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CITIZENS UNITED AND THE ORPHANED ANTIDISTORTION RATIONALE

Richard L. Hasen*

INTRODUCTION

Soon after his retirement, Supreme Court Justice John Paul Stevens gave an interview to the CBS television program *60 Minutes*. Interviewer Scott Pelley asked the Justice to identify the Court's "mistake" in *Citizens United v. FEC*,[1] the 5–4 decision striking down corporate spending limits in candidate elections. When Justice Stevens, author of the primary *Citizens United* dissent,[2] asked which mistake he should emphasize, Pelley told him to choose. Justice Stevens then responded:

> Well, you know, basically, an election is a debate. And most debates, you have rules. And I think Congress is the one that ought to make those rules. And if the debate is distorted by having one side have so much greater resources than the other, that, sometimes may distort the ability to decide the debate on the merits. You want to be sure that it's a fair fight.[3]

Reacting to the Stevens interview, David Bossie, the President of Citizens United, lauded the Court's decision. He said that allowing corporations to spend their general treasury funds on elections (rather than being limited only to political action committee funds raised from human sources) "will allow the conservative movement to

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1. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).
2. Justice Thomas also wrote a dissent, for himself alone, on disclosure issues. *Id.* at 980 (Thomas, J., concurring in part and dissenting in part).
3. *60 Minutes: Supreme Court Justice John Paul Stevens Opens Up* (CBS News television broadcast Nov. 28, 2010), *available at* http://www.cbsnews.com/stories/2010/11/23/60minutes/main7082572.shtml?tag=contentMain;contentBody.

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participate on a 'level playing field' with groups like MoveOn.org and labor unions."[4]

How strange that both the *Citizens United* prime dissenter and plaintiff described the decision in terms of its effect on political equality, an interest the Supreme Court in *Citizens United* termed the "antidistortion interest."[5] On *60 Minutes*, Justice Stevens's main complaint about the decision was that the unequal wealth of corporations could now distort electoral outcomes. In contrast, Mr. Bossie defended the decision on grounds that it will create greater equality across groups engaged in political battles.

The irony in this debate over whether *Citizens United* promotes or impedes political equality is that Mr. Bossie's group argued before the Supreme Court that the First Amendment barred taking political equality concerns into account in fashioning campaign finance rules.[6] In his dissent, Justice Stevens did his best to avoid acknowledging that he was defending corporate spending limits, in part, on political equality grounds. Justice Stevens's failure to expressly defend corporate spending limits on political equality grounds came after the government had abandoned the rationale in the Supreme Court.

This brief Essay argues that the antidistortion argument did not deserve to be orphaned, and remains—as the quotes by Justice Stevens and Mr. Bossie illustrate—a key animating principle in thinking about the desirability of campaign finance laws. Part I explains how the antidistortion argument became an orphan in *Citizens United*, laying the blame with the Solicitor General's office and with Justice Stevens's muddled *Citizens United* dissent. Part II

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4. Ryan J. Reilly, *Citizens United President Enjoys 'Bitching And Moaning' Over Supreme Court Case*, TPM MUCKRAKER (Dec. 1, 2010), http://tpmmuckraker.talkingpointsmemo.com/2010/12/citizens_united_president_enjoys_bitching_and_moan.php.

5. *Citizens United*, 130 S. Ct. at 903. Until the end of this Essay, I use the terms "antidistortion rationale" and "political equality rationale" interchangeably. At the end, I explain more fully the relationship between the two terms.

6. Supplemental Brief for Appellant at 1, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2009) (No. 08-205), *available at* http://electionlawblog.org/archives/Citizens%20United--Supplemental%20Brief.pdf ("For the proper disposition of this case, the Court should reject the anti-distortion rationale for suppressing corporate political speech formulated in *Austin* and relied upon in *McConnell*—which is the only justification the government has advanced for prohibiting Video On Demand distribution of *Hillary*.").

explains the cost of this orphaning for the future of campaign finance and related laws: keeping the political equality rationale in the closet will make it harder to get legislative and judicial change in the campaign finance arena going forward, and it prevents a full and honest debate about the desirability and cost of campaign finance laws justified on political equality grounds.

