THE ROBERTS COURT AND CAMPAIGN FINANCE: "UMPIRE" OR "PRO-BUSINESS ACTIVISM?"

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I. INTRODUCTION

When he was nominated as the seventeenth Chief Justice of the United States Supreme Court, John G. Roberts characterized the judicial role in a modest and unassuming fashion:[1] "Judges and Justices are servants of the law, not the other way around."[2] Indeed, he went so far as to analogize the role of judges to that of "umpires:" "Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . ."[3]

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1. *See* N.Y. Times, *Times Topics*, *John G. Roberts, Jr.*, http://topics.nytimes.com/top/reference/timestopics/people/r/john_g_jr_roberts/index.html (updated July 26, 2010) [hereinafter *Times Topics*] (characterizing the attitude conveyed by Chief Justice Roberts during his confirmation hearings as one of "judicial modesty" and "respect for precedent").

2. John G. Roberts, Jr., Statement, *Statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States* (Washington, D.C., Sept. 12, 2005), in Sen. Jud. Comm., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 158, 55 (Sept. 12, 2005) (available at http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html; *select* Download the entire S. Hrg. 109-158).

3. *Id.* at 55. Including the "umpire" reference, Roberts' characterization of the judicial role included the following statement:

> Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.

During Roberts' tenure as Chief Justice, the Court has rendered a number of important and controversial decisions on a range of issues.[4] Commentators and critics have questioned whether he has remained true to the "umpire" role, or whether he has instead tried to insert himself into the lineup (as, perhaps,

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> Mr. Chairman, when I worked in the Department of Justice in the Office of the Solicitor General, it was my job to argue cases for the United States before the Supreme Court. I always found it very moving to stand before the Justices and say, "I speak for my country." But it was after I left the Department and began arguing cases against the United States, that I fully appreciated the importance of the Supreme Court in our constitutional system. Here was the United States, the most powerful entity in the world, aligned against my client, and yet all I had to do was convince the Court that I was right on the law, and the Government was wrong, and all that power and might would recede in deference to the rule of law.
>
> That is a remarkable thing. It is what we mean when we say that we are a Government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans. It is the envy of the world, because without the rule of law, any rights are meaningless.
>
> President Ronald Reagan used to speak of the Soviet Constitution, and he noted that it purported to grant wonderful rights of all sorts to people, but those rights were empty promises because that system did not have an independent judiciary to uphold the rule of law and enforce those rights. We do, because of the wisdom of our Founders and the sacrifices of our heroes over the generations to make their vision a reality.
>
> Mr. Chairman, I come before the Committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it[is] my job to call balls and strikes and not to pitch or bat.

Id. at 55–56.

4. *See Holder v. Humanitarian L. Project*, 130 S. Ct. 2705, 2712–2714, 2724, 2728 (2010) (discussing whether an expressive right to provide material support to terrorist organizations exists, and finding that the government's legitimate interest in combating terrorism allows for regulation of speech in this instance); *United States v. Stevens*, 130 S. Ct. 1577, 1583, 1592 (2010) (quoting H.R. Rpt. 106-397 at 2 (Oct. 19, 1999)) (dealing with the issue of whether "crush videos"—in which women stomp small animals to death with their high heels—deserve constitutional protection, and finding that the statute regulating depictions of animal cruelty was overly broad); *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (holding that a municipality has the right to reject a religious monument because placing a permanent monument in a public park is not a form of government speech, and thus "is not subject to the Free Speech Clause"); *Garcetti v. Ceballos*, 547 U.S. 410, 413, 421 (2006) (deciding whether and to what extent public employees enjoy free-speech rights in their employment, and finding that when such speech is made while carrying out official duties, the speaker is "not speaking as [a] citizen[ ] for First Amendment purposes, and the Constitution does not insulate [the speaker's] communications from employer discipline").

has a majority of the Court).[5] *The New York Times* views the Roberts Court as playing an "activist" role and argues that it has pursued an aggressive agenda[6] that has championed the rights of corporations.[7] *The New York Times* also claims that "[j]udicial minimalism is gone"; that the Roberts Court has entered an "assertive and sometimes unpredictable phase"; and that the Court is the "most conservative" Supreme Court "in living memory."[8]

This Article examines several recent United States Supreme Court decisions on campaign finance.[9] Newspapers and commentators have criticized those holdings and at least one recent decision, *Citizens United v. Federal Election Commission*,[10] which overruled the government's ability to restrict corporate spending on political campaigns as a violation of free speech, evoked a firestorm of protest.[11] *The New York Times* dismissed the decision as

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5. *E.g.* The Opinion Pages, *Editorial*, *First Monday*, N.Y. Times A26 (Oct. 3, 2010) (available at http://www.nytimes.com/2010/10/04/opinion/04mon1.html) [hereinafter *First Monday*].

6. *See id.* ("The cases scheduled for argument in the next few months may appear modest. But if there is one lesson from the *Citizens United* ruling, it is that nothing—for this [C]ourt—is inevitably modest." (emphasis added)).

7. *Id.* Specifically, the *First Monday* editorial opines:

> The kinds of petitioners favored say a lot about the [C]ourt's interests and biases. The Warren [C]ourt, eager to champion individual rights, chose a large number of petitions from downtrodden people. The Rehnquist [C]ourt, looking for opportunities to vindicate states' rights, favored petitions from the states.
>
> The Roberts [C]ourt has championed corporations. The cases it has chosen for review this term suggest it will continue that trend.

Id.

8. *Times Topics*, *supra* n. 1.

