furthermore, there are arguably significant questions regarding the workability of the *WRTL*-adopted definition of electioneering communications in the minds of at least several of the Justices including, most critically, Justice Alito.¹⁸³ So even though the constitutional harm caused by leaving *McConnell*, and therefore § 203, in place is probably relatively minimal, it appears likely that if a majority of the Court believes the Court incorrectly decided this part of *McConnell*, the doctrine of stare decisis will not provide much support for nevertheless leaving that holding intact.

E. Conclusion

If, however, both Chief Justice Roberts and Justice Alito reject this stare decisis argument, then it appears likely that a

181. See *infra* notes 192–94 and accompanying text.

182. See *supra* notes 81–84 and accompanying text.

183. In his *WRTL* concurrence, Justice Alito suggested he might be willing to revisit *McConnell* if the *WRTL* standard could be shown to “impermissibly chill[] political speech.” *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2674 (2007) (Alito, J., concurring); see also *id.* at 2679–84 (Scalia, J., concurring) (arguing that the *WRTL* standard and indeed any definition of “functional equivalent of express advocacy” is unworkable). For this reason, if a majority of the Court concludes that the Court wrongly decided *McConnell* with respect to BCRA § 203, it is also highly unlikely to uphold that statute based on a “backup” definition for electioneering communications provided by Congress that in fact is very similar to the *WRTL* definition except it lacks the time limits contained in the primary definition. See 2 U.S.C. § 434(f)(3)(ii) (2006) (“If clause (i) is held to be constitutionally insufficient . . . then the term ‘electioneering communication’ means any broadcast, cable, or satellite communication which promotes or supports a candidate . . . or attacks or opposes a candidate . . . and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.”).

majority of the Court will choose to reject either or both of the cited precedents.¹⁸⁴ Rejection of only the *McConnell* holding relating to corporate funding of electioneering communications is all that is necessary to resolve the issue of whether Citizens United can distribute the movie through video on-demand, and the careful attempts by Chief Justice Roberts and Justice Alito to avoid explicitly overruling precedents in the campaign finance area would suggest that a limited overruling may be more likely if—and this is a big if—they continue to follow this approach.¹⁸⁵ The fact that they presumably supported the re-argument and supplemental briefing on these precedents does not necessarily mean that they will completely abandon this approach by supporting the overruling of *Austin* as well, as it may simply be that the narrow, technical ways of resolving this case implicitly rejected by the Court were not attractive particularly after the March 2009 oral argument.¹⁸⁶ Such a result also does not necessarily require defending *Austin* or the distinction between express advocacy and the functional equivalent of express advocacy, since only the later is at issue in this case. Rather, the Court could simply leave re-visiting *Austin* for another day, although almost certainly over the objections of Justices Scalia, Kennedy, and Thomas.¹⁸⁷ It is certainly possible, however, that Chief Justice Roberts and Justice Alito will join the three certain opponents in abandoning this cautious approach to overrule *Austin* as well. The next part considers the possible ramifications if the Court does in fact overrule one or both of these precedents.

184. Nothing in the oral re-argument of the case, held on September 9, 2009, would indicate a different conclusion; in fact, neither Chief Justice Roberts nor Justice Alito gave any indication they would be particularly open to a stare decisis argument.

185. See *supra* notes 116–17 and accompanying text.

186. To be fair to the government's attorney, the statements at oral argument were consistent with statements in its brief regarding the constitutional scope of Congress' authority in this area. See Brief for the Appellee, at 14–16, *Citizens United v. FEC*, No. 08-205 (U.S. Feb. 17, 2009).