I. HOW THE ANTIDISTORTION RATIONALE WAS ORPHANED[7]

A. *From* Austin *to* Citizens United

Before *Citizens United*, the leading case on the constitutionality of corporate spending limits in candidate elections was *Austin v. Michigan Chamber of Commerce*.[8] In that 1990 case, the Supreme Court upheld corporate spending limits in candidate elections against a First Amendment challenge. *Austin* did so based upon what the Supreme Court in *Citizens United* later termed[9] the *antidistortion interest*: the government's interest in curbing 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."[10]

Austin itself was somewhat of a surprise. Earlier, in the leading 1976 case, *Buckley v. Valeo*,[11] the Supreme Court, applying strict scrutiny, held that spending limits imposed on *individuals* violated the First Amendment.[12] The Court concluded that individual spending limits could not be justified by an anticorruption interest because of the lack of evidence that independent spending could

7. This Part assumes the reader is familiar with the Court's campaign finance jurisprudence generally and how the *Citizens United* decision changed that jurisprudence. For readers without that background, see generally Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

8. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

9. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 903 (2010).

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

11. Buckley v. Valeo, 424 U.S. 1 (1976).

12. *Id.* at 20–21, 44–51.

corrupt candidates.[13] Nor could the limits be justified on equality grounds, because doing so would be "wholly foreign" to the First Amendment.[14]

Though *Austin* sought to characterize the antidistortion interest as a "different type of corruption in the political arena,"[15] it fairly can be understood as voicing a type of political equality concern.[16] That is, under *Austin* "corruption," the way corporations "distort" the political process is not through *quid pro quo* corruption—"dollars for political favors"—or even "undue influence," but rather through corporate spending that is *disproportionate* to the public's support for the corporation's political ideas.

B. The Citizens United *Briefing and Argument: Abandonment*

Citizens United presented a delicate task for the Solicitor General's office, the arm of the United States Department of Justice charged with defending the position of the United States before the Supreme Court. Though the Supreme Court in the 2003 case of *McConnell v. FEC*[17] had reaffirmed *Austin*[18] and extended it to labor unions, it was clear by the time the Court agreed to hear *Citizens United* that the Court had moved from its period of greatest deference toward legislative efforts at campaign finance regulation to its period of greatest skepticism.[19] The cause of the shift was the replacement of

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13. *Id.* at 47.

14. *Id.* at 48–49.

15. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990). In *First National Bank of Boston v. Bellotti*, the Supreme Court left open the question whether independent corporate spending could be justified on traditional anticorruption grounds. 435 U.S. 765, 788 n.26 (1978). The Court did so despite *Buckley*'s statement that independent individual spending cannot corrupt because of the absence of coordination, and in *Citizens United*, the Court rejected the possibility of proving corruption by independent expenditures left open by Footnote 26 of *Bellotti*. *Citizens United*, 130 S. Ct. at 909. For further discussion of Footnote 26, see Hasen, *supra* note 7, at 596, 618.

16. This is a point I made in RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 114 (2003). In his concurring opinion in *Citizens United*, Chief Justice Roberts cited this work and others to support the proposition that *Austin*'s rationale was one grounded in political equality concerns. *Citizens United*, 130 S. Ct. at 922 & n.2.

17. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

18. As with many points about *Citizens United*, this point about reaffirmation is controversial. *See* Hasen, *supra* note 7, at 599 (discussing dispute among Justices in *Citizens United* over whether Supreme Court had "reaffirmed" *Austin* in other cases).

19. *See id.* at 586–90.

retiring Justice O'Connor on the Court with Justice Alito, swinging a five-justice majority generally voting to uphold campaign finance regulation to a five-justice majority voting to strike such regulations down. Among the cases decided by this new majority was a 2008 case, *Davis v. FEC*,[20] in which five Justices on the Court emphatically rejected political equality as a permissible rationale for campaign finance regulation.

