A CRITICAL ANALYSIS OF A CORPORATION'S FIRST AMENDMENT CONSTITUTIONAL RIGHT OF FREEDOM OF SPEECH AND THE EXPANSION OF THEIR POLITICAL INFLUENCE: THE CASE OF *CITIZENS UNITED V. FEDERAL ELECTIONS COMMISSION*

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I. INTRODUCTION

In January 2008, the appellant, Citizens United, a nonprofit corporation, released a documentary critical of Senator Hillary Clinton, a candidate for president of the United States. Citizens United also produced television ads to run on broadcast and cable television and hoped to make the documentary movie and the ads available in cable television through video-on-demand within thirty days of the primary election.

However, the U. S. Code, Section 441b,[1] states that corporations and unions are prohibited from using their general treasury funds to make independent expenditures that are an "electioneering communication"[2] or for speech that expressly advocates the election or defeat of a political candidate.[3] In 2003 the Supreme Court ruling on *McConnell v FEC*[4] upheld

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[1] Federal Election Campaign Act, 2 U.S.C. § 441b (1971) [hereinafter FECA]. Section 441b provides: "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative."

[2] 11 C.F.R. §100.29(a)(2) (stating that electioneering communication is any broadcast cable or satellite communication that refers to a clearly identified candidate for Federal office and is made with 30 days of a primary election and is publically distributed).

[3] *See supra* note 1, FECA 2 U.S.C. § 441b.

[4] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 203, 209 (2003).The Court upheld the constitutionality of most of the Bipartisan Campaign Reform Act of 2002 (BCRA), often referred to as the McCain-Feingold Act, [hereinafter McConnell].

limits on electioneering communication, relying on its 1990 holding in *Austin v. Michigan*[5] that political speech by corporations may be restricted.

The corporation was concerned about possible violation of §441b and possible civil and criminal penalties; therefore, it brought a cause of action for injunctive relief in the District Court arguing that §441b was unconstitutional because it violated the corporation's First Amendment rights guaranteeing Freedom of Speech. The District Court ruled in favor of the government and against the corporation, granting the Federal Election Commission (FEC) summary judgment.[6] Upon appeal to the Supreme Court, Justice Kennedy delivered the majority opinion.

II. NARROW-GROUNDS INTERPRETATION

The first issue formulated by Justice Kennedy, who delivered the majority opinion, is whether Citizens United's claim that §441 cannot be applied to the Hillary film may be resolved on narrower grounds.[7] If the issue could be argued on narrower grounds, the Supreme Court only had to find an exception to § 441, find for Citizens United, and allow Citizens United to show the film. If, on the other hand, the issue could not be argued on narrower grounds, the court would have to go further and overrule *Austin v. Michigan*[8] to find for Citizens United. It is Justice Kennedy's objective to find no issue that can be resolved on narrow grounds.

A. *Electioneering Communications*

Prior to the Bipartisan Campaign Reform Act of 2002 (BCRA)[9], federal law prohibited corporations and unions from using general treasury funds to make contributions to advocate the election or defeat of candidates in any form of media.[10] Then, BCRA § 203 amended 2 U.S.C. §441b to prohibit

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[5] *See* Austin v. Mich., 494 U.S. 652 (1990). The Supreme Court held that Michigan Campaign Finance Act, which prohibited corporations from using treasury money to support or oppose candidates in elections, did not violate the first and fourteenth Amendment "because corporate wealth can unfairly influence elections" [hereinafter Austin].

[6] *See* Citizens United Corp. v. FEC, 530 F. Supp. 2d 274 (2008).

[7] Citizens United Corp. v. FEC, 558 U.S. slip op. at 5 (2010) [hereinafter Citizens].

[8] *See* Austin v. Michigan Chamber of *C*ommerce, 494 U.S. 652 (1990).

[9] The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), became effective Jan. 1, 2003 (amended the Fed. Election Campaign Act of 1971) (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972).