187. See *WRTL*, 551 U.S. ___, 127 S. Ct. at 2678–79 (Scalia, J., concurring).

V. RAMIFICATIONS IF THE COURT OVERRULES
MCCONNELL (IN PART) OR *AUSTIN*

If the Court overrules only the relevant part of *McConnell*, it is not clear that it will have a significant effect on elections given the Court's earlier *WRTL* decision that significantly limited the reach of BCRA § 203.¹⁸⁸ Such a decision would also likely leave BCRA's electioneering communication disclaimer and disclosure provisions unscathed for reasons discussed below.¹⁸⁹ Furthermore, a decision that only overruled *McConnell* but stopped short of overruling *Austin* might signal an end to the current Court's revisiting of constitutional decisions relating to campaign finance, thereby leaving the bulk of federal (and state) election law intact, although it also might only be a way station on the road to further limitations on Congress's authority in this area.¹⁹⁰

Overruling *Austin* would have a far greater immediate effect, as not only would it have the effect of overruling *McConnell* with respect to BCRA § 203, but it would free corporations (and likely unions) to make unlimited independent expenditures. I argue below, however, that the impact on elections would not be as dramatic as some have asserted, as it is far from clear how much new corporate (and likely union) spending would result as opposed to simply shifting such spending from currently unregulated, election-related activity.¹⁹¹ More significantly, such a step could foreshadow even more dramatic decisions with respect to campaign finance laws relating to both limitations on contributions to political committees engaged in independent expenditures and with respect to corporate contributions to both political parties and candidates' campaigns. Such further steps are not inevitable, however. Third and finally, overruling *Austin* would likely place substantial pressure on a separate body of law: the federal tax rules governing the political activities of tax-

188. See *supra* notes 81–84 and accompanying text.

189. See *infra* notes 219–23 and accompanying text.

190. See Hasen, *supra* note 84, at 1066–67 (predicting that the current Court will be favorably disposed to numerous campaign finance law challenges).

191. See *infra* notes 195–204 and accompanying text.

exempt organizations—the vast majority of which are nonprofit corporations—particularly if the Court also strikes down the disclosure provisions currently applicable to independent expenditures and electioneering communications.

A. Ramifications for Elections

If the Court only overrules the part of *McConnell* relating to BCRA § 203, it will return campaign finance laws for independent activities to their pre-BCRA state. That will presumably mean a return to at least the volume of election-related communications that stopped short of express advocacy which existed prior to BCRA. The amount of spending on communications reached by BCRA even pre-*WRTL* was probably in the neighborhood of \$100 million per two-year election cycle, based on spending on political advertising by groups acting independently of candidates and political parties.¹⁹² That figure compares to total contributions in each of the 2000 and 2002 federal election cycles reported to the FEC, not including soft money contributions to political parties or permitted contributions for independent expenditures of over a billion dollars.¹⁹³ And presumably at least some of those funds have been spent in other ways even after BCRA, such as on election-

192. See David B. Magleby & J. Quin Monson, *The Last Hurrah?: Soft Money and Issue Advocacy in the 2002 Congressional Elections*, in *THE LAST HURRAH?: SOFT MONEY AND ISSUE ADVOCACY IN THE 2002 CONGRESSIONAL ELECTION* 1, 2–3 (David B. Magleby & J. Quin Monson, eds., 2003), available at <http://csed.byu.edu/Assets/Pew/2002%20Monograph.pdf> (describing issue advocacy, i.e. non-express advocacy, in the last federal election before BCRA that appeared to be at or slightly above the levels during the 2000 election); Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections: Executive Summary* 13 (2001), available at http://brennan.3cdn.net/efd37f417f16ee6341_4dm6iid9c.pdf (reporting television spending by special interest groups, which would presumably include both permitted independent expenditures by MCFL corporations and advertising outside of the BCRA time windows as well as BCRA-covered electioneering communications, at just under \$100 million).

193. See FED. ELECTION COMM'N, ANNUAL REPORT 2002, 50–51, 55 (2003) (reporting candidate and political party “hard money” receipts for the 2002 election cycle); FED. ELECTION COMM'N, ANNUAL REPORT 2000, 58, 62, 65–66 (2001) (reporting candidate and political party “hard money” receipts for the 2000 election cycle).

related communications that used avenues other than broadcast, cable, or satellite or avoided the BCRA time windows.¹⁹⁴ So while a determination by the Court that *McConnell* was incorrect in that BCRA § 203 is unconstitutional will widen the already existing cracks in the corporate spending dam, it will do so only marginally.