9. *Citizens United v. Fed. Election Commn.*, 130 S. Ct. 876 (2010); *Fed. Election Commn. v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*); *McConnell v. Fed. Election Commn.*, 540 U.S. 93 (2003); *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990); *Fed. Election Commn. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*); *Buckley v. Valeo*, 424 U.S. 1 (1976).

10. 130 S. Ct. 876.

11. *Id.* at 886, 917; *see First Monday*, *supra* n. 5 ("By a [five]-to-[four] vote, the conservative justices overturned a century of precedent to give corporations, along with labor unions, an unlimited right to spend money in politics."); *see also All Things Considered*, Radio Broad., "Opposing Views of Campaign Finance Decision" (Natl. Pub. Radio Jan. 21, 2010) (transcript available at http://www.npr.org/templates/story/story.php?storyId=122823118) (host Madeline Brand interviews Newt Gingrich, Former Speaker of the House and campaign-finance-restriction opponent; and Fred Wertheimer, founder of Democracy 21, a nonprofit group dedicated to campaign-finance reform) (discussing the Supreme Court's ruling in *Citizens United*); Deborah Tedford, *Supreme Court Rips up Campaign Finance Laws*, http://www.npr.org/templates/story/story.php?storyId=122805666 (Jan. 21, 2010) (criticizing and explaining the effects of the *Citizens United* decision).

"[t]he most far-reaching example of the Roberts [C]ourt's pro-business bias," and it argued that the decision "[gave] corporations, along with labor unions, an unlimited right to spend money in politics."[12] President Obama agreed, characterizing the decision as "a major victory for big oil, Wall Street banks, health insurance companies[,] and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."[13] Others have expressed concern that the *Citizens United* decision will lead to the corruption of government officials.[14] Finally, the decision has sparked congressional attempts to amend existing campaign-finance laws and was even an issue in the 2010 congressional elections.[15]

This Article attempts to cut through the political rhetoric surrounding *Citizens United* and the Court's other major campaign-finance decision, *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL*).[16] It argues that the Roberts Court's approach to campaign finance is rooted more in doctrinal concerns regarding the Court's pre-Roberts precedent and disagreements regarding how the First Amendment should apply in the campaign-finance arena. While the Roberts Court's free-speech decisions have been mixed, with some decisions restrictively construing that right[17] and others expounding a more expansive view

12. *First Monday*, *supra* n. 5.

13. The White House, Off. of Press Sec., *Briefing Room*, *Statements & Releases*, *Statement from the President on Today's Supreme Court Decision*, http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0 (Jan. 21, 2010).

14. *E.g.* Ethan Arrow, Planet Money Blog, *Will a Court Ruling on Campaign Finance Raise Concerns about Corruption?* http://www.npr.org/blogs/money/2010/02/will_a_court_ruling_on_campaig.html (Feb. 8, 2010, 12:01 p.m.).

15. Frank James, The Two-Way—NPR's News Blog, *Obama Hits GOP for Opposing Campaign-Finance Bill*, http://www.npr.org/blogs/thetwo-way/2010/07/26/128778100/obama-hits-republicans-for-opposing-disclose-act (July 26, 2010, 4:41 p.m.).

16. 551 U.S. 449.

17. *See e.g. Pleasant Grove*, 129 S. Ct. at 1132, 1138 (holding that a city can decline to accept a permanent monument in a public park); *United States v. Williams*, 553 U.S. 285, 294–299, 307 (2008) (upholding portions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act against vagueness and overbreadth challenges, and adding child pornography to the list of speech categories that are excluded from First Amendment protection); *Beard v. Banks*, 548 U.S. 521, 524–525, 535 (2006) (upholding a "prison policy that 'denie[d] newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates" (quoting Amicus Curiae Br. of Council of St. Govts. et al. in Support of Petr., *Beard v. Banks*, 2006 WL 46381 at *i (No. 04-1739)); *Garcetti*, 547 U.S. at 421 (upholding restrictions on speech in the work environment in a prosecutor's office).

of the right to free speech,[18] many of the Court's pre-Roberts decisions were issued by a badly divided Court that produced multiple concurring and dissenting opinions.[19] These pre-Roberts Court decisions revealed major divisions within the Court regarding the scope of free-speech rights and the government's ability to regulate campaign-finance issues.[20] Given these previous dissensions, it is not surprising that the Roberts Court has not afforded much respect to the pre-Roberts Court's campaign-finance decisions. And as the dissenters gained majority status, they overturned some of those decisions.[21] Their chance came relatively quickly when Justice Sandra Day O'Connor retired from the Court in 2006 and was replaced by Justice Samuel Alito.[22] Part II of this Article summarizes the pre-Roberts Court's critical campaign-finance decisions leading up to this major change in the Court's composition.

II. SHIFTING SANDS AND CHANGING JURISPRUDENCE

Although *Citizens United* is the campaign-finance decision that has produced the most controversy and criticism, it was neither the Roberts Court's first foray into the campaign-finance arena, nor was this its first decision dealing with corporate participation in the political process. In the *WRTL* case, during Chief Justice Roberts' second year on the bench, the Court struck down portions of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA).[23] Section 203 criminalized corporate broadcasts of

18. Including the campaign-finance decisions, there have been several pro-free-speech decisions. *See Stevens*, 130 S. Ct. at 1592 (striking down a federal ban on "crush videos"); *Citizens United*, 130 S. Ct. at 917 (striking down portions of the Bipartisan Campaign Finance Reform Act); *Davis v. Fed. Election Commn.*, 554 U.S. 724, 744 (2008) (striking down portions of the Bipartisan Campaign Finance Reform Act); *WRTL*, 551 U.S. at 481–482 (striking down portions of the Bipartisan Campaign Finance Reform Act).

