



# The First Amendment, Political Speech, and the Future of Campaign Finance Laws

*The Constitution at a Crossroads*

## Introduction

In 2010, the Supreme Court's decision in *Citizens United v. FEC* upended the world of campaign finance law as we know it by recognizing for the first time that the political speech of corporations is entitled to the same constitutional protections as political speech by individuals. Reacting to the decision, President Barack Obama chastised the Court in his 2010 State of the Union Address: "[L]ast week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections." He continued, "I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people." In response, Justice Samuel Alito, sitting in the audience with most of his Supreme Court colleagues, mouthed "Not true," even as much of Congress gave the President a standing ovation for his criticism of the Court.

The visceral interaction between the three branches of government at the 2010 State of the Union Address highlights the uncertainties created by the Court's deeply divided decision in *Citizens United*. The five-Justice majority and four-Justice dissent in *Citizens United* disagreed sharply about fundamental propositions such as whether corporations should receive the same First Amendment rights as living human beings and the scope of the powers of the federal government and the states to root out corruption in our political process.

With the Court currently considering whether to strike down Montana's century-old law limiting corporate political spending, perhaps without oral argument, and with challenges to long-standing federal restrictions on political contributions by corporations and federal contractors hurtling towards the Supreme Court, the Nation's system of campaign finance law and the Constitution's protection of corporate political speech are at a crossroads.

## The Founders' Constitution: Freedom of Speech, Corporations, and Corruption

Campaign finance law lies squarely at the intersection of three important aspects of our constitutional history—freedom of speech, the rights of corporations versus the rights of the people, and fear of corruption. Since our Nation's founding, there has been a "profound national commitment

to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>1</sup> When it comes to the corporate form, it has been long understood that “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”<sup>2</sup> And as George Mason warned his fellow Delegates at the Constitutional Convention in Philadelphia, “if we do not provide against corruption, our government will soon be at an end.”<sup>3</sup>

The First Amendment specifies that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” While the Founders did not clarify the scope of the First Amendment’s protections during debates on the Amendment, it has been widely recognized since the debates over the Alien and Sedition Act of 1798 that protection of political speech lies at the core of the First Amendment’s guarantee of freedom of speech. The Alien and Sedition Act imposed criminal penalties on false, scandalous, and malicious anti-government speech, and in the famous Virginia Resolution of 1798, James Madison, the father of the First Amendment, made the case that the Act could not be squared with the First Amendment. In arguing against the constitutionality of the Act, James Madison forcefully argued that “the right of freely examining public characters and measures, and of free communication among the people thereon,” has “justly [been] deemed the only effectual guardian of every other right.”<sup>4</sup> In the court of history, Madison’s objection that “the censorial power is in the people over the Government, and not in the Government over the people”<sup>5</sup> carried the day. As President, Thomas Jefferson pardoned those who had been convicted and sentenced under the Act, and fines levied under the Act were repaid by an Act of Congress on the ground that the Act violated the Constitution.<sup>6</sup>

While our Founding-era history demonstrates a fundamental concern that individuals be free to criticize the government, the Founders recognized a fundamental difference between corporations and “We the People” who founded the Nation and created the Constitution. The Founders viewed corporations as legally distinct from natural persons, treating them as powerful artificial entities that needed to be carefully regulated to ensure that they did not abuse the special privileges they alone received. James Madison summed up the Founding-era vision of corporations during the 1st Congress by explaining that “a charter of incorporation . . . creates an artificial person not existing in law,” and confers special “rights and attributes, which could not otherwise be claimed.”<sup>7</sup> In contrast, the Declaration of Independence recognized that the people were “endowed . . . with certain unalienable Rights.” Madison’s view was reflected again in Chief Justice John Marshall’s decision in *Trustees of Dartmouth College v. Woodward*, which explained that a corporation, “[b]eing a mere creature of law, [] possesses only those properties which the charter of creation confer upon it . . . .”<sup>8</sup>

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<sup>1</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>2</sup> *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

<sup>3</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 392 (Max Farrand ed. 1966) (“Farrand’s Records”).

