Stare Decisis after *Citizens United*: When Should Courts Overturn Precedent

by Ilya Shapiro* and Nicholas Mosvick**

Introduction

Citizens United has become one of the most controversial Supreme Court decisions in recent memory. The level of vitriol its critics have expectorated would lead an unknowing observer to conclude that the Court ignored every possible legal principle in order to give corporations control over the electoral process.[1] Indeed, President Obama at the 2010 State of the Union accused the Supreme Court of "revers[ing] a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[2] And former Senator Russ

* Senior Fellow in Constitutional Studies, Cato Institute, and Editor-in-Chief, *Cato Supreme Court Review*; J.D., University of Chicago Law School; M.Sc., London School of Economics; A.B., Princeton University. I was a signatory to Cato's two Supreme Court *amicus* briefs in *Citizens United*.

** Legal Associate, Cato Institute; J.D., University of Virginia; M.A., University of Virginia; B.A., University of Minnesota-Twin Cities. The authors would like to thank Josh Blackman for his helpful comments and suggestions.

1. *See*, *e.g.*, Statement from the President on Today's Supreme Court Ruling (Jan. 21, 2010), *available at* http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0 ("With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is 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."); David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES, Jan. 22, 2010, at A1 ("Fred Wertheimer, a longtime advocate of campaign finance laws, said the decision 'wipes out a hundred years of history' during which American laws have sought to tamp down corporate power to influence elections.").

2. State of the Union 2010 (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-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. I don't think American elections should be bankrolled by America's most powerful interests, or

Feingold, one of the authors of the infamous McCain-Feingold Act that has been whittled away by the Court in a series of decisions culminating in *Citizens United*, promised a legislative response in order to "level the playing field."[3]

The furor surrounding the decision was recently reignited by its one-year anniversary, with the editor of *The Nation* reminding us that "Chief Justice John Roberts and his conservative activist colleagues on the Supreme Court joined together in a dramatic assault on American democracy" by "allowing unlimited contributions from corporate treasuries to flood the electoral landscape."[4] Common Cause has gone so far as to ask the Justice Department to investigate whether Justices Antonin Scalia and Clarence Thomas should have recused themselves from the case due to their attendance at retreats organized by the libertarian philanthropist Charles Koch.[5] The debate over *Citizens United* continues to be rife with misperceptions of the case's holding, inaccuracies regarding the history of campaign finance law, and animus towards an "activist" Court.[6]

As far as constitutional criticism goes, the response to *Citizens United* has focused on much more than evaluating the overturned precedent and weighing the decisions' ramifications on First Amendment jurisprudence and campaign finance law. Critics have principally used the case as the primary exemplar of the Roberts Court's alleged judicial con-

---

worse, by foreign entities."). See section II, *infra*, for a critique of the president's factual assertions. Of course, Justice Samuel Alito famously provided his own critique in real-time from the House floor. Robert Barnes, *Alito Dissents on Obama Critique of Court Decision*, WASH. POST, Jan. 28, 2010, at A6.

3. Statement of U.S. Senator Russ Feingold in Response to the Supreme Court's Decision in *Citizens United v. FEC*, January 21, 2010, http://feingold.senate.gov/record.cfm?id=321625 ("I will work with my colleagues to pass legislation restoring as many of the critical restraints on corporate control of our elections as possible."). This legislative response would take the form of the (failed) Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 4790, 111th Cong. § 101 (2010). Tellingly, many of Feingold's supporters attributed his loss in last November's elections directly to the independent corporate spending that *Citizens United* allowed. *See*, *e.g.*, Don Walker, *Johnson Defeats Feingold in U.S. Senate Race,* JS ONLINE, Nov. 3, 2010, http://www.jsonline.com/news/wisconsin/106580463 .html ("[Opponent Johnson benefited] from an unrelenting barrage of third-party ads from national groups that targeted Feingold.").

4. Katrina vanden Heuvel, *Reversing 'Citizens United*,' WASH. POST., Jan. 18, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/18/AR2011011803719.html?wpisrc$^{N}_{L}$_opinions. See section II, *infra*, for a correction of the factual misstatements in vanden Heuvel's article.

5. *See*, *e.g.*, Eric Lichtblau, *Scalia and Thomas May Have Conflict of Interest, Common Cause Says*, N.Y. TIMES, Jan. 19, 2011, at A15.

6. *See*, *e.g.*, Nan Aron, *One Year After Citizens United, the Corporate Court is Still Open for Business,* HUFFINGTON POST, Jan. 21, 2011, http://www.huffingtonpost.com/nan-aron/one-year-after-citizens-u_b_812152.html (arguing that Citizens United "overturned long-standing precedent and policy, unleashing a torrent of corporate money into American elections that threatens to further distort a political process that is already disproportionately beholden to the interests of powerful corporations" and that it is an example of the Roberts Court's "transparent agenda" to "favor corporate interests and enhance their power"); Pelosi Statement on Anniversary of Citizens United Ruling, http://pelosi.house.gov/news/press-releases/2011/01/pelosi-statement-on-anniversary-of-citizens-united-ruling.shtml (last visited Feb. 1, 2011) ("One year ago, the Supreme Court opened the floodgates to uninhibited special interest spending in our elections and unlimited corporate influence over our public policy debate"). Again, see section II, *infra*, for a critique of these sorts of claims.