19. *E.g. McConnell*, 540 U.S. 93; *Buckley*, 424 U.S. 1.

20. See *infra* Part II for a discussion of how the Court was divided on these issues.

21. *See* Adam Liptak, *Court under Roberts Is Most Conservative in Decades*, N.Y. Times A1 (July 25, 2010) (available at http://www.nytimes.com/2010/07/25/us/25roberts.html?_r=1) (discussing the Roberts Court's conservative decisions).

22. *See id.* (discussing how Justice Sandra Day O'Connor's retirement affected the Court's balance).

23. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified throughout Title II of the United States Code);*WRTL*, 551 U.S. at 481–482.

communications naming a federal candidate for elected office that was targeted to the electorate shortly before an election.[24]

At the heart of *WRTL* was the distinction between "issue advertising" and "express advocacy."[25] An "issue advertisement" is one that seeks to educate or persuade the public regarding a specific issue.[26] "Express advocacy" is an advertisement that argues for or against the election of a specific candidate.[27] As the Roberts Court noted in *WRTL*, under pre-BCRA law, corporations were free to engage in political expression and debate so long as they did not engage in express promotion by advocating for or against a specific candidate.[28]

A. *Buckley*, *McConnell*, and the Pre-Roberts Court Dissents

The distinction between issue advertisement and express advocacy in advertising was first recognized by the Court's pre-Roberts decision in *Buckley v. Valeo*.[29] *Buckley*, a landmark campaign-finance decision in its own right, dealt with the Federal Election Campaign Act (FECA)[30] and the provision of that Act making it a crime for any person to spend more than one thousand dollars per year advocating the election or defeat of a candidate.[31] The Court recognized that the dividing line between explicitly advocating for the election or defeat of a candidate and merely discussing the issues was far from clear:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially

24. Pub. L. No. 107-155 at § 203 (codified at 2 U.S.C. § 441b(a) (2006)).

25. *See WRTL*, 551 U.S. at 456 (examining the distinction made in *McConnell*, 540 U.S. 93).

26. *Id.*

27. *Id.*

28. *Id.* at 457 (citing 2 U.S.C. §§ 441b(a)–(b)(2); *Fed. Election Commn. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (*MCFL*); *Buckley*, 423 U.S. at 44–45).

29. 424 U.S. 1.

30. Pub. L. No. 92-225, 86 Stat. 3 (1972) (as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263) (codified throughout the United States Code).

31. *Buckley*, 424 U.S. at 39 (quoting 18 U.S.C. § 608(e)(1), which states: "No person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds [one thousand dollars].").

> incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[32]

In order to avoid constitutional concerns, the Court construed the FECA as not applying to individuals who ran issue advertisements even if the advertisements urged viewers to contact the candidate.[33] In other words, the Court construed the language as prohibiting only advertisements that explicitly advocated for the election or defeat of a candidate.[34] The *Buckley* Court was concerned that an alternate interpretation would raise constitutional concerns because speakers might assume that their speech could be construed as an expenditure that violated Section 608(e)(1).[35] Under this framework, absent the "magic words"—of advocacy of election or defeat of a candidate—the Court would assume that issue advertisements did not constitute express advocacy.[36]

The *Buckley* distinction between "issue advertising" and "express advocacy" was rejected twenty-seven years later in *McConnell v. Federal Election Commission*.[37] *McConnell* involved a constitutional challenge to the BCRA's prohibition against "electioneering communications."[38] Specifically, the BCRA prohibited "any broadcast, cable, or satellite communication" that referred "to a clearly identified candidate for Federal office" and was targeted to the relevant electorate (involving fifty thousand or more persons) from airing within sixty days of a general election (or a runoff or special election) or within thirty days of a primary election or caucus.[39] Of course, the BCRA's definition of "electioneering communications" ran afoul of *Buckley*'s distinction between "issue advertising" and "express advocacy"[40] because an issue advertisement could refer to a "clearly identified candidate" if, for

32. *Id.* at 42–43.
33. *Id.*
34. *Id.* at 43–44.
35. *Id.* at 44–45.
36. *Id.* at 43–45.
37. 540 U.S. 93.
38. *Id.* at 132–133.
39. Pub. L. No. 107-155 at § 201 (codified at 2 U.S.C. § 434(f)(3)(A)(i)).
40. *Buckley*, 424 U.S. at 42–43.

example, it discussed an issue and then invited the viewer to call a particular candidate for public office.

In *McConnell*, the Court rejected *Buckley*'s distinction between "issue advertising" and "express advocacy" as "functionally meaningless."[41] In the *McConnell* Court's view, advertisers could avoid FECA liability easily by avoiding the magic words "calling for election or defeat of a candidate" and thereby casting their advertisements as "issue ads"—and they often chose to do so.[42] Indeed, the Court concluded that advertisers frequently believed it was preferable to air advertisements that avoided using the magic words:

> While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to "vote against Jane Doe" and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think." Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca–Cola, should, and did, avoid the use of the magic words.[43]

The Court noted that issue advertising was frequently designed to tip election results because "almost all of them aired in the [sixty] days immediately preceding a federal election."[44] As a result, *McConnell* held that issue advertising could be treated as express advocacy and therefore could be prohibited,[45] and rejected the

41. *McConnell*, 540 U.S. at 193 (citing the lower court in *McConnell v. Fed. Election Commn.*, 251 F. Supp. 2d 176, 303–304 (D.D.C. 2003) (Henderson, J., mem.); *id.* at 534 (Kollar-Kotelly, J., mem.); *id.* at 875–879 (Leon, J., mem.)).