<sup>4</sup> Virginia Resolution of 1798, 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 553-54 (1876).

<sup>5</sup> Annals of Congress, 3<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. 934 (1794).

<sup>6</sup> For discussion, see *New York Times*, 376 U.S. at 276.

<sup>7</sup> Annals of Congress, 1st Cong., 3rd Sess. 1949 (1791).

<sup>8</sup> *Dartmouth College*, 17 U.S. at 636.

Finally, the Founders were intensely concerned about corruption of the government, and sought to design the Constitution to give our national government broad powers to prevent corruption or the appearance of corruption.<sup>9</sup> James Madison’s notes of the Constitutional Convention record that 15 delegates used the term “corruption” no fewer than 54 times, the vast majority by seven of the most prominent delegates, including Madison, Gouverneur Morris, George Mason, and James Wilson.<sup>10</sup> Alexander Hamilton explained in Federalist No. 68 that in drafting the Constitution, “[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.”<sup>11</sup> According to James Madison, the desire of the Framers was to ensure that American government would be “dependent on the people alone.”<sup>12</sup>

## Campaign Finance Law from the 1907 Tillman Act to *Citizens United*

The roots of modern campaign finance law and restrictions on corporate political speech can be traced back to President Theodore Roosevelt. In 1904, during his annual address to Congress, President Roosevelt expressed that “[t]he power of the Government to protect the integrity of the elections of its own officials is inherent,” recommending “the enactment of a law directed against bribery and corruption in Federal elections.”<sup>13</sup> The next year, he went further, exhorting in his 1905 annual address to Congress that “[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law.”<sup>14</sup> In 1906, President Roosevelt again pushed Congress in his annual address to “prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly.”<sup>15</sup> Congress responded in 1907 by passing the Tillman Act, which prohibited corporations from contributing money to influence elections.

Congress continually strengthened campaign finance laws over the coming decades,<sup>16</sup> but it was only in the wake of the Watergate scandal that Congress enacted comprehensive campaign finance reform. In 1974, in amendments to the Federal Election Campaign Act (FECA), Congress imposed extensive limits on campaign fundraising and spending, expanded disclosure requirements, established the presidential public financing program, and created the Federal Elections Commission. In 1976, in *Buckley v. Valeo*,<sup>17</sup> the Supreme Court issued its landmark decision upholding FECA’s contribution limits,<sup>18</sup> disclosure requirements,<sup>19</sup> and the presidential public financing program,<sup>20</sup> while striking down

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<sup>9</sup> See, e.g., Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009).

<sup>10</sup> James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 177 (1994).

<sup>11</sup> The Federalist No. 68, at 411 (Clinton Rossiter ed. 2003).

<sup>12</sup> The Federalist No. 52, at 323 (Clinton Rossiter ed. 2003).

<sup>13</sup> 39 Cong. Rec. 17 (1904).

<sup>14</sup> 40 Cong. Rec. 96 (1905).

<sup>15</sup> 41 Cong. Rec. 22 (1906).

<sup>16</sup> See Federal Corrupt Practices Act of 1925, 43 Stat. 1070; Hatch Act of 1939, 53 Stat. 1147; Labor Management Relations Act of 1947, 61 Stat. 136; Federal Election Campaign Act of 1972, 86 Stat. 3.

<sup>17</sup> 424 U.S. 1 (1976).

<sup>18</sup> *Id.* at 23-38.

<sup>19</sup> *Id.* at 60-85.

<sup>20</sup> *Id.* at 85-108.

its expenditure limitations.<sup>21</sup> The *Buckley* Court reasoned that the first three of these regulations were justified by the need to prevent corruption or the appearance of corruption from undermining the integrity of American democracy, but that the restriction on campaign spending trenched too heavily on the First Amendment's protection of political speech. In the Court's view, FECA's strict limits on spending – permitting the expenditure of only \$1,000 on a campaign, not even enough to pay for a one-page newspaper advertisement – could not be justified as necessary to prevent corruption.