If, on the other hand, the Court overrules *Austin* then a broader range of communications will now be fundable with corporate—and presumably union—moneys.¹⁹⁵ It is unrealistic, however, to expect that ExxonMobil or GE or Microsoft, or for-profit corporations collectively, will suddenly start pumping billions of dollars into election-related ads in this situation. Even when corporate funding of election-related activities was subject to much fewer restrictions, business corporations did not demonstrate anywhere near this level of spending. As already noted, pre-BCRA levels of independent spending that was not for express advocacy—and so not prohibited—were significant but still relatively modest compared to overall spending.¹⁹⁶ Furthermore, even under current law, corporations can both inform the public, in a limited way, that they have endorsed a particular candidate and communicate freely about that endorsement with their shareholders and senior employees, but the vast majority of corporations appear not to have taken advantage of this freedom.¹⁹⁷ Perhaps most telling is the evidence

194. See Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT* 112, 113–14 (Michael J. Malbin ed., 2006) (concluding that BCRA's electioneering communication rules had "marginal effects" on interest group advertising in 2004 because many groups shifted their ads to before the BCRA 60-day general election time windows and also to voter mobilization as opposed to television ads).

195. If the Court concludes that the First Amendment prohibits limits on corporate independent expenditures, thereby rejecting the various rationales previously discussed, it is difficult to see how it could reach a different conclusion with respect to unions. See *supra* Part II.C; see also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 665–66 (1990) (upholding Michigan's decision to bar independent expenditures by corporations but not unions by concluding that unions do not have all of the characteristics of corporations that raise distortion concerns).

196. See *supra* notes 192–94 and accompanying text.

197. See *FEC*, *supra* note 63, at 87–88.

of corporate independent expenditure relating to state and local elections in states that do not prohibit such spending.¹⁹⁸

A 2008 report by the California Fair Political Practices Commission (FPPC), provocatively titled *Independent Expenditures: The Giant Gorilla in Campaign Finance*, found that from 2001 through 2006, or during three election cycles, total independent expenditures were \$88 million.¹⁹⁹ It should be noted that approximately ten percent of this figure included spending traceable to individuals, as opposed to corporations, unions, or other entities.²⁰⁰ Assuming this report's figures are accurate—and its title certainly suggests a bias toward, if anything, inflating these figures—this spending pales in comparison to the over \$750 million dollars raised by state and legislative candidates during the same three election cycles.²⁰¹ So even in the most populous state, with unlimited corporate and union funding of independent expenditures permitted, such expenditures do not dominate the campaign finance landscape. The data that is readily available from other states indicates similar patterns; independent expenditures (some of which may

198. See *supra* note 25. There do not appear to be any studies regarding whether corporate and union funded independent expenditures result in increased corruption at the state and local level or change public perceptions of government, although there is at least one study testing whether there was a correlation between views of government and some common campaign finance laws (public disclosure of campaign contributions, limits on contributions by organizations, limits on contributions by organizations and individuals, public subsidies to candidates that abide by expenditure limits, and mandatory expenditures limits (pre-*Buckley*)); it found at most a minor correlation for some but not all of the laws. See David M. Primo & Jeff Milyo, *Campaign Finance and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 34–35 (2006).

199. CAL. FAIR POL. PRACTICES COMM'N (FPPC), *INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE* 3 (2008), available at <http://www.fppc.ca.gov/ie/IEReport2.pdf>.

200. *Id.* at 22.

201. FPPC, *THE BILLION DOLLAR MONEY TRAIN: FUNDRAISING BY CANDIDATES FOR STATE OFFICE SINCE VOTERS ENACTED CONTRIBUTION LIMITS* 34 (2009), available at http://www.fppc.ca.gov/reports/billion_dollar_money_train.pdf. The billion dollars referred to in the title is the total amount raised during the past four election cycles (2001 through 2008). *Id.* at 3. The report also states that there were \$110 million in independent expenditures during those four election cycles, but does not provide information regarding how much of such expenditures can be traced back to individuals. *Id.* at 24.

originate with individual donors) are generally much less than candidate contributions.²⁰² That said, it is true that careful targeting of such expenditures can lead to them representing a significant proportion of the spending in a given race.²⁰³ But the reality appears to be there is less water behind the already leaking corporate (and union) independent expenditure dam than some suggest.²⁰⁴

There are a number of likely reasons for these limited contributions: the ever increasing but still limited amount of money that can be spent effectively during the election season, the negative ramifications for both a business corporation and the candidates it would like to see elected if it is perceived as having “bought” the election, and so on. (For the reasons detailed in the next section, the disclaimer and disclosure provisions of both BCRA and applying to independent expenditures are likely to survive even an overruling of *Austin*.²⁰⁵) But whatever the reasons, this limited past involvement argues against a sudden ten-figure flood of corporate funds into federal elections.