servative activism.[7] One unsigned *New York Times* editorial cited Chief Justice John Roberts's concurrence—which focused on *stare decisis*—as a means to try to excuse "shameful judicial overreaching."[8] These lines of attack centered on the idea that an "activist" Court overturned a well-established doctrine in the face of copious precedents.[9] The bottom line is that the Roberts Court had allegedly ignored *stare decisis* to reach its preferred (pro-corporate) policy outcome.[10]

It is that foundational charge which prompted this essay, wherein we examine the role that *stare decisis* played in *Citizens United* and the resulting state of that doctrine. Beyond the lofty and hyperbolic rhetoric, and as explained by the Chief Justice in his concurrence, the Court in *Citizens United* takes great pains to respect the long-standing role of *stare decisis*. Because of that solicitude, the case—quite apart from its impact on elections and campaign finance regulation—serves to clarify this oft-misunderstood judicial precept. Ultimately, while *stare decisis* plays an important part in the Court's decision-making, it is not "an inexorable command" but rather a "principle of policy."[11]

I. A Brief Background on *Stare Decisis*

As noted above, *stare decisis* ("to stand by decisions") is not a binding principle by which a court—the U.S. Supreme Court or otherwise—never overrules its own precedent. Indeed, if precedent

7. *See*, *e.g.*, E.J. Dionne, Jr., *Supreme Court Ruling Calls for Populist Revolt*, WASH. POST.(Jan. 25, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/24/AR2010012402298.html?nav=emailpage (calling the decision "an astonishing display of judicial arrogance, overreach and unjustified activism" that turned "its back on a century of practice and decades of precedent" and a "distortion of our political system by ideologically driven justices"); *Doug Kendall, Citizens United: The Problem Isn't the Law, It's the Court*, HUFFINGTON POST, Jan. 21, 2010, http://www.huffingtonpost.com/doug-kendall/citizens-united-the-probl_b_431989.html ("The justices did what many progressives feared for months it would do: hold that long-standing restrictions on corporate campaign spending violate the First Amendment."); Editorial, *The Supreme Court Removes Important Limits on Campaign Finance*, WASH. POST (Jan. 22, 2010),, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104482.html (calling the Court's action "a mockery of some justices' pretensions to judicial restraint").

8. *See* Editorial, *This Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 (Roberts was singled out here because he was, according to the author, "no doubt aware of how sharply these actions clash with his confirmation-time vow to be judicially modest and simply 'call balls and strikes.'").

9. And, of course, this is specifically what the dissent of Justice Stevens in *Citizens United* claims. *Citizens United v. FEC*, 130 S. Ct. 876, 930-31 (2010) (Stevens, J., dissenting).

10. Not all liberals or progressives have taken these sorts of positions. Kathleen Sullivan (former Stanford Law School dean and perennial candidate for high legal office in the Obama administration), for example, sought to dispel the hyperbole surrounding *Citizens United* by laying out what she sees as the two historical visions of free speech—"libertarian" and "egalitarian"—and argued for combining "[*Citizen United*'s] free-speech-as-liberty perspective with the egalitarian view's skepticism toward speech-restrictive conditions on government benefits." Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 146 (2010). While Sullivan's take implicates *stare decisis* by placing *Citizens United* in a larger jurisprudence, it never directly addresses the case's implications for the doctrine.

11. *See Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989); *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) ("*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.").

could never be reversed, then *Plessy v. Ferguson* and *Bowers v. Hardwick* could never have yielded to *Brown v. Board of Education* and *Lawrence v. Texas*, respectively. Instead, *stare decisis* is a prudential doctrine that "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[12] That is, society has an interest in the law's stability and predictability: The reliance interests produced by judicial decisions sometimes dictate that incorrect legal rulings be maintained—because the social disruptions from correction outweigh the benefits of reaching better decisions.

Still, in fulfilling its mission to declare what the law is—rather than making it[13]—courts inevitably get the law wrong on occasion. These errors may not become apparent for some time, however, and as William Blackstone explained, *stare decisis* does not require courts to extend or preserve a prior decision that misstated or misapplied the law.[14] Moreover, as strikingly argued by Chancellor James Kent, courts "are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."[15] Courts thus have to decide, based on factors such as the correctness, antiquity, and workability of the legal regime a precedent created, whether to overturn their earlier incorrect rulings.

Notably, the principle of *stare decisis* has different weight according to the area of law. While it plays a necessarily greater role in property and contract cases—where significant reliance interests always exist but a legislature can step in to correct any result it believes to be improper—the Court has noted that the doctrine is weakest in constitutional cases "because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."[16] That is, while Congress can always amend a statute that it feels the

---

12. *Payne*, 501 U.S. at 827.

13. *See, e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Although "judges in a real sense 'make' law . . . they make it as judges make it, which is to say as though they were 'finding' it — discerning what the law is, rather than decreeing what it is today changed to.") (Scalia, J., concurring in the judgment); 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 51 (London, E. & R. Brooke 1797) (1642) ("[I]t is the function of a judge not to make, but to declare the law, according to the golden meta-wand of the law and not by the crooked cord of discretion.").

14. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 69-70 (Univ. of Chi. Press 1979) (1765) ("Yet this rule admits of exception, where the former determination is most evidently contrary to reason. . .even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm as has been erroneously determined.").

15. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 477 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) (12th ed. 1873). "Chancellor" was the highest judicial official of New York from 1701 to 1847.