*Buckley* also established the controversial, but now largely settled, principle that money is a form of speech protected by the First Amendment. As the Court explained, “virtually every means of communicating ideas in today's mass society requires the expenditure of money,” therefore, it follows, “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression.”<sup>22</sup> Justice Byron White provided the dissenting view that “money is not always equivalent to or used for speech, even in the context of political campaigns . . . . There are . . . many expensive campaign activities that are not themselves communicative or remotely related to speech.”<sup>23</sup> Justice John Paul Stevens would later make the point even more succinctly, writing that “Money is property; it is not speech.”<sup>24</sup>

In 1978, two years after *Buckley*, in *First National Bank of Boston v. Bellotti*,<sup>25</sup> the Supreme Court for the first time held unconstitutional state efforts to limit political spending by for-profit corporations. In its 5-4 ruling in *Bellotti*, a divided Court struck down limits on independent expenditures made by corporations in a state ballot measure election, concluding that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source” and that the government's interest in preventing corruption did not justify a ban on corporate spending concerning the merits of a state ballot measure.<sup>26</sup> Nonetheless, the five-Justice majority in *Bellotti* went out of its way to suggest that “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.”<sup>27</sup>

The majority's understanding in *Bellotti* that corporations might present special dangers under certain circumstances was not altogether different than the dissent's view that government had an

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<sup>21</sup> *Id.* at 39-59. The Court also held that the method of appointment of the members of the FEC violated the Appointments Clause, and thus that the Commission, as presently constituted, could not constitutionally exercise most of its powers. *Id.* at 118-43.

<sup>22</sup> *Id.* at 19.

<sup>23</sup> *Id.* at 263 (White, J., concurring in part and dissenting in part).

<sup>24</sup> *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results. . . . The right to use one's own money to hire gladiators, or to fund “speech by proxy,” certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases.”).

<sup>25</sup> 435 U.S. 765 (1977).

<sup>26</sup> *Id.* at 777, 788-92.

<sup>27</sup> *Id.* at 787 n.26.

interest in “preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process.”<sup>28</sup> Leading the charge for this view was none other than then-Justice William Rehnquist, who quickly established himself as the Court’s leading voice on regulating corporate political speech in order to protect the public interest and combat corruption. Indeed, in *FEC v. National Right to Work Committee (NRWC)*,<sup>29</sup> four years after *Bellotti*, Justice Rehnquist wrote for a unanimous Court that Congress’s “legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,” upholding FECA’s limitations on corporate solicitation of campaign funds as “a permissible assessment of the dangers posed by those entities to the electoral process.”<sup>30</sup>

In 1990, in *Austin v. Michigan Chamber of Commerce*,<sup>31</sup> the Court confirmed by a vote of 6-3 that corporations could be treated differently than people when it came to candidate elections. Building off *NRWC* and other precedents, *Austin* reaffirmed the government’s anti-corruption interest in regulating “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form,” even as it acknowledged that “[t]he mere fact that [a speaker] is a corporation does not remove its speech from the ambit of the First Amendment.”<sup>32</sup> Citing *Bellotti*, the Court again recognized that “a legislature might demonstrate a danger of real or apparent corruption posed by [independent] expenditures when made by corporations to influence candidate elections,” emphasizing that “the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”<sup>33</sup>

Justice Anthony Kennedy and Justice Antonin Scalia, newcomers to the Court, wrote scathing dissenting opinions arguing that, under the First Amendment, corporations no less than individuals had an unlimited right to spend money in all elections.<sup>34</sup> In their view, it was unconstitutional censorship to demand that corporations surrender their First Amendment rights simply because they received benefits from the government. Justice Kennedy condemned the Court’s judgment as “repugnant to the First Amendment” and inconsistent with its “central guarantee, the freedom to speak in the electoral process,” while Justice Scalia argued that the Court had lost sight of the “absolutely central truth of the First Amendment” that “government cannot be trusted to assure, through censorship the ‘fairness’ of political debate.”<sup>35</sup> In these dissents, Justice Kennedy and Scalia laid the groundwork for the view that would later obtain a majority in *Citizens United*.