B. Ramifications for Election Law

The Supreme Court’s decision in *Citizens United* potentially could have a much more fundamental effect on election law generally and so on elections in the long-term. Whether this potential is realized turns in part on whether the Court limits itself to overruling *McConnell* or also overrules *Austin*. The overruling of *McConnell* would represent the rejection of a relatively new precedent—less than eight years old—and one that has already been sharply curtailed by the subsequent *WRTL*

202. See NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, INDEPENDENT EXPENDITURES, 2006 5–6 (summarizing data from five states, including California) (2007), available at <http://www.followthemoney.org/press/ReportView.phtml?r=333>.

203. See *id.* at 27 (noting that in Washington state independent expenditures relating to three Supreme Court races totaled more than the total amount of contributions to the six candidates in those races); FPPC, *supra* note 199, at 4 (noting that in some California state legislative races independent expenditures totaled up to half of the funds available in each race).

204. See *supra* notes 178–80 and accompanying text.

205. See *infra* notes 219–23.

decision.²⁰⁶ Furthermore, a choice by the Court to step back from overruling *Austin* might suggest that a majority of the Court is willing to accept the pre-*McConnell* legal landscape as in fact constitutional or, at least, that *Austin* is due respect as established precedent. Certainly much of the parsing of the opinions under this scenario would be to see whether Chief Justice Roberts and Justice Alito either write or join opinions that support *Austin* or simply, as they did with respect to *McConnell* in *WRTL*, carefully avoid opining on *Austin*.²⁰⁷

If the Court were to overrule *Austin*, the likely election law ramifications are much more significant. First, such an overruling would necessarily also overrule the BCRA § 203 prohibition on corporate (and union) funding of electioneering communications, as that ruling explicitly relied on *Austin*.²⁰⁸ Second and more importantly, if the Court overruled *Austin* there would also be significant ramifications for the definition of what is a political committee or PAC.²⁰⁹ Briefly, an entity becomes a PAC if its major purpose is to influence federal elections and it solicits contributions of over \$1,000 or makes expenditures of over \$1,000, with these terms limited to contributions given to influence elections (e.g., evidenced by a fundraising appeal that makes it clear that is the planned use of the funds) and expenditures made to influence elections.²¹⁰ For these purposes, as interpreted by the FEC, influencing elections includes making independent expenditures.²¹¹ Being classified as a PAC has significant ramifications, as a PAC is prohibited from receiving corporate or union contributions, contributions from individuals are limited in amount, and PACs must also file detailed disclosure reports regarding contributions and expenditures.²¹²

206. See *supra* notes 81–84 and accompanying text.

207. See *supra* notes 116–17 and accompanying text.

208. See *supra* note 80; see also *supra* note 195 (discussing why a decision reaching corporate spending would likely also apply to union spending).

209. See *supra* note 64 and accompanying text.

210. See 2 U.S.C. § 431(4) (2006); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

211. See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 957–58 (2005).

212. 2 U.S.C. § 434 (2006).

The overruling of *Austin* would, however, lead almost inevitably to the question of whether entities that solely engage in independent expenditures can, constitutionally, be subject to the existing PAC limitations. If both individuals and corporations must, constitutionally, be permitted to engage in unlimited independent expenditures on speech, can an entity that only engages in such expenditures (i.e., does not make contributions to candidates or political parties) be subject to at least the contribution limits imposed on a PAC? It would seem the answer would be no. This issue is already making its way through the federal courts in the form of two cases, where the plaintiffs are challenging certain limits on individual contributions used by entities to make independent expenditures: *EMILY's List v. FEC* and *SpeechNow.org v. FEC*.²¹³