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

Court misinterpreted (or for any other reason),[17] the Court's pronouncements on, for instance, the First Amendment or the Commerce Clause are essentially the last word on the issue unless the Court itself takes the same issue up again.

Often when the Court reverses itself it does so upon discovering that the standards it previously set out prove unworkable, as it recently did in the Sixth Amendment assistance-of-counsel context in *Montejo v. Louisiana*.[18] As Justice Scalia wrote for the *Montejo* majority, the relevant principles other than workability in deciding whether to adhere to *stare decisis* "include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."[19] These are the considerations that the *Citizens United* majority employed in finding that *stare decisis* did not prevent overturning Court-imposed restrictions on corporate political speech. To understand why, we need to survey the relevant law leading up to *Citizens United*.

II. Campaign Finance Law Leading up to *Citizens United*

To begin, the claims about the "century's worth of precedent overturned by the Court" are both inaccurate and disingenuous. The "century's worth" claim seems to refer to the 1907 Tillman Act.[20] The problem is that the Tillman Act did not, as critics contend, ban outright the use of corporate money in election campaigns. Instead, the Tillman Act banned only *direct* corporate contributions to candidates.[21] It wasn't until 1947 under the Taft- Hartley Act that independent corporate and union campaign expenditures were banned—and even this ban was not clearly upheld for decades.[22] It is

17. For example, recall the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) a congressional response to a Supreme Court decision interpreting federal law to limit a female plaintiff's ability to sue for sex discrimination in compensation. *Ledbetter v. Goodyear*, 550 U.S. 618 (2007).

18. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2083 (2009) (overturning *Michigan v. Jackson*, 475 U.S. 625 (1986), to avoid adopting "an unworkable standard" or forcing lower courts to make "arbitrary and anomalous distinctions"); *see Payne,* 501 U.S. at 827 (unworkability is a traditional reason for changing a legal standard).

19. *Montejo*, 129 S. Ct. at 2088-89.

20. *See* E.J. Dionne Jr., *Justice Alito's Candid Response to Obama's Rebuke,* WASH. POST. (Feb. 1, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/31/AR2010013101838.html ("Obama was not simply referring to court precedents but also to the 1907 Tillman Act, which banned corporate money in electoral campaigns."). As Justice Kennedy noted in oral argument in reaction to a similar argument from then-Solicitor General Kagan, this is only true if you look at the "contribution-expenditure line," but was not true for expenditures limitations. Transcript of Oral Argument at 36-37, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

21. Campaign Expenses Publicity Act AKA Federal Corrupt Practices Act, 59 Pub. L. 36, 34 Stat. 864 (1907) [hereinafter *Tillman Act*] (purpose is to "prohibit corporations from making money contributions in connection with political elections"). *See also* Roger Pilon, *The Unrelenting Battle over Campaign Finance*, Cato@Liberty, Feb. 2, 2010, http://www.cato-at-liberty.org/2010/02/01/the-unrelenting-battle-over-campaign-finance.

22. *See id.* As Justice Scalia noted during the *Citizens United* oral argument, the Court never questioned or approved the Tillman Act or the Taft-Hartley Act, instead giving some "really weird" interpretations of the acts in order to avoid "confronting the question" until *Buckley* and *Austin*. Transcript of Oral Argument at 35-36, *Citizens United*, 130 S. Ct. 876 (No. 08-205). Following the Taft-Hartley Act and until *Buckley* in 1976, the

the Taft-Hartley ban on independent corporate expenditures that the Court declared unconstitutional in *Citizens United*, not the Tillman Act's ban on *direct* expenditures.[23] As Justice Anthony Kennedy's majority opinion noted, direct contributions made by corporations and unions have long been prohibited and were so long before McCain-Feingold was enacted in 2002.[24] *Citizens United* did not touch these restrictions, so there can be no plausible argument that the *C*ourt in fact overturned a century of law.

Instead, the overturned precedent was *Austin v. Michigan Chamber of Commerce*, a 1990 decision that, for the first time ever, sanctioned a regulation of political speech based on something other than corruption or the appearance thereof.[25] The challenged provision of Michigan's Campaign Finance Act prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office.[26] https://www.lexis.com/research/buttonTFLink?_m=1aefb2aa959e5717687a7e7461a1a828&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b494%20U.S.%20652%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=111&_butInline=1&_butinfo=MICH.%20COMP.%20LAWS%20169.254&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlW-zSkAl&_md5=c5f2c083d74f947a5443d4468e7b370b In *Austin*, the Supreme Court for the first time recognized "a unique state interest" in guarding against corporations unduly influencing elections through the "amassing of large treasuries."[27] Specifically, it upheld the Michigan law under an equality rationale to "ensure that expenditures reflect actual public support for the political ideas espoused by corporations" and to eliminate the "distortions" caused by

---

Court consistently avoided ruling on the constitutionality of restrictions on independent expenditures. *See Pipefitters* v. *United States*, 407 U.S. 385 (1972); *United States* v. *International Union United Auto.*, 352 U.S. 567 (1957); *U.S. v. Cong. of Industrial Org.,* 335 U.S. 106, 110, 124 (1948). When the Court finally did turn to that question, it struck them down. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

23. *Citizens United*, 130 S. Ct. at 898 (the bans on independent corporate expenditures are what amount to a ban on speech, not direct contributions); *id.* at 887 ("Before [McCain Feingold], federal law prohibited — and still does prohibit — corporations and unions from using general treasury funds to make direct contributions to candidates."); *id.* at 914-15 (upholding disclosure requirements).