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<sup>28</sup> *Id.* at 809 (White, J., dissenting); *id.* at 826 (Rehnquist, J., dissenting).

<sup>29</sup> 459 U.S. 197 (1982).

<sup>30</sup> *Id.* at 209-10, 209.

<sup>31</sup> 494 U.S. 652 (1990).

<sup>32</sup> *Id.* at 652, 657, 660 (1990).

<sup>33</sup> *Id.* at 659-60.

<sup>34</sup> *Id.* at 695 (Kennedy, J., dissenting); *id.* at 679 (Scalia, J., dissenting). Justice Sandra Day O’Connor, who had voted in the unanimous majority in *NRWC*, joined Justice Kennedy’s dissent in *Austin*, an alliance that was short-lived.

<sup>35</sup> *Id.* at 696 (Kennedy, J., dissenting); *id.* at 680 (Scalia, J., dissenting).

Following *Austin*, Justice Kennedy and Justice Scalia, now joined by Justice Clarence Thomas, continued to argue for a radical revision of constitutional first principles, arguing that the First Amendment also strictly limited the power of the government to regulate campaign contributions. In 2000, in *Nixon v. Shrink Missouri Gov't PAC*,<sup>36</sup> the Court, by a 6-3 vote, upheld Missouri's campaign contribution limits, holding "*Buckley* to be authority for comparable state regulation" and finding "no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute."<sup>37</sup> Justice Kennedy dissented, arguing that, with the rise of soft money, *Buckley's* acceptance of limits on campaign contributions had to be reconsidered. He lambasted the majority for announcing a rule that "suppresses one of our most essential and prevalent forms of political speech" and "perpetuates and compounds a serious distortion of the First Amendment."<sup>38</sup> In a separate dissent, Justice Thomas, joined by Justice Scalia, argued that "*Buckley* was in error" and ought to be overruled.<sup>39</sup> In their view, "the Constitution leaves it entirely up to citizens and candidates to determine who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade. *Buckley's* ratification of the government's attempt to wrest this fundamental right from citizens was error."<sup>40</sup>

These deep ideological divisions over the meaning of the First Amendment and the authority of the government to ensure the integrity of the political process continued in 2003 in *McConnell v. FEC*,<sup>41</sup> when the Court rejected by a 5-4 vote constitutional challenges to the Bipartisan Campaign Reform Act ("BCRA"), commonly known as "McCain-Feingold," an effort by Congress to close loop holes in campaign finance law that had emerged after *Buckley*. In *McConnell*, Justices O'Connor and Stevens, writing for the five-Justice majority, reaffirmed *Buckley's* conclusion that "the prevention of corruption and its appearance constitutes a sufficiently important interest to justify political contribution limits."<sup>42</sup> The majority also rejected the challenge to the regulation of independent expenditures by corporations on the basis of *Austin* and other precedents, explaining that "[s]ince our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."<sup>43</sup>

Justices Kennedy, Thomas, and Scalia disagreed, dissenting both as to the broad scope of Congress' power to prevent corruption and its appearance and to the continued recognition that corporations do not have the same rights as living persons to spend money to influence elections.<sup>44</sup> The dissenters would have dramatically narrowed the government's authority to prevent corruption, limiting it to cases of *quid pro quo* corruption, while greatly expanding the rights of corporations, overruling

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<sup>36</sup> 528 U.S. 377 (2000).

<sup>37</sup> *Id.* at 382, 397-98.

<sup>38</sup> *Id.* at 405, 406 (Kennedy, J., dissenting).