Third and probably most importantly, the overruling of *Austin* might foreshadow one further step with respect to finding existing campaign finance laws unconstitutional. This step would be a determination that the total prohibition on corporate contributions to candidates—while individuals are still permitted to make such contributions, albeit subject to limits—cannot be sustained constitutionally.²¹⁴ That is, if corporations cannot be treated differently from individuals for independent expenditure purposes under the First Amendment, what justification is there for treating corporations differently than individuals for campaign contribution purposes? While there are some plausible counter-arguments, such as the potential use of corporations by individuals to evade the limits on individual contributions (assuming the entire *Buckley* contribution/expenditure divide,

213. See *EMILY's List v. FEC*, No. 08-5422 (D.C. Cir. Sept. 18, 2009) (holding unconstitutional FEC regulations requiring nonprofit corporations that make both independent expenditures and, through a PAC, campaign contributions to pay for a portion of their independent expenditures with hard money, i.e., funds raised subject to per individual donor contribution limits); *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008) (denying motion for preliminary injunction that would have enjoined the FEC from imposing hard money contribution limits on funds raised by a PAC engaged solely in making independent expenditures), *appeal docketed*, No. 08-5223 (D.C. Cir. July 23, 2008).

214. See 2 U.S.C. §§ 441a(1), 441b(a).

and therefore those limits, are not also vulnerable²¹⁵), an overruling of *Austin* at least raises this question. The same rationale would also support a challenge to the BCRA prohibition on corporate contributions to political parties, an element in the pending case of *Republican National Committee v. FEC* in which the RNC is challenging various applications of the prohibition on soft money contributions to national political party committees.²¹⁶

The one element of the existing campaign finance laws that should survive even an overruling of *Austin* is the disclaimer and disclosure provisions that apply not only to electioneering communications but to express advocacy as well.²¹⁷ It is true that one of the governmental interests furthered by these provisions is to aid in the enforcement of the prohibitions and limits on the funding for such communications.²¹⁸ Even if, however, the Court eliminates these prohibitions and limits by overruling *Austin*, two other important governmental interests would still be furthered by these provisions.²¹⁹ First, they serve the independent purpose of providing the electorate with additional information about a candidate by disclosing who supports and who opposes that candidate.²²⁰ Second, they also help to prevent corruption and the appearance of corruption—even if “corruption” is defined in a strict quid pro quo sense—by exposing to public view the sources of electoral support so that any “bought” official’s actions may be more easily traced to the

215. See *supra* note 36 and accompanying text (noting that at least some of the Justices believe limits on both contributions and expenditures are, or may be, unconstitutional).

216. *Republican Nat’l Comm. v. FEC*, No. 08-1953 (D.D.C. filed Nov. 13, 2008).

217. See 2 U.S.C. § 434(c), (f) (2006).

218. See *McConnell v. FEC*, 540 U.S. 93, 196 (2003); *MCFL*, 479 U.S. 238, 262 (1986); *Buckley v. Valeo*, 424 U.S. 1, 67–68 (1976).

219. This is in contrast to the extra disclosure provisions relating to BCRA’s millionaire’s amendment that the Court struck down in *Davis*, as those provisions only apparently served to aid the enforcement of the unconstitutional millionaire’s amendment and so were not justified by any governmental interest absent that amendment. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2459, at 2774–75 (2008).

220. See *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 66–67.

provision of this support.²²¹ These interests are particularly well served by disclosure provisions in the Internet age, when such information is readily and speedily available.²²² Indeed, in *McConnell* the Justices considered these reasons so compelling with respect to the BCRA-imposed electioneering communications disclosure provisions that only one member of the Court found them unconstitutional, as compared to the four Justices who objected to the corporate and union funding prohibition with respect to such communications.²²³

The bottom line is that a decision in *Citizens United* that only overruled *McConnell* in part *might* signal that in the Court's view Congress has only gone slightly past the outer boundary of constitutionally permissible campaign finance regulations with respect to corporations and so would not either have seismic effects on such laws immediately or foreshadow future fundamental changes. Of course, such a decision might only represent a way station on the path to more fundamental change, as *WRTL* appears to have been, but it is at least possible it would represent a terminus instead. A decision that overruled *Austin* could, however, easily foreshadow even more significant election law changes with respect to the definition of political committees and the limit on corporate contributions to candidates and parties, thereby foreshadowing a breaching of not only the corporate expenditure dam but possibly of the corporate spending dam almost in its entirety.²²⁴

221. See *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 67.

222. See, e.g., FEC, CAMPAIGN FINANCE REPORTS AND DATA, <http://www.fec.gov/disclosure.shtml>. Cf. Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743 (2003) (describing how courts have increasingly cited the availability of self-help technology as demonstrating a less restrictive means for serving an inserted governmental interest, particularly with respect to governmental restrictions on speech).