24. *Id.* at 887. *See also Buckley*, 424 U.S. at 25-26 (upholding limits on direct contributions to candidates under 18 U.S.C. § 608(b)(2006) by recognizing a governmental interest in preventing *quid pro quo* corruption).

25. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990).

26. Mich. Comp. Laws § 169.254(1) (1979). See *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 489 (2007) (Scalia, J., concurring) ("[*Austin*] was the only pre-*McConnell* case in which this Court had ever permitted the government to restrict political speech based on the corporate identity of the speaker").

27. *Austin*, 494 U.S. at 660 ("Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations."). Note that while *Austin* approved a ban on corporate *express* advocacy, it left open under *Buckley* corporate speech mentioning candidates until the Bipartisan Campaign Reform Act was enacted. James Bopp, Jr., & Richard E. Coleson, *Citizens United v. Federal Election Commission*: "Precisely what WRTL Sought to Avoid," *in* 2009-2010 CATO SUP. CT. REV. 29 (2010).

corporate spending.[28] The majority found that the statute was "narrowly tailored" to meet the interest of controlling "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[29]

As Justice Scalia pointed out in his *Austin* dissent, however, this ruling was in direct conflict with *Buckley v. Valeo*, which not only found no compelling state interest in limiting independent corporate expenditures, but overturned a limitation on "persons" (defined to include corporations) making independent expenditures.[30] And as Justice Kennedy—who would author *Citizens United* 20 years later—said in *his* dissent, the Michigan law was an example of "value-laden, content-based speech suppression that permits some nonprofit corporate groups, but not others, to engage in political speech."[31] By upholding the law, the Court showed not only contempt for the kind of political speech at issue, but also adopted a rule that "allows Michigan to stifle the voices of some of the most respected groups in public life on subjects central to the integrity of our democratic system."[32]

Kennedy then cited *First National Bank of Boston v. Bellotti* for the proposition that in the realm of protected speech, "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[33] Kennedy's opinion echoes Scalia's point that the *Austin* majority ignored both *Buckley* and *Bellotti* and thus was inconsistent with precedent:

By using distinctions based upon both the speech and the speaker, the Act engages in the rawest form of censorship: the State censors what a particular segment of the political community might say with regard to candidates who stand for election. The Court's holding cannot be reconciled with the principle that "'legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.'"[34]

It was instead the favoring of nonprofit, non-corporate speakers for First

28. *Austin*, 494 U.S. at 660. The Court was even more honest about this rationale later in the majority opinion, conceding its "desire to *counterbalance* those advantages unique to the corporate form is the State's compelling interest in this case." *Id.* at 665.

29. *Id.* at 660 (citing *Gitlow v. New York*, 268 U.S. 652, 658-59 (1925)).

30. *Austin*, 494 U.S. at 682-83 (Scalia, J., dissenting) ("Neither the [*Austin* majority] nor either of the concurrences makes any effort to distinguish [*Buckley*] — except, perhaps, by misdescribing the case as involving 'federal laws regulating individual donors.'"); *Buckley*, 424 U.S. 1, 23, 45 (1976) (holding that independent expenditures to express the political views of individuals and associations "do not raise a sufficient threat of corruption to justify prohibition").

31. *Id.* at 695-96 (Kennedy, J., dissenting).

32. *Id.* at 696.

33. *Id.* at 698-99 (quoting *First Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978)).

34. *Id.* at 700 (quoting *Meyer* v. *Grant,* 486 U. S. 414, 428 (1988), in turn quoting *Buckley,* 424 U.S. at 50).

Amendment protection; "the majority invent[ed] a new interest."[35]

Austin's blanket ban on corporate political speech thus created tension with *Buckley*'s "express advocacy" test, which allowed campaign-finance regulation on independent expenditures to reach *only* speech that was "unambiguously related to the campaign of a particular federal candidate."[36] It was also at odds with *Bellotti*, which came just two years after *Buckley* and reiterated that corporations would *not* be treated differently than persons for First Amendment purposes.[37] Finally, *Austin* was inconsistent with *FEC v. National Conservative Political Action Committee*, which rejected the idea that the larger amounts of spending by political action committees than by individuals leads to a greater potential for corruption in the former context.[38]

Austin would eventually be reinforced by *McConnell v. FEC*, however, which not only upheld McCain-Feingold's ban on "soft money" given directly to candidates—the only major provision that has survived eight years of judicial review—but upheld the ban on "corporate electioneering campaigns."[39] Specifically, *McConnell* suggested that since *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."[40] This reasoning repeated *Austin*'s misinterpretation of *Buckley*, which had *rejected* the idea that the anti-corruption interest supports restrictions on independent corporate expenditures.[41] *McConnell* also relied on *Austin* to reach the erroneous conclusion that the Court had "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas'"—when *Aus-*

35. *Id.* at 703.

36. *Buckley*, 424 U.S. at 80 (emphasis added). This test is known for seeking the "magic words," which included "vote for," which left the door open to "issue advocacy" as opposed to "express advocacy." *Id.*

37. *Bellotti*, 435 U.S. at 776-77 (such advocacy is "at the heart of the First Amendment's protection" and is "indispensable to decisionmaking in a democracy," a principle that is "no less true because the speech comes from a corporation rather than an individual.") The *Bellotti* court also rejected an "equality" argument that corporate participation "would exert an undue influence on the outcome of a referendum vote" and that corporations would "drown out other points of view" and "destroy the confidence of the people in the democratic process." *Id.* at 789.