<sup>39</sup> *Id.* at 410 (Thomas, J., dissenting).

<sup>40</sup> *Id.* at 420 (Thomas, J., dissenting).

<sup>41</sup> 540 U.S. 93 (2003).

<sup>42</sup> *Id.* at 143.

<sup>43</sup> *Id.* at 203.

<sup>44</sup> *Id.* at 256-60 (Scalia, J., concurring in part and dissenting in part); *id.* at 264-75 (Thomas, J., concurring in part and dissenting in part); *id.* at 323-330 (Kennedy, J., concurring in part and dissenting in part).

*Austin* and giving corporations the right to spend unlimited sums of money on elections. In a dramatic shift, Chief Justice Rehnquist, without explanation, signed on to Justice Kennedy’s call to overrule *Austin*, breaking from his more than 25 years of unwavering support for the proposition that corporations do not possess the same First Amendment rights as individuals to spend money to influence elections.

## ***Citizens United: Deregulating Campaign Finance Law***

On the day the Supreme Court heard reargument in *Citizens United v. FEC*, Senator John McCain, co-author of BCRA, admonished Chief Justice John Roberts to stand by the promise he had made during his confirmation hearing that he would respect precedent.<sup>45</sup> Senator McCain had legitimate cause for concern. *Citizens United* had initially appeared before the Court as a relatively narrow case—whether a full-length documentary film critical of Hillary Clinton was entitled, under the First Amendment, to an exemption from BCRA’s restrictions on corporate electioneering. After oral argument, however, the Court took the highly unusual step of requesting reargument, asking the parties whether it should overrule *McConnell* and *Austin* and strike down BCRA’s restrictions on electioneering communications.<sup>46</sup> Reacting to this development, Senator McCain argued that “nothing has happened . . . to warrant the drastic step of overruling [*McConnell* and *Austin*].”<sup>47</sup> Something *had* happened though. Chief Justice Roberts and Justice Samuel Alito had succeeded Chief Justice William Rehnquist and Justice Sandra Day O’Connor. And what a difference a change in Court membership can make.

The *Citizens United* majority, led by Justice Kennedy, made two significant changes in the law. First, by overruling *McConnell* and *Austin*, the majority held that corporations have the same constitutional right to speak during elections as “We the People.” Second, it elevated to majority status what Justice O’Connor had pilloried as a “crabbed view of corruption”<sup>48</sup> in *McConnell* – that large corporate independent expenditures supporting a specific candidate simply do not give rise to corruption, or even the appearance of corruption.

The first major shift of *Citizens United* was the majority’s recognition that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”<sup>49</sup> In Justice Kennedy’s view, the government cannot “repress speech by silencing certain voices.”<sup>50</sup> To the majority in *Citizens United*, *Austin* and other cases “interfere[d] with the ‘open marketplace’ of ideas protected by the First Amendment.”<sup>51</sup> In dissent, Justice Stevens emphasized that Justice Kennedy’s “denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality,” criticizing the majority

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<sup>45</sup> Statement of U.S. Senators John McCain and Russ Feingold on the Implications of Supreme Court Case *Citizens United v. FEC*, September 9, 2009.

<sup>46</sup> Justice John Paul Stevens responded to this development in his dissent in *Citizens United*, explaining that “five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.” *Citizens United v. FEC*, 130 S.Ct. 876, 932 (2010) (Stevens, J., dissenting).

<sup>47</sup> Statement of Senator McCain, September 9, 2009.

<sup>48</sup> *McConnell*, 540 U.S. at 152.

<sup>49</sup> *Citizens United*, 130 S.Ct. at 903.

<sup>50</sup> *Id.* at 898.