[10] Citizens, *supra* note 8, slip op. at 10; *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 203–09 (2003) (affirming that Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditure for speech defined as electioneering communication or for speech expressly advocating the election or defeat of a candidate).

any "electioneering communication"[11] as well. Corporations and unions were thereby barred from using their general treasury funds for express advocacy or electioneering communications.

The appellant, Citizens United, argued that §441b does not apply to Hillary because the film does not qualify as an "electioneering communication." The definition of an "electioneering communication" requires (1) a cable communication, (2) a clearly identified candidate for Federal Office, and (3) creation within 30 days of a primary election.[12] Citizens United argues that its communication was not a cable communication because the Hillary film was not "publicly distributed." The group argued that the film was not publicly distributed because a single video-on-demand transmission is sent to cable converter boxes only when requested by just one household. In other words, the households were not comprised of 50,000 or more persons as required by the regulation.[13]

Citizens United's argument would justify viewing the case from a narrow point of view. Yet Justice Kennedy rejects this argument for viewing the case narrowly. He states that section 100.29(b)(3)(ii)[14] dictates the method for determining how households are to be counted. "The regulation provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area"[15] Hence, Citizens United was making an argument that it was using a cable video-on-demand system that had 34.5 million subscribers, not just one. Therefore, concluded Justice Kennedy, 441b does apply to the Hillary film because it qualifies as an "electioneering communication,"[16] making Citizens United in possible violation of criminal statutes under 441b.

B. *Exceptions for Nonprofit Corporations*

Citizens United also argued to carve out an exception to §441b expenditure ban for nonprofit corporate political speech funded by individuals. Given this approach, the court would view this issue from a

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[11] An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. §434(f)(3)(A). It is further defined as a communication that is "publicly distributed." 11 C.F.R. §100.29(a)(2) (2009). "In the case of a candidate for nomination for President . . . *publicly distributed* means" that the communication "can be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days." *Id*. at §100.29(b)(3)(ii).

[12] *See* 2 U.S.C. § 434(f)(3)(A)(i); *see also* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) [hereinafter MCFL].

[13] 11 C.F.R. § 100.29(a)(2) (2009).

[14] Citizens v. FEC, 558 U.S. 6 (2010); §§100.29.29(b)(7)(i)&G) and ii.

[15] *See id*. Citizens; *see also* §§100.29.29(b)(7)(i)&G) and ii.

[16] *See id.* Citizens *at* 7.

narrow perspective and not have to reconsider and overrule *Austin*.[17] In *Massachusetts Citizens for Life*,[18] the court had found that restrictions on corporate expenditures as applied to nonprofit corporations were unconstitutional if (1) the corporation was formed for the sole purpose of promoting political ideas, (2) did not engage in business activities , and (3) did not accept contributions from for-profit corporations or labor unions.[19] The court rejected this argument, stating that *Citizen United* does not qualify for the *Massachusetts Citizens for Life* exception because funds used to make the film were a donation from for-profit corporations. Therefore, concluded Justice Kennedy, the court cannot resolve this case on a narrower ground without chilling political speech. Since there is no basis for an alternative ruling, the court, argues Kennedy, is required to give full consideration of the effect of the speech suppression that was upheld in *Austin*.[20]

On the other hand, Justice Stevens, in dissent, argues that the majority has transgressed a cardinal principle of the judicial process: "If it is not necessary to decide more, it is necessary not to decide more."[21] Stevens cites three methods by which the majority could have decided the case: (1) on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an "electioneering communication," [22] (2) by expanding statutory exemption, the Court could have expended the MCFL exemption to cover nonprofits that accept only a de minimis amount of money from for-profit corporations,[23] and (3) by limiting constitutional interpretation, the Court could have easily limited the breadth of its constitutional holding had it declined to adopt the novel notion that speakers and speech acts must always be treated identically in the political realm.[24] Another way that the majority could have decided the case was simply to apply *Austin* and *McConnell* to uphold the validity of the statute.