38. *FEC v.Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497-98 (1985); see also *Austin*, 494 U.S. at 705 (Kennedy, J., dissenting) (discussing same). Kennedy also noted that the *NCPAC* majority found that "the mere hypothetical possibility that candidates may take notice of and reward political action committee (PAC) expenditures by giving official favors was insufficient to demonstrate that the threat of corruption justified the spending regulation." *Austin*, 494 U.S. at 703 (Kennedy, J., dissenting) (citing *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497).

39. *McConnell v. FEC* , 540 U.S. 93, 203 (2003). It is this part of the *McConnell* opinion that *Citizens United* overruled. *Citizens United*, 130 S. Ct. at 913.

40. *McConnell*, 540 U.S. at 203.

41. *Buckley*, 424 U.S. at 45.

tin was the only case adopting the corrosive/distorting rationale.[42] After *McConnell*, Congress could not only ban independent corporate expenditures for express advocacy but could reach into non-express advocacy—an extension of *Austin*. In the years between *McConnell* and *Citizens United*, however, a series of cases eroded the *Austin*/*McConnell* precedent with respect to corporate political speech.

First, in *Wisconsin Right to Life v. FEC* ("*WRTL I*"), the Court vacated and remanded for further consideration a rejected challenge to McCain-Feingold as it applied to broadcast advertisements that WRTL intended to run during the 2004 election.[43] WRTL's claim was that its ads were merely "grassroots lobbying" and as such McCain-Feingold could not be constitutionally applied to them.[44] After the FEC appealed a subsequent unfavorable district court opinion, Chief Justice Roberts's controlling opinion in *FEC v. Wisconsin Right to Life* ("*WRTL II*") held that *Austin*'s interest in addressing "the corrosive and distorting effects of immense aggregations of wealth" could not be extended to genuine issue ads because "doing so would call into question this Court's holdings that the corporate identity of a speaker does not strip corporations of all free speech rights."[45] Roberts's approach avoided the need to overrule *Austin* while calling its foundations into question.[46] It also began to erode *McConnell* by creating the "appeal to vote" test, which restored much of *Buckley*'s strong protections for issue advocacy by declaring that no ad could be "the functional equivalent of express advocacy" under unless it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[47] Tellingly, Justice Alito noted in a brief concurrence that if a chill on issue advocacy became evident, the

---

42. *McConnell*, 540 U.S. at 205 (citing *Austin*, 494 U.S. at 660). *McConnell* would apply this logic to reach not only "express advocacy," but also its "functional equivalent," a decision that was also in clear tension with *Buckley*'s "express advocacy" test. *See*, *e.g.*, James Bopp Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy*, 31 N. KY. L. REV. 289 (2004).

43. *Wisconsin Right to Life, Inc. v.FEC*, 546 U.S. 410, 411-12 (2006).

44. *See id.* at 411.

45. *FEC v. Wisconsin Right To Life, Inc.,* 551 U.S. 449, 480-81 (2007) (controlling opinion by Roberts, C.J., joined by Alito, J.) ("We hold that the interest recognized in *Austin* as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech has no application to issue advocacy of the sort engaged in by 'Wisconsin Right to Life.'").

46. We see the same incrementalism in another 2007 case that split along similar lines: In *Hein v. Freedom from Religion Fund*, Justice Alito's plurality opinion (joined by the Chief Justice) declined to overrule a controversial precedent, *Flast v. Cohen*, 392 U.S. 83 (1968), in the context of taxpayer standing despite Justice Scalia's insistence in concurrence that there was no principled way to resolve the case without either extending or overruling that precedent. *Hein v. Freedom from Religion Fund,Inc.*, 551 U.S. 587, 615 (2007) (plurality opinion) ("We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it. . .. We need go no further to decide this case. Relying on the provision of the Constitution that limits our role to resolving the "Cases" and "Controversies" before us, we decide only the case at hand.").

47. *WRTL II*, 551 U.S. at 469-70. This test, however, was completely undermined by the FEC, who reduced the test to being part of a "two-part, 11-factor balancing test." *See Citizens United*, 130 S. Ct. at 895.

Court might need to reconsider *McConnell*—and therefore, *Austin*.[48]

Most pertinent, however, was Justice Scalia's concurrence in *WRTL II*, which argued that *stare decisis* considerations militated for overruling *McConnell* due to the impracticability of *McConnell's* test along with its unsettling of decades of constitutional law.[49] Scalia pointed out that the First Amendment is a special area with regards to *stare decisis*, in that the "Court has not hesitated to overrule decisions offensive to the First Amendment (a 'fixed star in our constitutional constellation,' if there is one)—and to do so promptly where fundamental error was apparent."[50] He also noted that overruling a constitutional case decided a few years earlier is not that uncommon.[51] Chief Justice Roberts's concurrence in *Citizens United* would echo Justice Scalia's analysis of *WRTL II*.