42. *Id.* at 127.

43. *Id.* at 126–127 (footnotes omitted).

44. *Id.* at 127.

45. *Id.* at 193–194 ("*Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted [the] BCRA to correct the flaws it found in the existing system.").

vagueness concerns that had prompted a different result in *Buckley*.[46]

McConnell's conclusions came from a badly divided Court, with four dissenters raising free-speech concerns.[47] Justice Scalia leveled one of the strongest condemnations, flatly stating that "[t]his is a sad day for the freedom of speech."[48] He viewed the BCRA as unconstitutionally protecting incumbents against challengers and prohibiting criticism of government.[49] Justice Thomas agreed, characterizing the BCRA as "the most significant abridgement of the freedoms of speech and association since the Civil War."[50] Justice Kennedy denounced the majority's decision because he believed that it "replace[d] discrete and respected First Amendment principles with new, amorphous, and unsound rules, rules [that] dismantle basic protections for speech."[51] Finally, Chief Justice Rehnquist also dissented on free-speech grounds.[52] In sum, four Justices rejected significant parts of the *McConnell* decision due to its First Amendment implications.

With so much disagreement, it might not be surprising that the dissenting Justices would afford little respect to the *McConnell* decision in the future. In fairness to the Roberts Court, the pre-Roberts *McConnell* opinion was not one of the best decisions rendered by the United States Supreme Court in its long and revered history.[53] The decision was 272 pages long, in part

46. *Id.* at 194.

47. *See id.* at 247–365 (encompassing Justices Scalia, Thomas, Kennedy, and Rehnquist's dissenting opinions).

48. *Id.* at 248 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to Titles I and V, and concurring in the judgment in part and dissenting in part with respect to Title II).

49. *Id.* at 248, 262.

50. *Id.* at 264 (Thomas, J., concurring with respect to Titles III and IV, excepting BCRA §§ 311–318, concurring in the result with respect to BCRA § 318, concurring in the judgment in part and dissenting in part with respect to Title II, and dissenting with respect to Titles I and V and 18 U.S.C. § 311).

51. *Id.* at 287 (Kennedy, J., dissenting with respect to Titles I and II, concurring in the judgment with respect to BCRA § 213 and FECA§ 323(e), concurring in the judgment in part, and dissenting in part with respect to BCRA §§ 201–202 and 214).

52. *Id.* at 350–363 (Rehnquist, J., dissenting with respect to BCRA Titles I and V).

53. For example, at one point, Justice Sandra Day O'Connor's first majority opinion refers to the possibility that campaign-finance contributions can be corrupting or create the appearance of corruption. *Id.* at 149–150 (majority). But rather than provide proof that such contributions had resulted in actual corruption, the Court's holding was based largely on speculation by some legislators, and very little hard evidence existed:

because of the number of issues, and in part because of divisions on the Court regarding the meaning and application of the First Amendment in the arena of campaign finance, and the Court's failure to seek or find consensus.

B. Judicial Retirements and Shifting Balances

Within two years of *McConnell*, as Chief Justice Rehnquist passed away and Justice Sandra Day O'Connor retired from the Court, the dissenters had a potential opportunity to overrule the then-current majority as Chief Justice Roberts replaced Chief Justice Rehnquist in 2005 and Justice Samuel Alito replaced Justice O'Connor in early 2006.[54] To the extent that Chief Justice Roberts agreed with former Chief Justice Rehnquist's views[55] and Justice Alito's views diverged from Justice O'Connor's views,[56] the stage was set for overruling all or part of the *McConnell* decision.

The Court quickly seized the opportunity. *WRTL* was decided during Chief Justice Roberts' second term, and one year after Justice Alito's appointment.[57] The case involved Section 203 of the BCRA (one of the provisions upheld in *McConnell*), which criminalized the broadcasting of a communication that (a) names a federal candidate for elected office; and (b) is targeted to the electorate shortly before an election.[58] Although *McConnell* had rejected a facial challenge to this provision, *WRTL* involved an

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> Plaintiffs argue that without concrete evidence of an instance in which a federal officeholder has actually switched a vote (or, presumably, evidence of a specific instance where the public believes a vote was switched), Congress has not shown that there exists real or apparent corruption. But the record is to the contrary. The evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation . . . . To claim that such actions do not change legislative outcomes surely misunderstands the legislative process.

Id.

54. *See* Liptak, *supra* n. 21 and accompanying text (discussing the changes in the Court's dynamics after Justice Sandra Day O'Connor's retirement).

55. *See* Roger Parloff, CNNMoney.com, *Fortune*, *On History's Stage: Chief Justice John Roberts Jr.*, http://management.fortune.cnn.com/2011/01/03/on-historys-stage-chief-justice-john-roberts-jr (Jan. 3, 2011) (commenting on the Court's rightward shift and the direction in which it will likely head in the years to come).

56. *Id.*

57. 551 U.S. 449.