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[17] *See* Austin v. Michigan Chamber of Commerce 494 U.S. 652 (1990). Austin held that corporate political speech may be restricted based on the corporate *id*entity [hereinafter Austin].
[18] *See* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) [hereinafter MCLI].
[19] *See id ,MCLI*.
[20] *See* Austin, *supra* note 17.
[21] Citizens, *supra* note 7, slip op. at 14; *see also* PDK Labs., Inc. v. Drug Enforcement Admin., 362 F.3d 786 (review denied 2004).
[22] *See* BCRA, *supra* note 3, 2 U.S.C. §441b §203.
[23] *See* Citizens, *supra* note 7, slip op. at 15.
[24] *See id*. slip op. at 16.

III. FACIAL OR AS-APPLIED CHALLENGE

One of the interesting discourses that the court goes into is the concept of "facial" versus "as-applied challenges." The court can review the challenged statute based on its face. In other words, is the challenged statute narrow on its face or not? If the challenged statue is too broad, it can be found unconstitutional for broadness. If it is narrow on its face, then the court will explore a broader way to approach the solution, like overruling a previous precedent. If, on the other hand, the statute is an as-applied challenge, then the court could simply look at the application of the challenged law and overrule it as unconstitutional without having to overrule the precedent.

The courts use several doctrines to avoid hearing complaints. Since courts only decide "cases or controversies" and do not issue "advisory opinions," they can only find a complaint either "ripe" or "moot." Alternatively, the court can rule that the complainant has no "standing."[25] If, on the other hand, the court decides to accept a case for judicial review, the court will first determine whether the statute or regulation or its execution is authorized. Then it will determine whether the means that the government used are necessary and proper.

Assuming that the court decides to hear the case after these requirements are satisfied, what is the court's theory and procedures for applying the facial versus as-applied challenges?

> To challenge a measure, individuals can bring either a *facial* or an *as-applied* challenge or both. A successful facial challenge will conclude that the measure [on its face] is unconstitutional per se, and it will cease to exist. On the other hand, a successful as-applied challenge, as the name implies, finds the measure or its part unconstitutional as applied to the individual, leaving the measure otherwise intact. But that brief outline only begins the discussion, which is made more difficult because the Court has never articulated a consistent theory with respect to facial and as-applied challenges.[26]

What makes this issue complex is that the distinction between facial and as-applied challenges does not always have to control the pleading and

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[25] Roger Pilon, *Facial v. As Applied Challenges: Does it Matte*r? 2008-2009 Cato Sup. Ct. Rev. vii (2009) [hereinafter Pilon].
[26] *Id.*

disposition in every case involving a constitutional challenge.[27] According to Justice Kennedy, it goes to the breath of the remedy employed by the court, not what must be pleaded in a complaint.[28]

Here, the court concluded that the Government's narrow arguments are not sustainable, and, therefore, in the exercise of its judicial responsibility, it is necessary for the court to consider the "facial" validity[29] for the following reasons: (1) the uncertainty caused by the government's position; (2) the interpretation of the statutory provision will take a substantial time, causing a chilling effect on speech during the interpretation period; and (3) the primary importance of speech to the integrity of the election process.[30] These seem to be broad conceptual elements with little certainty as to their specific meaning, but here the court was able to find all three concepts for *facial* validity present in the case at bar. For these reasons, the court states, it is necessary to reconsider *Austin*.[31]

In the dissent, Justice Stevens argues that the Court has repeatedly emphasized that "facial challenges are disfavored."[32] But the normal rule is that partial invalidation, rather than facial invalidation, is the required course. In this manner a statute may be declared invalid to the extent that it reaches too far, but is otherwise left intact.[33] The unnecessary resort to a facial inquiry "run[s] contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[34] Justice Stevens further argues that the majority has manufactured a facial challenge because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United.[35]

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[27] *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000) (stating that "Once a case is brought, no general categorical line bars a court from making broader pronouncement of invalidity in properly "as-applied cases").

[28] *See* United States v. Treasury Employees 513 U.S. 454, 477-78 (1995) (contrasting a facial challenge with a narrower remedy).