<sup>51</sup> *Id.* at 906.

opinion as “essentially an amalgamation of resuscitated dissents.”<sup>52</sup> In the dissent’s view, the majority had lost sight of the fundamental differences between individuals and corporations, faulting the majority for ignoring that corporations “are not themselves members of ‘We the People’ by whom and for whom the Constitution was established” as well as the “distinctive potential of corporations to corrupt the electoral process.”<sup>53</sup>

*Citizens United*’s most far-reaching conclusion may be its second – that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” since only “*quid pro quo* arrangements” with candidates create a potential for actual or apparent corruption.<sup>54</sup> Justifying this expansive conclusion in *Citizens United*, Justice Kennedy explained that “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt,” and in any case, “[i]ngratiation and access . . . are not corruption.”<sup>55</sup> The majority also surmised that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”<sup>56</sup>

Pushing back forcefully, the dissent in *Citizens United* argued that the majority “ha[s] no basis for elevating [its] own optimism into a tenet of constitutional law.”<sup>57</sup> To the contrary, “the majority’s apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences is at odds with “our constitutional history and the fundamental demands of a democratic society.”<sup>58</sup> As Justice Stevens argued, a broad view of the government’s power to stamp out corruption “has deep roots in this Nation’s history. . . . ‘[T]he Framers were obsessed with corruption,’ which they understood to encompass dependency of public officeholders on private interests. . . . When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that the Court has lost sight of.”<sup>59</sup>

## Public Financing in *Arizona Free Enterprise Club*

A year after *Citizens United*, a divided Supreme Court in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* struck down an Arizona public financing law – the Clean Elections Act -- that had been enacted by the people of Arizona through public referendum in reaction to a string of public corruption scandals that shook the state and the Nation.<sup>60</sup> In an opinion by Chief Justice Roberts, the same five-Justice majority that decided *Citizens United* expressed two primary problems with Arizona’s public financing program. First, although the Clean Elections Act did not create any limitations on how

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<sup>52</sup> *Id.* at 945, 942 (Stevens, J., concurring in part and dissenting in part).

<sup>53</sup> *Id.* at 972, 947 (Stevens, J., concurring in part and dissenting in part).

<sup>54</sup> *Id.* at 909.

<sup>55</sup> *Id.* at 910.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 963 n. 64 (Stevens, J., concurring in part and dissenting in part).

<sup>58</sup> *Id.* at 961, 963 (Stevens, J., concurring in part and dissenting in part).

<sup>59</sup> *Id.* at 963-94 (Stevens, J., concurring in part and dissenting in part) (quoting Teachout, *supra*, at 348).

<sup>60</sup> 131 S. Ct. 2806 (2011). The scandal, which became known as AzScam, implicated nearly ten percent of the members of the Arizona legislature for allegedly receiving more than \$370,000 in bribes to support efforts to legalize casino gambling. See *State v. Walker*, 914 P.2d 1320, 1324-29 (Ariz. Ct. App. 1995) (detailing allegations).

much non-participating candidates or independent groups could spend, the majority nonetheless concluded that it “substantially burden[ed] protected political speech” because the release of supplementary public financing was “triggered” when opponents’ expenditure of private funds exceeded a certain threshold.<sup>61</sup> Second, the majority held that Arizona did not have a compelling governmental interest in tailoring its program to balance the need for sufficient public funding to attract candidate participation with a desire to conserve limited public resources, since this only indirectly served an anti-corruption interest.<sup>62</sup> Instead, the majority viewed Arizona as attempting to “level the playing field,” which Chief Justice Roberts condemned as an unconstitutional “intrusion by the government into the debate over who should govern . . . .”<sup>63</sup>