58. See *supra* note 37 and accompanying text for a discussion of Section 203 and how the *McConnell* decision affected this statutory provision.

as-applied challenge.[59] The case was brought by Wisconsin Right to Life (WRTL), a nonprofit, ideological advocacy corporation that sought to air a political advertisement entitled "Wedding."[60] It also aired another advertisement entitled "Loan."[61] Because the advertisements would run within thirty days of a primary election and urged viewers to contact candidates for public office, they were prohibited under the BCRA because they referred to a candidate in that election and were targeted to the electorate.[62]

Applying strict scrutiny, the Court struck down the BCRA provision as applied to the WRTL advertisements.[63] In doing so, the Court relied heavily on the free-speech principles emphasized by the *McConnell* dissenters.[64] The Court began by reaffirming the nation's commitment to the principle that "'debate on public issues should be uninhibited, robust, and wide-open,'"[65] and therefore provides "a safe harbor for those who wish to exercise First Amendment rights."[66] The Court also emphasized that the concept of free speech "embraces at least the liberty to discuss

59. An as-applied challenge is "[a] claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied." *Black's Law Dictionary* 100 (Bryan A. Garner ed., 9th ed., West 2009).

60. The Court printed a copy of the advertisement in its opinion:

> **PASTOR:** And who gives this woman to be married to this man?
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> **BRIDE'S FATHER:** Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .
>
> **VOICE-OVER:** Sometimes it's just not fair to delay an important decision.
>
> But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.
>
> It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

WRTL, 551 U.S. at 458–459 (quoting *Wis. Right to Life, Inc. v. Fed. Election Commn.*, 466 F. Supp. 2d 195, 198 n. 3 (D.D.C. 2006)).

61. *Id.* at 459 (citing *Wis. Right to Life, Inc.*, 466 F. Supp. 2d at 198 n. 4).

62. *Id.* at 460.

63. *Id.* at 464–465, 481.

64. *Id.* at 469–471.

65. *Id.* at 467 (quoting *Buckley*, 424 U.S. at 14 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

66. *Id.*

publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[67] The Court then rejected *McConnell*'s holding regarding issue advertisements, finding instead that an ad should be treated as "the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[68] Thus, it concluded that WRTL's ads should properly be construed as "issue advertising."[69] The Court reached these conclusions even though the ads ran shortly before an election and despite the Federal Election Commission's argument that the ads were the functional equivalent of express advocacy.[70]

But although the *WRTL* decision raised questions regarding the continued vitality of other aspects of the *McConnell* decision, the Court chose to skirt those questions and limit its holding to the issues that were actually raised in the *WRTL* case.[71] It did so even though Justice Scalia argued that *McConnell* should be overruled.[72] Perhaps the Court did not render a broader ruling because Justices Roberts and Alito were only in their second year on the Court and were thus reluctant to overrule precedent quickly.

67. *Id.* at 469 (quoting *First Natl. Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

68. *Id.* at 469–470.

69. *Id.* at 456, 470. Specifically, the Court stated:

> Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 470.

70. *Id.* at 472–473.

71. *Id.* at 480 (finding that the Court had no reason to revisit *McConnell*'s holding that express advocacy—or its functional equivalent—by a corporation shortly before an election may be prohibited).

72. *Id.* at 500–504 (Scalia, J., dissenting).

III. CITIZENS UNITED*: THE FREE-SPEECH DISSENTERS CAPTURE THE MAJORITY*

Further demise of the *McConnell* decision came only three years later in *Citizens United*.[73] *Citizens United* is such a long decision that it is not worthwhile to examine the entire decision in an article of this length.[74] But the decision's most important aspect is that it overruled the pre-Roberts Court's *Austin v. Michigan Chamber of Commerce*[75] conclusion that government could limit corporations' right to participate in the political process.[76]

A. Pre-*Austin* Jurisprudence and Corporate Free Speech

Neither *Citizens United* nor *Austin* involved the Court's first attempt to define the free-speech rights of corporations. In a number of decisions, the pre-Roberts Court held that corporations enjoy free-speech rights.[77] For example, in the Court's landmark decision *New York Times Co. v. Sullivan*,[78] it constitutionalized the tort of defamation and held that free-speech considerations limit state courts' ability to award damages in defamation cases.[79] The Court reached that conclusion in a suit against a corporation, the New York Times Company.[80] Likewise, in *Globe Newspaper Co. v. Superior Court of Massachusetts*,[81] as well as in other decisions,[82] the Court held that the press—in many instances, the corporate press—enjoys a First Amendment right to access and observe judicial proceedings.[83] And in *Cox Broadcasting Corp. v.*

73. 130 S. Ct. 876.

74. The published opinion spans 106 pages. *Id.* at 876–982.

75. 494 U.S. at 667.

76. *Citizens United*, 130 S. Ct. at 913 (holding that "*Austin* . . . should be and now is overruled. We return to the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity.").

77. *E.g. Globe Newsp. Co. v. Super. Ct. of Cal.*, 457 U.S. 596, 609 (1982); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Sullivan*, 376 U.S. at 283.

78. 376 U.S. 254.

79. *Id.* at 283 (finding that the First Amendment restricts the states' power to award damages for libel in suits initiated "by public officials against critics of their official conduct").

80. *Id.* at 256.

81. 457 U.S. 596.

82. *E.g. Press-Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1 (1986); *Columbia Broad. Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973).