[29] Citizens, *supra* note 7, slip op. at 16.

[30] *See id.*, slip op. at 17.

[31] *See id.* slip op. at 20.

[32] *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) [hereinafter Grange]; *see also* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006) (holding that a statute that required Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. §§ 132:24-132:28 (Supp. 2004), was unconstitutional because it failed to provide an emergency health exception).

[33] *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985); *see also* Citizens, slip op. at 6 (Stevens, J., dissenting).

[34] *See* Grange, *supra* note 32.

[35] Citizens, *supra* note 29, slip op. at 14.

IV. RESTRICTION ON CORPORATE SPEECH

The First Amendment provides that "Congress shall make no law . . abridging the Freedom of Speech."[36] Justice Kennedy avers that Section 441b is an outright ban on a corporation's Freedom of Speech backed by criminal sanctions. Violation of 441b is a felony charge for all corporations, including nonprofit advocacy corporations.[37]

The first argument by Kennedy is based on the claim that *Austin* and *McConnell* have "banned" corporate speech. Second, his argument claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, Kennedy claims that *Austin* and *McConnell* were radical decisions in our First Amendment tradition and our campaign finance jurisprudence.

Stevens, in arguing for the minority position, first states that *Austin* and *McConnell* do "not impose an absolute ban on all forms of corporate political spending."[38] *McConnell* "has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy with the authority to form and administer separate segregated funds."[39] Furthermore, BCRA §203 has no application to the Internet, telephone, media companies, news stories, commentaries, editorials and print advocacy, contrary to the majority's opinion that the government under *Austin* can ban books, pamphlets, media corporations and blogs.[40] Stevens claims that neither *Austin* nor *McConnell* held or implied that corporations may be silenced. He further avers that the FEC is not a "censor".[41]

Second, states Stevens, the majority argues that "the government cannot restrict political speech based on the speaker's …identity" by simply relying on *Bellotti*.[42] But the truth of the matter is that First Amendment rights are not absolute, and the Court in the past has placed restrictions on speech right of students,[43] prisoners,[44] members of the Armed Forces,[45] foreigners,[46] and

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[36] U.S. Const., amend. I.
[37] Citizens, *supra* note 29, slip op. at 21.
[38] *See* Austin, *supra* note 20, at 660; *see also* McConnell, *supra* note 4 at 203-04.
[39] *See* McConnell, *supra* note 4, at 203.
[40] Citizens, supra note 6, slip op. at 26 (Stevens, J., dissenting)) n.31; *see also* 2 U.S.C. § 434(f)(3)(B)(i); McConnell, *supra* note 4, at 208-09; Austin, *supra* note 5, at 667-68.
[41] Citizens, *supra* note 7, slip op. at 28 (Stevens, J., dissenting).
[42] *See* First Nat. Bank of Boston v. Bellotti 435 U.S. 765 (1978) [hereinafter Bellotti].
[43] *See* Bethel Sch. Dist. v. Fraser No. 403, 478 U.S. 675, 682 (1986) (stating that students in public school do not have the same constitutional rights as adults in other settings).
[44] Jones v. N. C. Prisoners' Labor Union, Inc. 433 U.S. 119, 129 (1977) (stating that prisoners do not retain First Amendment rights that are inconsistent with their prisoner status).
[45] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) (stating that there is a different application of the First Amendment right with respect to member of the Armed Forces).

its own employees.[47] Speech may be restricted when there is a legitimate governmental interest and does not raise constitutional problems. Other examples are the prohibition on displaying campaign material near a polling place[48] and prohibiting federal employees from participation in political campaigning.[49]

Kennedy further states that laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."[50] Having made an argument based on the First Amendment Freedom of Speech, Kennedy curiously asserts that "it could find no basis, in the case of political speech, that the Government may impose restriction on certain disfavored speakers such as corporations.[51] But nowhere is the argument for "disfavored speakers" (i.e. corporations) directly connected to the First Amendment Freedom of Speech discourse except in Kennedy's conclusion.