One further case laid the groundwork for overruling *Austin* and *McConnell*'s restrictions on "electioneering campaigns." In *Davis v. FEC* (2008), the Court, in a 5-4 decision, struck down McCain-Feingold's § 319(a)—the so-called "millionaire's amendment," which relaxed campaign finance restrictions for opponents of self-funding candidates—"as impermissibly burden[ing the candidate's] First Amendment right to spend his own money on campaign speech."[52] While *Davis* did not directly grapple with *Austin*, it revitalized *Buckley's* holding that the cap on personal campaign expenditures at issue was not justified by "[t]he primary governmental interest" proffered in its defense—"the prevention of actual and apparent corruption of the political process."[53] Along with striking down the anti-corruption justification for expenditure caps, the *Buckley* court also rejected the argument that an expenditure cap should be upheld on the ground that it served "[t]he ancillary interest in equalizing the relative financial resources of candidates competing for elective office."[54] *Davis* thus reinvigorated *Buckley*'s idea that the government's ability to "restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," a position hard to reconcile with *Austin*.[55]

---

48. *Id.* at 482-83 (Alito, J., concurring) ("because § 203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether § 203 is unconstitutional on its face").

49. *Id.* at 500-04 (Scalia, J., concurring).

50. *Id.* at 500-01. (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

51. *Id.* at 501. *See also id.* at 501 n.9 (Scalia provides a large footnote here, with an exhaustive list of Supreme Court cases overturning questionable precedents that were relatively "young").

52. *Davis v. FEC*, 554 U.S. 724, 738 (2008). This amendment kicked in when a candidate spent more than $ 350,000 in personal funds and created what the statute regarded as a "financial imbalance," and allowed a candidate's opponent to qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures. 2 U.S.C. § 441a-1(a)(1)-(3) (2006).

53. *Davis*, 554 U.S. at 738 (quoting *Buckley*, 424 U.S. at 53).

54. *Id.* (quoting *Buckley*, 424 U.S. at 54).

55. *Id.* at 742 (quoting *Buckley*, 424 U.S. at 48-49) ("The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."). A similar issue comes before the Court this term, in a challenge to an Arizona law that

As the review of the above case law shows, *Austin*'s speech-equality rationale had stood on shaky ground from its inception. By the time *Citizens United* was set for re-argument on the issue of whether *Austin* and part of *McConnell* needed to be overruled, the die had already been cast for overcoming *stare decisis* concerns and thereby returning to *Buckley*'s first principles.

III. Stare Decisis in Citizens United

While the government invoked *stare decisis* as part of its defense of *Austin*, it did so without invoking the compelling interest that persuaded the *Austin* Court to rule as it did. Indeed, at oral argument, then-Solicitor General Elena Kagan abandoned *Austin*'s rationale of equalizing market distortions caused by amassed wealth in favor of new arguments regarding protection of shareholder interest and *quid pro quo* corruption.[56] As noted by Justice Kennedy in the majority opinion, instead of endorsing *Austin* on its own terms, "the Government urges us to reaffirm *Austin*'s specific holding on the basis of two new and potentially expansive interests."[57] Suffice it to say, that development did not help the government's position on *stare decisis* and plays a central role in Chief Justice Roberts's treatment of the doctrine in his concurrence.

The Chief Justice begins his opinion by noting that the Supreme Court had never been asked to reconsider *Austin*. That is, while the issue of overruling *Austin* was properly raised in *Citizens United*, past cases that may have mentioned or cited *Austin* did not involve claims requiring *Austin*'s reevaluation. Therefore, Justice Stevens's dissent was wrong in arguing that *Austin* was "reaffirmed" by decisions like *McConnell*.[58] Instead, as Justice Scalia observed at oral argument, the Court is not a "self-starting" institution; it only reviews decisions or laws asked to do so by the parties before it.[59]

Given that *Austin's* validity was now properly before the Court, Roberts could

---

provides matching funds to publicly funded candidates if their privately funded opponent spends above certain limits. *McComish, v. Bennett*, 605 F.3d. 720 (9th Cir. 2010), *cert. granted*, 2010 U.S. LEXIS 9363 (U.S. Dec. 13, 2010) (No. 10-239). *See* Ilya Shapiro, *Supreme Court Accepts Another Chance to Reverse Ninth Circuit, Uphold First Amendment*, Cato@Liberty, Nov. 29, 2010, http://www.cato-at-liberty.org/supreme-court-accepts-another-chance-to-reverse-ninth-circuit-uphold-first-amendment/.

56. Tr. of Oral Arg. at 45-48, *Citizens United*, 130 S. Ct. 876 (No. 08-205) (According to Kagan, the government's position was that "we do not rely at all on Austin to the extent that anybody takes Austin to be suggesting anything about the equalization of a speech market"). Interestingly enough, the *Bellotti* Court appeared to reject the shareholder argument, at least in the context of corporate ads related to referendums. *Bellotti*, 435 U.S. at 792-93 (rejecting the idea that the restriction was needed to protect shareholders "by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree").

57. *Citizens United*, 130 S. Ct. at 923 (Roberts, C.J., concurring).

58. *Cf. id.* at 940 (Stevens, J., dissenting) ("[T]he *McConnell* Court's decision to uphold [the relevant McCain-Feingold provision] relied not only on the antidistortion logic of *Austin* but also on the statute's historical pedigree.").