83. *Press-Enter. Co.*, 478 U.S. at 13 (holding that a "qualified First Amendment right of access" applies to preliminary criminal hearings); *Globe Newsp. Co.*, 457 U.S. at 598,

Cohn,[84] the Court held that the First Amendment barred a damage award against a corporation for publishing the name of a deceased rape victim.[85]

Furthermore, *Austin* was not the Court's first decision regarding corporations' political free-speech rights. In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*),[86] the Court struck down portions of the Federal Election Campaign Act that restricted corporations from making independent political expenditures except through special segregated funds—rather than from their general corporate treasuries—because the statute violated a corporation's free-speech rights.[87] In *MCFL*, the Court reasoned that a small nonprofit corporation would face significant organizational and financial burdens if it were required to establish and administer a segregated political fund.[88] The statute also required that the corporation appoint a treasurer for its segregated fund, keep records of all contributions, file a statement of organization containing information about the fund, and update that statement periodically.[89] In addition, the statute permitted the corporation to solicit contributions to its segregated fund only from "members" and could not accept contributions from other persons.[90] The *MCFL* Court held that these hurdles "impose[d] administrative costs that many small

608 (finding unconstitutional a Massachusetts statute that mandated the exclusion of the press and general public from the courtroom during testimony by underage victims of sexual offenses); *cf. Turner Broad. Sys.*, 512 U.S. at 626, 661 (declining to apply strict First Amendment scrutiny to must-carry provisions, which "require cable television systems to devote a portion of their channels to [transmitting] local broadcast television stations"); *Columbia Broad. Sys.*, 412 U.S. at 97, 121 (holding that the First Amendment does not require broadcasters to accept paid editorial advertisements); *but see Seattle Times Co.*, 467 U.S. at 37 (holding that if good cause is shown, a Rule 26(c) protective order against disseminating information learned during litigation that "is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, . . . does not offend the First Amendment").

84. 420 U.S. 469.

85. *Id.* at 471, 496–497.

86. 479 U.S. 238 (1986).

87. *Id.* at 241, 263.

88. *Id.* at 254–255.

89. *Id.* at 253. The statute specifically required corporations to "ensure that contributions are forwarded to the treasurer within [ten] or [thirty] days of receipt, . . . see that its treasurer keeps an account of every contribution[,] . . . and preserve receipts for all disbursements over [two hundred dollars] and all records for three years." *Id.*

90. *Id.* at 255.

entities may be unable to bear" and "create[d] a disincentive for such organizations to engage in political speech."[91]

B. The Roberts Court's Return to Precedent in *Citizens United*

The *Austin* case involved a Michigan law that prohibited corporations from making political contributions and independent expenditures (in other words, expenditures that were made independently of, rather than coordinated with, candidates) in connection with state candidate elections.[92] But the law did allow corporations to make contributions or expenditures from "segregated funds"—funds, as in *MCFL*, that were separate and distinct from the corporation's general funds.[93] The challenge was brought by the Michigan State Chamber of Commerce, which sought to use general corporate funds to run a newspaper advertisement in support of a candidate in a special election.[94] The Court distinguished *MCFL* and upheld the law, concluding that the Chamber of Commerce did not have a free-speech right to either make contributions to political campaigns or make independent political expenditures.[95] The Court emphasized that state law grants corporations various advantages, including "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," and then concluded that these advantages "not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain an 'unfair advantage in the political marketplace.'"[96] In other words, the *Austin* Court was concerned with "the corrosive and distorting effects of immense aggregations of wealth" accumulated by corporations and the fact that this wealth may have "little or no correlation to the public's support for the corporation's political ideas."[97] The Court then concluded that the law was narrowly tailored to the state's com-

91. *Id.* at 254. The Court stated that under the conditions imposed by the statute, "it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *Id.* at 255.

92. 494 U.S. at 655.

93. *Id.*; *MCFL*, 479 U.S. at 253.

94. *Austin*, 494 U.S. at 656.

95. *Id.* at 658–660.

96. *Id.* at 658–659 (quoting *MCFL*, 479 U.S. at 257).

97. *Id.* at 660.

pelling interest in preventing corruption because the statute did not completely prohibit corporations from spending money on political matters.[98] Rather, it simply required them to do so from segregated funds raised for political purposes.[99]

Austin did suggest that the Court would distinguish between "ordinary business corporations," and organizations "'formed for the express purpose of promoting political ideas.'"[100] To paraphrase, corporations like MCFL might be exempt from the Court's holding, but the Court applied its holding to the Chamber of Commerce because the Chamber was not organized for purposes other than political advocacy.[101] Moreover, the *Austin* Court reasoned that unlike MCFL, the Chamber of Commerce was not independent of the influence of business organizations, and noted that under the statute at issue, a corporation might attempt to funnel political donations through its general treasury.[102] Interestingly, *Austin* sanctioned the exclusion of labor unions and media corporations from the law's requirement, even though both of those industries are also capable of amassing large amounts of money and thus have the potential to impact the political process significantly.[103]

Austin, like *McConnell*, drew considerable dissent rooted in free-speech concerns.[104] Justice Scalia in particular chastised the

98. *Id.* at 659–660.

99. *Id.*

100. *Id.* at 662 (quoting *MCFL*, 479 U.S. at 264).

101. *Id.* The Court qualified this distinction as follows:

> In contrast [to MCFL], the Chamber's bylaws set forth more varied purposes, . . . several of which are not inherently political. For instance, the Chamber compiles and disseminates information relating to social, civic, and economic conditions, trains and educates its members, and promotes ethical business practices. Unlike MCFL's, the Chamber's educational activities are not expressly tied to political goals; many of its seminars, conventions, and publications are politically neutral and focus on business and economic issues.

Id.

102. *Id.* at 664.

103. *Id.* at 665–668. The Court reasoned that labor unions are different in that "the funds available for a union's political activities more accurately reflects [its] members' support for the organization's political views than does a corporation's general treasury." *Id.* at 666. Regarding media corporations, the Court reasoned that its exemption from the political expenditure restriction was justified by the "crucial societal role" such entities serve by disseminating information to keep the public apprised of current events, including providing the general public with "election-related news stories and editorials." *Id.* at 667–668.