V. FIRST AMENDMENT RIGHTS EXTEND TO CORPORATIONS

Kennedy argues that the Court has consistently recognized in a long series of cases that First Amendment protection extends to corporations.[52] Citing *Button*,[53] the Court states that the protection has been extended to the context of political speech and further states that corporations do not lose their protection "simply because its source is a corporation."[54] In the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970s. In *Bellotti*[55] specifically, the court concluded that it "could find no support in the First Amendment or in the decision of this court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses

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[46] *See* 2 U.S.C. § 441e(a)(1) (stating that foreign nationals may not make contributions in connection with a U.S. election).
[47] *See* Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973) (stating that Executive Branch employees are prohibited from taking any active part in political management or political campaigns).
[48] *See* Burson v. Freeman, 504 U.S. 191 (1992).
[49] *See* Civil Ser. Comm'n v. Letter Carriers, 413 U.S. 548, 556 (1973).
[50] *See Fed. Election Comm'n* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) [hereinafter WRTL]; *see also* Citizens, *supra* note 19, slip op. at 24.
[51] Citizens *supra* note 7, slip op. at 25.
[52] Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977); Time, Inc. v. Firestone, 424 U.S. 448 (1976); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).
[53] NAACP v. Button 371 U.S. at 428-29 (1963).
[54] Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 8 (1986).
[55] *See* Bellotti, *supra* note 42.

that protection simply because its source is a corporation."[56] This concept, states Kennedy, rests on the principle that government lacks the power to ban corporations from speaking. This was the law until *Austin*[57] was decided.

A. *Pre-Austin versus Post-Austin on First Amendment Rights*

In *Austin*,[58] the Michigan Chamber of Commerce wanted to use general treasury funds to run a newspaper advertisement supporting a specific candidate.[59] The law in Michigan prohibited independent expenditures by corporations that supported or opposed any candidate for state office. Violation of the state law was a felony. *Austin* found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[60] Thus, Justice Kennedy concludes that the court must now resolve the conflict between two lines of reasoning: pre-*Austin* reasoning that forbids restrictions on political speech based on the speaker's corporate identity, and post-*Austin* reasoning that upheld legislation prohibiting independent expenditures for political speech based on the speaker's identity.[61]

1. The Antidistortion Rationale

Austin's fundamental argument was that it sought to defend the antidistortion rationale as a means to prevent corporations from obtaining "an unfair advantage in the political market place" by using "resources amassed in the economic marketplace."[62] But, argues Kennedy, *Buckley*[63] rejected the premise that the government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections."[64] Furthermore, he argues, the First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion."[65] On the contrary, the government argues that corporations already have an unfair advantage because the "state law grants corporations special advantages such

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[56] *See id.*
[57] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 695 (1990) [hereinafter Austin].
[58] *See id*, at 660.
[59] *See id.*
[60] *See id.*; *see also id.*, at 659.
[61] Citizens, *supra* note 7, slip op. at 32.
[62] *See* Austin, supra note 57, at 659.
[63] *See* Buckley v. Valeo, 424 U.S. 1 (1976).
[64] *See id.* at 48.
[65] *See id.* at 49.

as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."[66] Kennedy then reaches deep into *Austin*'s dissenting opinion and quotes Justice Scalia who states that "it is rudimentary that the State cannot exact as the price of those special advantages to forfeiture of First Amendment Right."[67] Kennedy carries the argument further and concludes that the antidistortion rationale would lead to Congress banning political speech of media corporations and infringe upon First Amendment freedom of the press.[68] Kennedy avers that *Austin* interferes with the "open marketplace" of ideas protected by the First Amendment.[69]

But Justice Stevens counters in the dissenting opinion that *Austin* set forth some basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments."[70] Unlike voters in U. S. elections, corporations may be controlled by foreign interests or entities. It should also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, and no desires. They are not themselves members of "We the People" by whom and for whom our Constitution was established. These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on electioneering are less likely to encroach upon First Amendment freedoms.[71] The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' "war chests" and their special "advantages" in the legal realm may translate into special advantages in the market for legislation.[72] When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position.[73] It is for reasons such as these that campaign finance jurisprudence has long appreciated that "the differing structures and purposes of different entities