In the initial Supreme Court briefing in *Citizens United*, the government certainly did not stress the antidistortion argument from *Austin*. But the government did not abandon the rationale either. In its original merits brief, the government wrote:

> Congress has historically imposed particularly stringent limits on the electoral advocacy of corporations and labor unions. Those restrictions reflect a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation, and this Court has consistently respect[ed] that judgment. In particular, because of the numerous advantages that the corporate form confers, a corporation's ability to pay for electoral advocacy has "little or no correlation to the public's support for the corporation's political ideas."[21]

The Supreme Court initially heard argument in *Citizens United* in March 2009,[22] and the government's case appeared to collapse when the Deputy Solicitor General had trouble answering a hypothetical question about the regulation of corporate-funded books containing the functional equivalent of express advocacy.[23] At the end of Court's term in June 2009, the Court announced it would rehear the

20. Davis v. Fed. Election Comm'n, 554 U.S. 724, 741 (2008).

21. Brief for the Appellee at 15, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2009) (No. 08-205) (citing *McConnell*, 540 U.S. 205) (some citations and quotations omitted), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellee.pdf .

22. Transcript of Oral Argument, Citizens United v. FEC, 130 S. Ct. 876 (2009) (No. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

23. Adam Liptak, *Justices Consider Interplay Between First Amendment and Campaign Finance Laws*, N.Y. TIMES, Mar. 25, 2009, at A16.

case, and it asked for supplemental briefing on the following question:

> For the proper disposition of this case, should the Court overrule either or both *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, Section 441(b) in Title 2 of the United States Code?[24]

The Solicitor General's office had to decide how to handle the question of *Austin*'s vitality in the supplemental briefing. The issue was a high stakes one. Former Harvard Law School dean Elena Kagan had taken over as the Solicitor General, and she was set to argue this case, her first appellate argument in her career. She was widely rumored (correctly) to be on the short list for a Supreme Court opening. The Court's supplemental briefing order called into question a key part of federal campaign finance law. People were going to be paying attention to this argument.

The government had a number of reasons to downplay the antidistortion argument: it was sure to generate hostile questions from at least some Justices (who had dissented in *Austin* or who had shown skepticism to the constitutionality of regulation in recent cases); it was hard to see five votes to accept the argument, especially in light of *Davis*; as a law professor, Kagan had written an article calling *Austin*'s antidistortion argument into question;[25] and spending time arguing over antidistortion would take time away at oral argument to

24. Order Restoring Reargument, 128 S. Ct. 1732 (2009) (No. 08-205). Elsewhere I argue that under the constitutional avoidance doctrine the Court should not have asked for this supplemental briefing, or overruled *Austin* or part of *McConnell* in this case. *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181.

25. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 464-72 (1996). Before Kagan was confirmed as a Supreme Court Justice, I noted the difficulty in determining whether she would have voted with the majority or dissenters in *Citizens United* if she had been serving on the Supreme Court at that time. Richard L. Hasen, *The Big Ban Theory*, SLATE, May 24, 2010, http://www.slate.com/id/2254830/.

advance other, potentially more convincing arguments to sustain the corporate spending limits.

In the supplemental brief,[26] and at the second oral argument, the government did more than simply downplay the *Austin* antidistortion rationale: it abandoned it entirely. The government sought—without any apparent textual basis—to recast the antidistortion language in *Austin* as one about protecting shareholders from the political spending decisions of corporate managers.[27] It also tried to defend corporate spending limits on more traditional anticorruption grounds. The brief made no mention of antidistortion as a political equality rationale or quoted the key *Austin* language.

At the second *Citizens United* oral argument,[28] when pressed by Chief Justice Roberts, General Kagan explicitly abandoned the antidistortion rationale:

> CHIEF JUSTICE ROBERTS: . . . [P]utting the quid pro quo interest aside, where in your supplemental briefing do you support the interest that was articulated by the Court in *Austin*?
>
> GENERAL KAGAN: Where we talk about shareholder protection and where we talk about the distortion of the electoral process that occurs when corporations use their shareholders' money who may or may not agree –
>
> CHIEF JUSTICE ROBERTS: I understand that to be a different interest. That is the shareholder protection interest as opposed to the fact that corporations have such wealth and they[] distort the marketplace.

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26. Supplemental Brief for the Appellee, *Citizens United*, 130 S. Ct. 876 (No. 08-205), *available at* http://www.scotusblog.com/wp-content/uploads/2009/07/08-205_us_supp.pdf.