Justice Elena Kagan authored a four-Justice dissent, which expressed disbelief at the “chutzpah” of the plaintiffs’ “novel argument” that “Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even though they could have received (but chose to spurn) the same financial assistance.”<sup>64</sup> In Justice Kagan’s view, “*Buckley* rejected any idea, along the lines the majority proposes, that a subsidy of electoral speech was in truth a restraint.”<sup>65</sup> The dissent highlighted how the majority’s insistence on a one-size-fits-all public financing program tied the hands of policymakers seeking to create a program that can be effective and viable across a wide variety of races. “Too small,” Justice Kagan explained, “and the grant will not attract candidates to the program; and with no participating candidates, the program can hardly decrease corruption.”<sup>66</sup> “Too large,” she continued, “and the system becomes unsustainable, or at the least an unnecessary drain on public resources.”<sup>67</sup> In Justice Kagan’s view, Arizona’s trigger “is just a fine-tuning of the lump-sum program approved in *Buckley*.”<sup>68</sup> Finally, Justice Kagan expressed concern over subjecting the “burden” identified by the majority to “the most stringent review,” a standard far in excess of the one *Buckley* applied to disclosure requirements or even contribution ceilings,<sup>69</sup> suggesting an across-the-board skepticism of campaign finance reform by the Court’s conservatives.

## The First Amendment and Political Speech at a Crossroads

Taken seriously, the expansive language of *Citizens United* suggests few limits on political spending that would not be viewed skeptically by the conservative bloc of the Roberts Court. The Court’s emphasis that the government cannot restrict speech based on the identity of the speaker calls into question the continuing validity of federal and state limits on contributions to candidates by corporations, unions, and perhaps others.<sup>70</sup> And if the Court’s conservative majority continues to take a very narrow view of the government’s anti-corruption interest, then other federal restrictions might also

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<sup>61</sup> *Arizona Free Enterprise*, 131 S.Ct. at 2813.

<sup>62</sup> *Id.* at 2824.

<sup>63</sup> *Id.* at 2826.

<sup>64</sup> *Id.* at 2835 (Kagan, J., dissenting) (emphasis in original).

<sup>65</sup> *Id.* at 2836.

<sup>66</sup> *Id.* at 2842 (Kagan, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 2839 (Kagan, J., dissenting).

be called into question, such as limitations on so-called “soft money” previously upheld in *McConnell*,<sup>71</sup> or the federal law, enacted at mid-century, limiting federal contractors from making political contributions to influence federal elections.<sup>72</sup> Indeed, the Roberts Court might even go further, following the lead of Justices Scalia and Thomas, and overrule *Buckley* and impose new limitations on the authority of federal and state governments to regulate campaign contributions.<sup>73</sup> After *Citizens United* and *Arizona Free Enterprise*, only disclosure requirements seem safe from invalidation by the Roberts Court.

The impact of *Citizens United* at the state level has also been significant, with more than a dozen states scurrying to change their laws in order to avoid legal challenges.<sup>74</sup> The only state to resist *Citizens United*, Montana, now appears on a collision course with the Supreme Court after the Montana Supreme Court upheld the state’s century old ban on corporate political spending.<sup>75</sup> In a statement attached to the Court’s order staying the Montana decision pending the filing of a petition for writ of *certiorari*, Justice Ruth Bader Ginsburg, joined by Justice Stephen Breyer, questioned “whether, in light of the huge sums currently deployed to buy candidates’ allegiance, *Citizens United* should continue to hold sway.”<sup>76</sup> Justice Ginsburg also challenged Justice Kennedy’s view of corruption, stating that “Montana’s experience, and experience elsewhere since this Court’s decision in *Citizens United*, make it exceedingly difficult to maintain that independent expenditures by corporations ‘do not give rise to corruption or the appearance of corruption.’”<sup>77</sup> Whether state laws will fall in the wake of *Citizens United* and whether Justice Kennedy’s narrow view of corruption will continue to prevail are questions that may soon be addressed by the Court.