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[66] *See* Austin, *supra* note 57, at 658-59.
[67] *See id*. at 680.
[68] Citizen, *supra* note 7, slip op. at 35.
[69] N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008).
[70] Citizens, *supra* note 7, slip op. at 75 (Stevens, J., dissenting); *see also* Austin 494 U.S. at 658-59.
[71] *See* Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 34, n.2 (1980).
[72] *See* Austin*, supra* note 57, at 659.
[73] Citizens, *supra* note 7, slip op. at 82 (Stevens, J., dissenting).

may require different forms of regulation in order to protect the integrity of the electoral process."[74]

2. Speech Restrictions to Prevent Corruption

The Government argues that corporate political speech can be banned in order to prevent corruption or the appearance of corruption.[75] Kennedy counters this opinion by citing *Buckley*, which found "that the governmental interest in preventing corruption and the appearance of corruption was inadequate to justify the ban on independent expenditures."[76] Limits on independent expenditures, such as § 441b, states Kennedy, have a chilling effect extending well beyond the government's interest in preventing *quid pro quo* corruption. [77] The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt, says Kennedy. Then he concludes that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[78] Reliance on a "generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle."[79]

Stevens, by contrast, argues that if we "take away Congress' authority to regulate the appearance of undue influence, and the cynical assumption that large donors call the tune, it could jeopardize the willingness of voters to take part in democratic governance."[80]

3. Shareholder-Protection Interest

The Government further argues that corporate independent expenditures can be limited by the government because it has an interest in protecting dissenting shareholders from being compelled to fund corporate political speech.[81] Kennedy avers that this position would allow the Government to

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[74] Fed. Election Comm'n v. Nat'l. Right to Work Comm., 459 U.S. 197, 210 (1982) [hereinafter NRWC].
[75] Citizens, *supra* note 7, slip op. at 40.
[76] *See* Buckley v. Valeo 424 U.S. 1, 45 (1976).
[77] Citizens, *supra* note 7, slip op. at 42.
[78] *Id., but cf.,* Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies,* 126 U. PA. L. REV. 386, 408 (1977) (stating that "corporations and labor unions should be held to different and more stringent standards than an individual or other association under a regulatory scheme for campaign financing").
[79] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 296 (2003).
[80] Citizens, *supra* note 7, slip op. at 60 (Stevens, J., dissenting); *see also id.* at 144, (quoting Nixon v. Shrink Mo. Government PAC,, 528 U.S. 377, 390 (2000)).
[81] *See* id., Citizens, slip op. at 46.

ban or restrict the political speech of media corporations.[82] The First Amendment does not allow that kind of power.[83] The abuse of shareholders can be corrected "through the procedures of corporate democracy."[84]

Stevens, on the other hand, argues that when corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments are being used to undermine their political convictions.

VI. DISSENTING OPINION ON FIRST AMENDMENT

Justice Stevens states that the majority is claiming that *Austin* and *McConnell* are radical aberrations in our First Amendment tradition, and that the radical departure from settled First Amendment Law is found, instead, in the majority's holding. The PAC mechanism, by contrast, helps assure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas.[85]

A. *Original Understanding*

The Framers of the Constitution and their contemporaries, states Stevens, conceived of speech more narrowly than we now think of it.[86] There were different views of the First Amendment and corporations in society. Corporations were strictly controlled by the legislature and authorized to operate by a legislative charter. The Charter's "authority fixed the scope and content of corporate organization."[87] It was "assumed that they were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare."[88] General incorporation statutes and widespread acceptance of business corporations as socially useful actors did not emerge until the

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[82] *Id.*
[83] *Id*.
[84] *See* Bellotti, *supra* note 55, at 794.
[85] Citizens, *supra* note 7, slip op. at 86 (Stevens, J., dissenting).
[86] *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).
[87] *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970).
[88] *See* RONALD E. SEAVOY, ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855, p. 5 (1982).