104. *See id.* at 695 (Kennedy, O'Connor & Scalia, JJ., dissenting) ("The majority opinion validates not one censorship of speech but two.").

majority on free-speech grounds,[105] claimed that the decision was inconsistent with precedent,[106] and challenged the law's assumptions.[107] Justice Kennedy, joined by Justices O'Connor and Scalia, also dissented on free-speech grounds, arguing that the Court had upheld "a direct restriction on the independent expenditure of funds for political speech for the first time in its history."[108]

With such significant dissent and with a major change in the Court's composition, it is not terribly surprising that the new majority overturned *Austin*. Being a corporate entity, Citizens United was perfectly situated to challenge the BCRA provisions that impose restrictions on corporations. It is not a large profit-making corporation, but rather a political-advocacy group.[109] Moreover, the *Citizens United* case itself involved a documentary about a presidential candidate, and Citizens United was therefore engaged in political speech.[110] Of course, the Court could have chosen to limit *Austin*'s holding to profit-making corporate entities and could have excluded groups like Citizens United from the BCRA's application. But given the Court's general pro-free-speech bias and the change in its composition between 1990 and 2010, that the Court chose to overrule *Austin* instead of limiting its breadth came as no shock to the legal community.

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105. *Id.* at 679 (Scalia, J., dissenting). Justice Scalia began his dissent by mocking the majority decision, calling it "Orwellian," and then stating:

> [T]he Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the "fairness" of political debate.

Id. at 679–680.

106. *Id.* at 681–684.

107. *See id.* at 685 ("Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with 'actual public support' for his positions?").

108. *Id.* at 695 (Kennedy, O'Connor & Scalia, JJ., dissenting).

109. Citizens United, *About Citizens United*, http://www.citizensunited.org/who-we-are.aspx (accessed Mar. 28, 2011). Citizens United's stated goal is to "reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security." *Id.*

110. *Citizens United*, 130 S. Ct. at 890 ("[T]here is no reasonable interpretation of [the documentary] other than as an appeal to vote against [the presidential candidate] . . . . [T]he film qualifies as the functional equivalent of express advocacy."). The film, titled *Hillary*, is a documentary purporting to be "about the Clinton scandals of the past and present." Hillary the Movie, *About the Film*, www.hillarythemovie.com/about.html (accessed Mar. 28, 2011).

In reaching its decision in *Citizens United*, the Court again relied heavily on free-speech principles and quickly overruled *Austin* and portions of *McConnell*.[111] Justice Kennedy, writing for the majority, agreed with a statement made by Justice Scalia in his *WRTL* concurrence: that *Austin* involved "a significant departure from ancient First Amendment principles."[112] Emphasizing that freedom of speech is essential to democracy[113] and noting that free speech has its greatest application in the context of political campaigns,[114] the Court flatly stated that "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[115] The majority cited extensive precedent that suggests corporations possess both free-speech rights[116] and the right to engage in political expression.[117] The Court concluded that *Austin*'s holding—and the portions of *McConnell*'s holding that limited corporate speech—could not be reconciled with this precedent,[118] and so found that *Austin* could not be reaffirmed without interfering with the marketplace of ideas[119] and involving government in the censorship of speech.[120]

IV. CONCLUSION

While politicians may find it politically useful to slam the *Citizens United* decision as reflecting a "pro-business bias," the

111. *Id.* at 886. The Court noted that the general law, after overruling *Austin* and portions of *McConnell*, is that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Id.*

112. *Id.* (quoting *WRTL*, 551 U.S. at 490 (Scalia, J., concurring in part and concurring in the judgment)).

113. *Id.* at 898 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.").

114. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Id.* (quoting *Eu v. S.F. Co. Democratic C. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

115. *Id.*

116. *Id.* at 899–900.

117. *Id.* at 900.

118. *Id.* at 899–913.

119. *Id.* at 906 ("*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment.").

120. *Id.* at 907 ("The censorship we now confront is vast in its reach.").

decision is more accurately construed as revealing the fundamental conflict between freedom of expression and legislative efforts to regulate campaign spending. In decisions like *Austin* and *McConnell*, campaign-finance "reformers" prevailed in the Court over claims that campaign-finance laws infringed freedom of expression.[121] By contrast, in cases like *WRTL* and *Citizens United*, the free-speech claims prevailed.[122] But all of these decisions revealed significant splits within the Court regarding how free-speech principles apply in the campaign-finance arena.

There is no doubt that money has had a significant impact on recent elections. In President Obama's 2008 campaign for the presidency, he eschewed public financing and ultimately raised more than $750 million.[123] In contrast, Senator John McCain accepted public financing and was only able to spend about eighty-four million dollars on his campaign.[124] In a tight election. President Obama received only about seven percent more of the popular vote than Senator McCain received, although his electoral margin was much larger.[125] President Obama's fundraising advantage—more than 7:1—probably influenced the election's outcome.

It is also clear that legislative and judicial decisions on campaign financing have impacted the balance of power significantly in the political process. Under laws like those upheld in *Austin*, a

121. *McConnell*, 540 U.S. at 161, 184, 185, 208; *Austin*, 494 U.S. at 666.

122. *See supra* n. 111 and accompanying text (explaining how the *WRTL* and *Citizens United* Courts heavily relied on free-speech principles).

123. Michael Luo, *Obama Hauls in Record $750 Million for Campaign*, N.Y. Times A29 (Dec. 5, 2008) (available at http://www.nytimes.com/2008/12/05/us/politics/05donate.html ?_r=1).