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<sup>70</sup> The Supreme Court upheld federal limits on contributions by corporations in *United States v. Beaumont*, 539 U.S. 146 (2003), but that case has been under sustained attack since *Citizens United*. See *United States v. Danielczyk*, 788 F.Supp.2d 472 (E.D. Va. 2011), *opinion clarified on denial of reconsideration*, 791 F. Supp. 2d 513, 514 (E.D. Va. 2011) (holding that “if an individual can make direct contributions within FECA’s limits, a corporation cannot be banned from doing the same thing,” since “*Citizens United* held that there is no distinction between an individual and a corporation with respect to political speech,” and concluding that *Beaumont’s* reasoning was supplanted by *Citizens United*); but see *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-26 (9th Cir. 2011); *Minn. Concerned Citizens for Life, Inc. v. Swanson*, 640 F.3d 304, 316-19 (8th Cir.), *reh’g en banc granted*, No. 10-3126 (8<sup>th</sup> Cir. July 12, 2011). The attack on *Beaumont* relies heavily on the language in *Citizens United* forbidding speaker-based distinctions, but this Term, the Court retreated from this language by upholding speaker-based distinctions in federal law that prohibit foreign citizens from donating money to candidates, national parties, and outside groups, or making expenditures that expressly advocate for or against a candidate. *Bluman v. FEC*, 800 F.Supp.2d 281 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012).

<sup>71</sup> The Supreme Court summarily affirmed a decision of a three-judge panel of the D.C. District Court upholding BCRA’s soft money ban, but Justices Kennedy, Scalia, and Thomas expressed a desire to hear oral argument in the case, suggesting a possible divide among the Justices on this issue. *Republican Nat. Comm. v. Fed. Election Comm’n*, 698 F. Supp. 2d 150 (D.D.C.), *aff’d*, 130 S. Ct. 3544 (U.S. 2010).

<sup>72</sup> See *Wagner v. FEC*, No. 11-1841 (JEB) (D.D.C. April 16, 2012) (denying motion for preliminary injunction).

<sup>73</sup> See, e.g., *Beaumont*, 539 U.S. at 164-65 (Thomas, J., dissenting); *id.* at 163-64 (Kennedy, J., concurring).

<sup>74</sup> See National Conference of State Legislatures, *Citizens United and the States* (Jan. 4, 2011) (available at <http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx>).

<sup>75</sup> *Am. Tradition P’ship, Inc. v. Bullock*, 363 Mont. 220 (2011), *stayed* 132 S. Ct. 1307 (2012).

<sup>76</sup> 132 S.Ct. 1307.

<sup>77</sup> *Id.* at 1307-08 (quoting *Citizens United*, 131 U.S. at 909).

It may still be possible to regulate campaign financing in this country consistent with *Citizens United*, and reformers have pointed to stronger disclosure rules in the proposed DISCLOSE Act, as well as public financing programs like New York City's, which encourages small donor donations by matching up to \$175 of each contribution at a six-to-one ratio.<sup>78</sup> But, by holding that corporations have the same right as living persons to spend money on elections and dramatically narrowing the scope of the government's interest in preventing corruption or the appearance of corruption, *Citizens United* takes off the table the most direct and prevalent means of ensuring that corporations do not abuse the special privileges they alone receive to dominate the political process. As Justice Stevens argued in dissent, "At bottom, the Court's opinion is a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."<sup>79</sup>

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<sup>78</sup> Angela Migally and Susan Liss, Small Donor Matching Funds: The NYC Election Experience, 1 (2010) available at [http://www.brennancenter.org/content/resource/small\\_donor\\_matching\\_funds\\_the\\_nyc\\_election\\_experience/](http://www.brennancenter.org/content/resource/small_donor_matching_funds_the_nyc_election_experience/).; E.J. Dionne, *How to Beat Citizens United*, WASH. POST., April 22, 2012 ([http://www.washingtonpost.com/opinions/how-to-beat-citizens-united/2012/04/22/qIQAxGjaT\\_story.html](http://www.washingtonpost.com/opinions/how-to-beat-citizens-united/2012/04/22/qIQAxGjaT_story.html)). But to the degree these programs trigger increased matching based on opponent expenditures it is likely they would face similar constitutional difficulties to Arizona's program.

<sup>79</sup> *Citizens United*, 130 S. Ct. at 979 (Stevens, J., concurring in part and dissenting in part).