59. Tr. of Oral Arg. at 35-36, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205).

then assess the role of *stare decisis*.[60] He first recited the reasons for *stare decisis*, noting that if *stare decisis* was a "mechanical formula" to "adhere[ ] to the latest decision," then "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants."[61] Instead, *stare decisis* requires the Court to balance the importance of having constitutional questions decided with the importance of having them decided correctly.[62] Reflecting the principles set out by Blackstone and Kent, Roberts states that when fidelity to any particular precedent does more to damage the constitutional ideal of rule of law than to advance it, "we must be more willing to depart from that precedent."[63]

That is, if a precedent being considered departed from the Court's jurisprudence, then returning to the "'intrinsically sounder' doctrine established in prior cases may 'better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it.'"[64] Similarly, if the precedent's underlying rationale has been undermined in subsequent cases such that it "cannot reliably function as a basis for decision in future cases" or "actually impedes the stable and orderly adjudication of future cases," *stare decisis* is diminished accordingly.[65] In this context, the prior cases with "intrinsically sounder" doctrine are *Buckley* and *Bellotti*, while *Austin* has proven to be a jurisprudential outlier that detracts from legal clarity and stability. Following these various considerations, Roberts finds that *stare decisis* weighed strongly in favor of overturning *Austin* and part of *McConnell*.

Roberts observes that *Austin* was an "'aberration' insofar as it departed from the robust protections we had granted political speech in our earlier cases."[66] Specifically, *Buckley* had rejected *Austin*'s interest in regulating independent expenditures out of concern for the "corrosive and distorting effects of immense aggregations of wealth," concluding that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to

60. *Citizens United*, 130 S. Ct. at 919 (Roberts, C.J., concurring).

61. *Id.* at 920 (referring to the overturning of *Plessy* by *Brown v. Board*, the overturning of *Adkins Children Hospital* by *West Coast Hotel*, and the overturning of *Olmstead v. U.S.* by *Katz v. U.S.*).

62. *See id*. (quoting Justice Robert Jackson, *Decisional Law and Stare Decisis*, 30 A. B. A. J. 334 (1944) (this balance requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other").

63. *Id.* at 921.

64. *Id.* (quoting *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995). *See also Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

65. *Id.* (citing *Pearson* v. *Callahan,* 129 S. Ct. 808, 817-18 (2009) (overturning a unworkable eight-year old precedent, and noting that criticism of Court members and the noted difficult in implementing the standards by lower federal courts is an important consideration under *stare decisis*). *See also Montejo* v. *Louisiana,* 129 S. Ct. at 2088-89 (holding that *stare decisis* considerations cut in favor of overruling a precedent that is "*only two decades* old," and where eliminating it would not upset expectations) (emphasis added)).

66. *Citizens United*, 130 S. Ct. at 921 (citing *Buckley*, 424 U.S. at 1; *Bellotti*, 435 U.S. at 765).

the First Amendment."[67] Stated more starkly, Roberts argues that "*Austin*'s reasoning was—and remains—inconsistent with *Buckley*'s explicit repudiation of any government interest in 'equalizing the relative ability of individuals and groups to influence the outcome of elections.'"[68]

Austin was also inconsistent with *Bellotti*'s rejection of the idea that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."[69] Here, Roberts notes that while the dissent is correct that *Bellotti* dealt with a referendum and not a candidate election, the dissent is unable to use this distinction to show why corporations may be subject to prohibitions on speech in candidate elections when under *Buckley* individuals are not.[70]

Moreover, one of the principal considerations in the Court's *stare decisis* analysis, as shown in *Montejo*, is whether the precedent is "well-reasoned." While not proof that precedent is not well-reasoned, the continued objections of justices on the Court should work against the precedent in question.[71] Here, in each major case since *Austin*, the corrosive/distorting effects rationale has been challenged by many members of the Court, including current Justices Roberts, Scalia, Kennedy, Thomas, and Alito.[72] Similarly, as mentioned above, Blackstone advised that *stare decisis* does not require courts to extend or preserve a prior decision that misstated or misapplied the law.[73] In that sense, a decision with broad implications due to misapplication of the law can be quite dangerous, as Roberts contended with regard to *Austin*.

Austin posed a threat to the Court's decisions even outside the particular context of corporate express advocacy. As Roberts argues, the "First Amendment theory underlying *Austin*'s holding is extraordinarily broad," in that *Austin*'s logic would "authorize government prohibition of political speech by a category of speakers in the name of equality."[74] Just

67. *Buckley*, 424 U.S. at 48-49. . *See also Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U.S. 290, 295 (1981); *Bellotti*, 435 U.S. at 790-791.

68. *Citizens United*, 130 S. Ct. at 921(Roberts, C.J., concurring) (quoting *Buckley*, 424 U.S. at 48-49).

69. *Id.* at 921-22 (quoting *Bellotti*, 435 U.S. at 784).

70. *See id.* at 922.

71. *See id.* (stating that these facts "undermine the precedent's ability to contribute to the stable and orderly development of the law" and in such circumstances, the Court should "address the matter with a greater willingness to consider new approaches capable of restoring our doctrine to sounder footing").

72. *See FEC v. Beaumont*, 539 U.S. 146, 163-64 (2003) (Kennedy, J., concurring); *McConnell*, 540 U.S. at 264, 286 (opinions of Scalia, Kennedy, Thomas, JJ.); *FEC v. WRTL*, 551 U.S. at 483-84 (Scalia, J., dissenting); *Davis v. FEC*, 554 U.S. at 753-54.

73. *See* COMMENTARIES, *supra*, note 14, at 69-71.