124. *See* N.Y. Times, *Opinion*, *Editorial*, *Public Funding on the Ropes*, http://www.nytimes.com/2008/06/20/opinion/20fri1.html (June 20, 2008) (noting that Senator McCain's campaign was able to raise $84.1 million); Peter Overby, Natl. Pub. Radio, *Obama's Fundraising Skyrockets after Slow May*, http://www.npr.org/templates/story/story.php?storyId=92627339 (July 17, 2008) (stating that Senator McCain was "taking [eighty-four] million [dollars] in federal funds" for his campaign); *see also NPR News Morning Edition*, Radio Broad., "Obama Campaign Shatters Fundraising Records" (Natl. Pub. Radio Dec. 5, 2008) (transcript available at http://www.npr.org/templates/story/story.php ?storyId=97843649) (host Renee Montagne discusses with Peter Overby of National Public Radio "[t]he latest reports on campaign spending and fundraising" the morning after the 2008 presidential election's campaign-financing figures were made public).

125. *See* CNNPolitics.com, *ElectionCenter 2008*, *President*, http://www.cnn.com/ELECTION/2008/results/president/ (posted Nov. 17, 2008, 5:13 p.m. EST) (outlining President Obama's popular vote margin as fifty-three percent, versus Senator McCain's forty-six percent, and also indicating that President Obama won 365 electoral votes, as compared to Senator McCain's mere 173).

distinction was drawn between ordinary profit-making corporations (which were subject to restrictions), and labor unions and media corporations (which were not subject to restrictions).[126] In other words, the government placed itself in the position of deciding who could influence the political process and who could not.[127] The dissenters in *Austin* and *McConnell* objected on free-speech grounds and doubted that government should exercise such power over the political process.[128] Interestingly, in the aftermath of *Citizens United* the political calculus has changed significantly. For instance, in the recent congressional elections, Republicans held a significant financial advantage over Democratic groups.[129] As a result, it is not surprising that opponents of *Citizens United* have been quite critical and have tried to cast the decision as "pro-business" and "pro-conservative."[130]

In the final analysis, it is unfair to characterize the Roberts Court's campaign-finance decisions as being intentionally pro-business. The evidence suggests that, in its pre-Roberts jurisprudence, the Justices who joined the majority in the Roberts Court's campaign-finance decisions (except Justices Roberts and Alito, who were not yet on the Court) were consistently concerned about

126. *Austin*, 494 U.S. at 665–667.

127. *See e.g. id.* at 665–666.

128. *McConnell*, 540 U.S. at 248 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II); *id.* at 264 (Thomas, J., concurring with respect to BCRA Titles III and IV, except for BCRA §§ 311 and 318, concurring in the result with respect to BCRA § 318, concurring in the judgment in part and dissenting in part with respect to BCRA Title II, and dissenting with respect to BCRA Titles I, V, and § 311); *id.* at 286–287 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II); *Austin*, 494 U.S. at 679–680 (Scalia, J., dissenting); *id.* at 695 (Kennedy, O'Connor & Scalia, JJ., dissenting).

129. *See NPR News Morning Edition*, Radio Broad., "Republicans Benefit from Influx of Campaign Funds" (Natl. Pub. Radio Oct. 19, 2010) (transcript available at http://www.npr.org/templates/story/story.php?storyId=130665397) (host Steve Inskeep interviews news analyst Juan Williams, and Inskeep notes that increasing Republican campaign contributions have resulted in "a situation where lots of money is sloshing around. It[is] hard to understand exactly what[is] happening because things are happening quickly, and disclosure is moving slowly.").

130. *See First Monday*, *supra* n. 5 (describing the *Citizens United* decision as the "most far-reaching example of the Roberts [C]ourt's pro-business bias"); *contra* Jonathan H. Adler, The Volokh Conspiracy Blog, *Justice Breyer Rejects Theory of "Pro-Business" Court*, http://volokh.com/2010/10/07/justice-breyer-rejects-theory-of-pro-business-court/ (Oct. 7, 2010, 9:36 a.m.) (agreeing with Justice Breyer's rejection of the notion that the Court has a pro-business slant and asserting that labeling the Roberts Court as "pro-business" does not survive scrutiny).

free-speech principles.[131] Of course, it is legitimate to criticize Chief Justice Roberts for not remaining true to the "umpire" analogy that he invoked during his confirmation hearings,[132] as well as for being an "activist" in terms of striking down campaign-finance restrictions. But the Court's intervention is more easily explained as a fundamental disagreement regarding the government's right to control political speech and its ability to equalize resources in political campaigns than as a Court pursuing a pro-business agenda. In decisions like *Austin* and *McConnell*, the Court had enough votes to uphold significant restrictions on campaign expenditures.[133] Even in those cases, however, a substantial number of Justices felt that such restrictions violated the right of free expression.[134] Due to this indecisive precedent and the powerful impact of the *Citizens United* decision, similar debates over the government's power to restrict political speech likely will continue into the foreseeable future.

131. See *supra* notes 48, 50, 51 and accompanying text for a description of the free-speech concerns articulated by Justices Scalia, Thomas, and Kennedy.

132. See *supra* n. 3 and accompanying text for Justice Roberts' statement invoking the "umpire" analogy at his Judicial Confirmation Hearing.

133. The law in *Austin* was upheld by a slim five-to-four margin. 494 U.S. at 654. See *McConnell*, 540 U.S. at 110 for an example of the complexity with which the Court split in upholding the campaign-spending restrictions there at issue.

134. *See supra* nn. 47–52 (detailing the separate dissents by four Justices on free-speech grounds).