223. See *McConnell*, 540 U.S. at 258 (Scalia, J., concurring in part and dissenting in part) (citing the availability of disclosure requirements as one of the reasons why the non-distortion theory is not sufficient to support the prohibition on corporate funding of independent communications); *id.* at 275–76 (Thomas, J., concurring in part and dissenting in part) (noting he differed from all of his colleagues in concluding that the BCRA electioneering communications disclosure provisions are unconstitutional).

224. Unless and until *Buckley* is overruled, however, both the federal

C. Possible Ramifications for Federal Tax Law

There is one other significant ramification if the Supreme Court were to overrule *Austin*, particularly if my prediction that the Court would still uphold the disclaimer and disclosure provisions is incorrect. That ramification is for federal tax law and the ways it currently classifies nonprofit organizations that seek to be tax-exempt.

Federal tax law divides tax-exempt nonprofit organizations into effectively three categories with respect to candidate-related activities: organizations that are prohibited from supporting or opposing candidates for elected office; organizations that are permitted to support or oppose candidates but not as their “primary” activity; and organizations that have as their primary activity supporting or opposing candidates.²²⁵ The first category is principally charities—organizations that are eligible to receive tax deductible contributions as well as being exempt from income tax.²²⁶ The second category includes social welfare groups such as Citizens United, labor unions, and business and trade associations such as chambers of commerce and industry groups.²²⁷ The third category is so-called “527” organizations, named after the Internal Revenue Code section that provides them with exemption from federal income tax but also generally requires extensive public disclosure of their contributors and expenditures.²²⁸ While all of these entities file public reports of their finances with the IRS, generally only 527 organizations are

government and the various states will presumably be able to place limits on corporate campaign contributions comparable to the limits already in place for individuals. See *supra* notes 29, 32 and accompanying text; see also National Conference of State Legislatures, *supra* note 20 (listing state limits on campaign contributions, including states that permit corporate campaign contributions but subject to limits).

225. See Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 637–40 (2007) (describing these categories).

226. See 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3) (2006).

227. See 26 U.S.C. §§ 501(c)(4)–(6) (2006); John Francis Reilly & Barbara A. Braig Allen, *Political Campaigns and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, EXEMPT ORGANIZATIONS—TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L-1 to L-3 (2002), available at <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>.

228. See 26 U.S.C. § 527 (2006).

required to disclose publicly the identities of their donors.²²⁹ Finally, it is important to recognize that whether a given activity supports or opposes a candidate for federal tax purposes is determined based on all the relevant facts and circumstances. For example, whether a communication supports or opposes a candidate does not depend solely on the presence or absence of “magic words” or other narrowing test as, is the case with election law, but instead looks at the full context and content of the communication.²³⁰

For numerous reasons, even if business corporations are freed to pay directly for electioneering communications or express advocacy, they are for the most part not likely to do so. For example, most businesses have no desire to possibly offend a significant part of their customer base by becoming so directly connected with candidate-related messages. It is therefore much more attractive to contribute to a group—such as a Citizens United, a union, or an industry group—that offers both a separation from the message and the ability to collect funds from numerous sources and so achieve economies of scale. While disclaimer and disclosure requirements, if they survive the Court’s scrutiny, would still allow some tracing back to the business corporation funders, that connection would be much more indirect (and those requirements might not survive the overruling of *Austin* under any conditions, although I believe they will). The attractiveness of this approach is demonstrated by the fact that even for candidate-related communications that business corporations can currently legally fund, those communications were primarily paid for by intermediate tax-exempt organizations, whether well known ones such as the U.S. Chamber of Commerce or innocuously named obscure ones such as the Senior Coalition.²³¹

229. See 26 U.S.C. §§ 527(j)(3)(B) (contributor information reporting for 527 organizations), 6104(d)(3)(A) (2006) (exempting tax-exempt organizations other than private foundations and 527 organizations from having to publicly disclose their donors).