74. *Citizens United*, 130 S. Ct. at 922 (Roberts, C.J., concurring) (citing scholarly articles to show that this is a widely accepted notion, even if Stevens's dissent denies it). *See*, *e.g.*, Elizabeth Garrett, *Fifth Annual Wiley A. Branton-Howard Law Journal Symposium Thurgood Marshall: His Life, His Work, His Legacy: Article & Essay: Influence and Legacy: The Future of the Post-Marshall Court: New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 HOW. L.J. 655, 669 (2009) (arguing that *Austin* "has been understood by most commentators to be an opinion driven by equality considerations, albeit disguised in the

as ominously, *Austin*'s logic could lead to the banning of books—at least those published with corporate treasury funds—as the government's lawyer candidly admitted at the first *Citizens United* argument.[75]

The proof of this inescapable logic can be found in the opinions of those justices who support applying *Austin*'s holding more broadly.[76] The dissent in *Citizens United* itself was willing to suggest that *Austin* justified prohibiting corporate speech because such speech might unduly influence the market for legislation. A legislature "might conclude that unregulated general treasury expenditures will give corporations 'unfai[r] influence' in the electoral process."[77] The dissent was unable to respond to Roberts's argument that the logic of *Austin* and its progeny could be extended to media corporations, because the fact that the law did not apply to them at the time was "no reason to overlook the danger inherent in accepting a theory that would allow government restrictions on their political speech."[78] *Austin* was a case that was decidedly difficult to limit to its facts; its underlying logic threatened to undermine First Amendment jurisprudence generally. According to the Chief Justice, the costs of giving *Austin stare decisis* effect were thus unusually high.[79]

It was even more damning that the government was unwilling to support the rationale of *Austin* at oral argument. This move was tantamount to admitting that *Austin*'s rationale lacked constitutional merit and, for Roberts, "underscores its weakness as a precedent of the Court."[80] As noted above, the government instead presented two new compelling interests to support the campaign finance laws—shareholder rights and quid pro quo corruption—while simultaneously asking the Court to follow *stare decisis* by upholding a discredited rationale. Such an argument, if accepted, would upset the principles of *stare decisis* because it would "effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors" and "allow the Court's past missteps to spawn

---

language of 'political corruption'"); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369, n.1 (1994) (noting that *Austin*'s rationale was based on equalizing political speech).

75. Tr. of Oral Arg. at 36-39, *Citizens United*, 130 S. Ct. 876 (No. 08-205) ("We would certainly take the position that if the labor union used its treasury funds to pay an author to produce a book that would constitute express advocacy . . . . the use of labor union funds, as part of the overall enterprise of writing and then publishing the book, would be covered.").

76. *Davis v. FEC*, 554 U.S. at 761-62 (Stevens, J., concurring in part and dissenting in part) ("[T]here is no reason that . . . concerns about the corrosive and distorting effects of wealth on our political process — [are] not equally applicable in the context of individual wealth."); *McConnell*, 540 U.S. at 203-09 (extending *Austin* to cover the "functional equivalent" of express advocacy as well as electioneering speech).

77. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting) (quoting *Austin*, 494 U.S. at 660).

78. *Id.* at 923 (Roberts, C.J., concurring) (citing *McConnell*, 540 U.S. at 283-86 (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part)).

79. *Id.*

80. *Id.* at 923-24 ("We may reasonably infer that it lacks confidence in that decision's original justification.").

future mistakes, undercutting the very rule-of-law values that *stare decisis* is designed to protect."[81] The Court cannot, under the guise of applying *stare decisis*, give precedential sway to reasoning not previously accepted—as this would go against the notion that *stare decisis* contributes to the "actual and perceived integrity of the judicial process."[82]

Conclusion

Both Justice Kennedy's majority opinion in *Citizens United* and Chief Justice Roberts's concurrence reinforce the idea that *stare decisis* does not mechanically prevent the overruling of precedent. Instead, as made clear by the common-law roots of the doctrine, if the concern of *stare decisis* is to protect the integrity of the judicial process and promote the consistent development of legal principles, the Court must take care to expunge errors that threaten the orderly development of the law. Indeed, errors of the type found in *Austin* neither foster reliance nor promote consistent legal doctrine. As the Cato Institute argued in its second amicus brief in *Citizens United*, nobody relies on having *less* freedom of speech.[83] And *Austin*'s anomalous situation at odds with precedent could only undermine stability and consistency in the law.

In the context of corporate or associational speech rights, *Austin* blatantly ignored *Buckley* and *Bellotti,* among other campaign finance precedents, and created a broad, subjective rationale that was continually questioned by members of the Court for 20 years. Those questions were the right ones to be asking and, by the time *Citizens United* arrived, it was clear that *Austin* needed to be overturned.

That should be the lesson taken from *Citizens United*'s treatment of *stare decisis*, particularly Chief Justice Roberts's concise restatement of the doctrine. If one case sits in open opposition to other unquestioned precedents, the Supreme Court is not blindly bound to uphold the outlier simply to uphold principles of *stare decisis*. "Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects."[84] That is not to say that the Court *must* overrule such precedent, but *stare decisis* in such cases will be at its nadir, militating strongly in favor of overturning the "aberrant" law.

---

81. *Id.* at 924.

82. *Payne*, 501 U.S. at 827.

83. Supplemental Brief for Cato Institute as Amicus Curiae Supporting Appellant at 16-17, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) ("On the contrary, both [*Austin* and *McConnell*] have had a chilling effect on the exercise of the constitutional right to freedom of speech. In other words, no one is relying on having less freedom of speech.") (citation omitted).

84. *Citizens United*, 130 S. Ct. at 921 (Roberts, C.J., concurring).