1800s.[89] The framers had no trouble distinguishing corporations from human beings and created the First Amendment for the latter and not the former. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."[90] It seems implausible, says Justice Stevens, that the Framers contemplated Freedom of Speech for corporations and then disallowed legislatures from limiting the power of the corporations against corporate capture of elections.[91] It follows that the First Amendment does not prohibit the legislature from taking into account the "Corporate Identity" of a sponsor of electoral advocacy.[92]

VII. TEST FOR OVERRULING PRECEDENT

In determining whether to overrule precedent or to follow the principles of *stare decisis,* the court will look at several relevant factors: (1) the antiquity of the precedent, (2) reliance interest at stake, (3) whether the decision was well reasoned,[93]and (4) whether experience has pointed out the precedent's shortcomings.[94] Kennedy quotes *Helvering*,[95] stating that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision"[96] and that the court does not hesitate to overrule precedent when it is offensive to the First Amendment. Kennedy therefore concludes that *Austin* was not well reasoned and that *Austin* has been outlived by modern communication technology. *Austin* is, therefore, overruled.[97]

Justice Stevens in dissent argues that the majority has violated a principle of judicial process, namely, *stare decisis.* "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[98] He avers that there is no such justification in this case, and that the only reason *stare decisis* was not followed by the majority is that it did not like *Austin*. The majority's justification was that *Austin* was

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[89] *See* Henry Hansmann & Reinier Kraskman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001).
[90] *See* Julian N. Eule, *Promoting Speaker Diversity: Austin and MetroBroadcasting,* 1990 S.Ct. Rev. 105, 129 (1991).
[91] Citizens, *supra* note 7, slip op., at 38 (Stevens, J., dissenting).
[92] *See id*.
[93] *See* Montejo v. La., 556 U.S. 59 (2009), slip op., at 13), 131 S. Ct. 656 (2010), overruling Michigan v. Jackson, 475 U.S. 625 (1986).
[94] *See* Pearson v. Callahan, 555 U.S. 223 (2009).
[95] Helvering v. Hallock, 309 U.S. 106, 118 (1940).
[96] *Id*. at 119.
[97] Citizens, *supra* note 7, slip op. at 50.
[98] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 864 (1992).

not well reasoned and conflicted with First Amendment principles. But, argues Stevens, the justification is based on incorrect premises.

While mentioning the relevant factors (antiquity of the precedent, the workability of its legal rule, and the reliance interest at stake), Justice Stevens states that the majority's ability to determine the applicability of *stare decisis* says almost nothing about the substantive application of these factors to the case.[99]

The majority simply argues that overruling *Austin* means that it provides no basis for allowing the government to limit corporate independent expenditures. Similarly, overruling *Austin* "effectively invalidates not only BCRA Section 203, but also 2 U.S.C 441b's prohibitions on the use of corporate treasury funds for [the purpose of] express advocacy."[100] The court also overruled part of *McConnell*,[101] which provided restriction on corporate independent expenditures.[102]

But here is the rub. The *McConnell* decision that upheld BCRA §203 relied not only on the antidistortion logic of *Austin*, but also on the statute's historical pedigree. "*McConnell* is only six years old, but *Austin* has been on the books for two decades, and many of the statutes called into question by the majority opinion have been on the books for a half century or more, therefore satisfying the requirement for following *stare decisis.*"[103] The principle of *stare decisis* exists as the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[104]

VIII. CONCLUSION

There are significant public policy questions raised by the Court's decision. The first is that Congress cannot "regulate" or "prohibit" a corporation's political speech. If Congress treated corporations and labor unions differently than individuals by prohibiting expenditures of their funds on "electioneering communications" while not prohibiting such expenditures by individuals, then the constitutional violation would be cured simply if Congress prohibited all expenditures for such purposes during the prohibited period. It is unclear whether the Court is stating that Congress has no power to regulate such activities of individuals either. If such is the case, then one

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[99] Citizens, *supra* note 7, slip op. at 19 (Stevens, J., dissenting).
[100] *See id.*, slip op. at 50.
[101] *See* McConnell, *supra* note 4, at 203-09.
[102] *See id.*
[103] *See* Citizens, *supra* note 7, slip op. at 19 (Stevens, J., dissenting).
[104] *See* Vasquez v. Hillary, 474 U.S. 254, 265 (1986).

may conclude that Congress can pass no law prohibiting or limiting anyone's speech or expenditures for political speech, no matter if they are individuals acting alone or within a corporation.