230. See Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007); Mayer, *supra* note 225, at 641–44.

231. See PUBLIC CITIZEN, *supra* note 47, at 27–30 (while lacking specific donor information, identifying business-favoring groups, including the U.S.

Assuming this pattern continues to hold in the wake of an overruling of *Austin*, there will likely be a surge in candidate-related communications by these intermediary tax-exempt organizations. Even under a *McConnell*-only overrule scenario, with disclaimer and disclosure requirements still in place, there would still be a preference to use organizations other than 527s because of the FEC's recent successful enforcement efforts to require 527s to be treated as PACs (and so subject to contribution limits)—an obvious step given that 527s by definition must have influencing elections as their major purpose.²³² Under an *Austin* overrule scenario, especially if the disclaimer and disclosure requirements did not survive, the relative anonymity of giving to tax-exempt organizations other than 527s would make them particularly attractive and so sharply increase the use of such entities.

The pressure such a turn to the middle category of tax-exempt organizations would create is on two aspects of the federal tax rules and enforcement of those rules. First, there is the issue of how much candidate-related activity is too much, i.e., how much makes that activity “primary” and so pushes the organization into the 527 category.²³³ For decades the IRS has failed to clarify this term, which appears to have led many groups—particularly in the wake of the 527 disclosure rules enacted by Congress in 2000—to confidently assert they qualify

Chamber of Commerce and the Seniors Coalition, that spent significant funds on election-related communications, probably mostly provided by corporations); *see also* FPPC, *supra* note 199, at 48 (listing the numerous entities through which even the largest supporters of independent expenditures relating to California state and legislative candidates funneled their support); STEPHEN R. WEISSMAN & KARA D. RYAN, *SOFT MONEY IN THE 2006 ELECTION AND THE OUTLOOK FOR 2008: THE CHANGING NONPROFITS LANDSCAPE* (2007) (documenting some of the largest nonprofit and, usually, tax-exempt organizations that were active in 2006 federal elections), *available at* http://www.cfinst.org/books_report_s/pdf/NP_SoftMoney_0608.pdf.

232. *See* WEISSMAN & RYAN, *supra* note 231, at 3–6 (describing the FEC's recent enforcement efforts in this area); Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 491–96 (2008).

233. *See* ABA Members Comment on Exempt Organizations and Politics, 45 EXEMPT ORG. TAX REV. 136, 152–54 (2004) (describing the uncertain definition of “primary” in this context).

for this middle category despite extensive candidate-related activities.²³⁴ Second, there is the relatively vague facts and circumstance test for determining whether a given activity actually supports or opposes a candidate.²³⁵ Apparently anticipating the pressure on this second aspect of the tax laws, the same election lawyer who initially brought the Citizens United case, Jim Bopp, along with the James Madison Center for Free Speech, has already launched two cases attacking this federal tax standard as being unconstitutionally vague.²³⁶ If successful, these cases could lead to a significant narrowing of what constitutes support of or opposition of a candidate for federal tax purposes and so open the door for groups to qualify for the middle category even though they engage in many activities that likely have an election-related effect.²³⁷

The demonstrated inability of the IRS to apply these two standards also does not bode well for maintaining the proper categorization of nonprofit corporations that are tax-exempt organizations. Because it relies on filed tax returns, the IRS has a backward-looking enforcement process that often does not address potential violations until many years after the fact. While that backward looking and delayed approach may be appropriate with respect to tax collection—where the passage of time can be recognized through requiring the payment of interest on unpaid but owed taxes—it is poorly suited for policing political activity that is aimed solely at a soon-to-occur election.²³⁸ The IRS is further hindered by a lack of enforcement resources; as I have documented elsewhere, audits of tax-exempt organizations

234. See PUBLIC CITIZEN, *supra* note 47, at 8, 49–52 (listing possible violators of the “primary” limitation).

235. See *supra* note 230 and accompanying text.

236. See *Catholic Answers, Ltd. v. United States*, No. 2009-00670 (S.D. Cal. filed Apr. 3, 2009); *Christian Coal. of Fla., Inc. v. United States*, No. 2009-000144 (M.D. Fla. filed Apr. 3, 2009). Bopp has also successfully represented parties challenging campaign finance laws before the Supreme Court in numerous other cases including, most recently, *WRTL*, 551 U.S. ___, 127 S.Ct. 2652 (2007) and *Randall v. Sorrell*, 548 U.S. 230 (2006).