Another public policy question is raised in reference to the numerous state statues that presently prohibit political subdivisions, including municipal corporations and quasi-municipal corporations, from spending or authorizing the spending of their funds or utilizing internal mailing systems on "political advertising." This includes, for example, a communication that is not limited to merely describing factually the purposes of a measure, but rather advocates passage or defeat of a measure or a candidate.[105] The question raised from the Court's decision is whether such statutes are unconstitutional infringement on the free speech of municipal corporations, especially in light of the Court's reasoning that speech rights are independent of the identity status of the speaker.

Additionally, in these instances, it is the individual's "speech" that is prohibited by state law, not the "speech" of the governmental corporation. For example, the Texas Election Code prohibits officers or employees of political subdivisions from spending or authorizing the spending of political subdivision funds. For example, Texas forbids municipal corporations from spending its funds on any communication that amounts to "political advertising" or a communication that advocates passage or defeat of a measure or defeat of a candidate, that is, "electioneering." A separate question is whether the governing body, acting on behalf of the governmental corporation, can authorize the corporation to "speak" as a corporation and thereby avoid similar prosecution as individuals as prescribed for in state statutes. Since, a municipal corporation cannot act without a valid vote from its governing body; it follows that a member of the governing body would theoretically violate the state law if it voted to authorize the expenditure of its funds on political advertising. Therefore, such state law provisions, in the reasoning of the Court, would operate as a "prior restraint" on the free speech rights of the municipal corporation, and are, thus, as the Court has ruled, an unconstitutional infringement on the "free speech" rights.

Yet, at the same time, the Court has also ruled that the constitutional free speech protections are afforded a "speaker" independent of its identity as a person or corporation. Therefore, if a corporation cannot be prohibited from spending its funds on "political advertising" then its officers and employees cannot be prohibited from spending or authorizing the spending of political subdivision funds. Hence, since the corporation cannot be prohibited from spending its funds on political advertising, then its officers, employees, and members of its governing body also cannot be prohibited from authorizing

[105] Texas Election Code, Chapter 255.

(including, to vote to authorize) or spending the corporation's funds on political advertising.

Finally, a separate question is raised regarding what kind of circumstances are required in order to factually establish a "compelling state interest" of sufficient degree to pass constitutional muster. In this case, the two major political parties must have felt "compelled to join together to develop the Bipartisan Campaign Reform Act of 2002" (BCRA) to address matters related to federal election campaigns. Additionally, notwithstanding the bipartisan nature of not only the final legislation but the observed need for it, the Court ignored the question of whether the specific provisions of the BCRA were in fact "narrowly tailored to achieve a compelling governmental interest." That is to say that the Bipartisan Campaign Reform Act of 2002 was developed in response to the consensus of the two opposing political parties in Congress as a result of intense political and philosophical debate, and with the oversight and guidance of various governmental and political legal advisers. It resulted from the agreement by political opponents of all sides on the need to "regulate" the political contributions, expenditures, and activities of corporations and unions. Through the process of such political debate, deliberation and agreement, the various members of Congress felt the need to limit certain types of communications during the narrow window of the 30-day period prior to an election. Yet the Court was not persuaded by the limiting nature of the prohibitions. BCRA did not wholly prohibit a corporation or a union from paying for any electioneering communications. The restrictions were only during the thirty-day window prior to election day. At any other time, corporations and unions are free to communicate their "opinions" on any candidate for elective office in any way they see fit.