237. See, e.g., *WRTL*, 551 U.S. ___, 127 S. Ct. at 2660–61 (describing the ads found not to be the functional equivalent of express advocacy); *id.* at 2697–99 (Souter, J., dissenting) (explaining why these ads likely had an electoral effect).

238. See Mayer, *supra* note 225, at 673.

are few and far between, and even the staff dedicated to such organizations have many issues to pursue other than candidate-related activity.²³⁹

It is therefore reasonable to predict that if the Court overrules *McConnell* in part, and especially if it overrules *Austin*, there will be a surge of corporate funds flowing to this middle category of tax-exempt organizations to fund candidate-related communications. Furthermore, in a post-*Austin* world, that flow may be hidden from public view if, contrary to my prediction, the election law disclosure requirements are also struck down because such entities are not required to publicly disclose their donors under federal tax law.²⁴⁰ The IRS is ill-equipped to deal with such a surge, even if it presses or exceeds the legal limits for such organizations. Supporters of stricter campaign finance laws would therefore be wise to anticipate issues arising under this separate but related body of law.

VI. CONCLUSION

The *Citizens United* case will likely be the vehicle for a shift in campaign finance law, although how significant a shift remains to be seen. Up until now, the addition of Chief Justice Roberts and Justice Alito to the Supreme Court has led to what, at least on their face, were only marginal changes in the Court's campaign finance jurisprudence.²⁴¹ The explicit request by the Court for the parties in this case to address the continued viability of two precedents, when the Court could easily have disposed of the case on relatively narrow grounds, appears to signal a more radical shift, especially when combined with statements of both Chief Justice Roberts and Justice Alito in earlier campaign finance cases. The strongest argument for securing a fifth vote against such a change, at least with respect to the *Austin* case, is one based on stare decisis, but it is far from clear whether that argument would be persuasive to one or both

239. See *id.* at 672–73.

240. See Reilly & Allen *supra* note 229 and accompanying text.

241. See *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2769 (2008); *WRTL*, 551 U.S. ___, 127 S. Ct. 2652 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006).

of these Justices.

The Court could still choose to make a relatively incremental, although significant, change by only reversing the relevant portion of the *McConnell* decision. Such a decision would still strike down a significant campaign finance law and major part of BCRA, but one that has already been undermined by the Court's previous *WRTL* decision, and it would leave in place the differing treatment of corporate-funded communications—albeit limited to express advocacy—as well as almost certainly the disclaimer and disclosure requirements for a broader range of communications. It might also signal that further shifts would be unlikely. The effect of such a decision on elections, therefore, would be relatively limited, and its effect on election law might also be relatively small.

The Court could instead, however, choose to overrule *Austin* as well. If it does so, not only would a much more significant part of campaign finance law be eliminated, but such a ruling could easily foreshadow even more dramatic changes with respect to how political committees can constitutionally be defined and with respect to the over century-old prohibition on corporate campaign contributions. It also likely could create significantly more pressure on the federal tax law rules governing politically active nonprofit corporations that are also tax-exempt, pressure the IRS is ill-equipped to address. If those predications are correct even in part, such a decision could therefore usher in an era of not only increasing corporate funding of election-related communications but potentially of significantly less disclosure regarding the role of corporations in elections. The volume of such corporate spending almost surely will not be as large as some have suggested, if both the pre-BCRA history and the amount of corporate spending in states that permit corporate funding of independent expenditures with respect to state and local elections are any indication. There is little doubt, however, that corporate leaders will continue to care about who is elected; candidates will continue to care about corporate-paid election-related communications, and if corporations have substantially greater freedom to pay for such communications, those communications will undoubtedly occur. And we all will experience the effects, whether they are greater information

about candidates and a more robust public debate or an outpouring of corporate funded communications that drown out other voices and unduly influence elected officials to favor corporate interests over the public interest.