27. Remarkably, the supplemental brief cites the pages containing the antidistortion language from *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–660 (1990), but the government never quotes that key language in the brief. Instead, the brief states, "[E]lectoral advocacy by for-profit corporations poses distinct risks, both to the public interest and to the corporation's shareholders, that are not implicated by individual electioneering." Supplemental Brief for the Appellee, *supra* note 26, at 6 (citation omitted).

28. Transcript of Oral Argument, *Citizens United*, 130 S. Ct. 876 (No. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf.

> GENERAL KAGAN: Well, [I] I think that they are connected because both come -
>
> CHIEF JUSTICE ROBERTS: [S]o am I right then in saying that in the supplemental briefing you do not rely at all on the market distortion rationale on which *Austin* relied; not the shareholder rationale, not the quid pro quo rationale, the market distortion issue. These corporations have a lot of money.
>
> GENERAL KAGAN: 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. So I know that that's the way that many people understand the distortion rationale of *Austin*, and if that's the way the Court understands i[t], we do not rely at all on that.[29]

C. The Muddled Treatment of the Antidistortion Rationale in Justice Stevens's Dissent

As one would expect, the *Citizens United* majority pounced on the government's failure to defend the antidistortion interest. The Court wrote that the government "all but abandon[ed] reliance" on *Austin*'s antidistortion interest,[30] and the Court then strongly rejected antidistortion as a permissible governmental interest.[31] Chief Justice Roberts, in a concurring opinion dedicated to defending the overruling of *Austin* as unavoidable and the Court's overruling of it in *Citizens United* as not activist,[32] leaned heavily on the

29. *Id.* at 47–48. Once General Kagan received a nomination to serve on the Supreme Court, newspapers considered whether the abandonment of *Austin* distortion was a strategic error. Adam Liptak, *Stints in Court as the Window to a Style on It*, N.Y. TIMES, Apr. 15, 2010, at A1, *available at* 2010 WLNR 7763123; *see also* Jess Bravin, *Kagan and Key Case: Jury Still Out*, WALL ST. J., May 12, 2010, at A6; Adam Liptak, *On First Amendment, Kagan Has Sympathized With Conservative Justices*, N.Y. TIMES, May 16, 2010, at A19, *available at* 2010 WLNR 10118063; Robert Barnes, *In Elena Kagan's Work as Solicitor General, Few Clues to Her Views*, WASH. POST, May 13, 2010, *available at* 2010 WLNR 9838059.

30. Citizens United v. Fed. Elections Comm'n, 130 S. Ct. 876, 903 (2009).

31. *Id.* at 904.

32. *See* Hasen, *supra* note 7, at 599–600 (describing Chief Justice Roberts's concurring opinion).

government's concession as well. At the end of a litany of reasons for rejecting the antidistortion rationale, the Chief wrote: "Finally and most importantly" was the government's own failure to defend *Austin*'s rationale;[33] "to the extent the Government relies on new arguments—and declines to defend *Austin* on its own terms—we may reasonably infer that it lacks confidence in that decision's original justification."[34]

The task then fell to Justice Stevens to defend the antidistortion rationale, and in this task he fell short. In the midst of a very long dissent, Justice Stevens turned to the antidistortion rationale and offered a hodge-podge of inconsistent understandings of it. He began by denying any difference between the anticorruption and antidistortion rationales: "Understood properly, 'antidistortion' is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an 'equalizing' ideal in disguise."[35] Justice Stevens then argued that the antidistortion rationale should not be read as embracing an equality rationale,[36] though he acknowledged "that *Austin* can bear an egalitarian reading."[37]

Justice Stevens proceeded to discuss the differences between corporations and live human beings, noting, among other things, that corporations can be foreign-owned, have limited liability, perpetual life, and do not engage in self-expression the way human beings do:[38] "These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but

33. *Citizens United*, 130 S. Ct. at 923 (Roberts, C.J., concurring). The Chief Justice explained that the *Austin* majority opinion relied upon neither the threat of quid pro quo corruption nor the need for shareholder protection. *Id.*

34. *Id.* at 924.

35. *Id.* at 970 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 970 n.69 (disagreeing with the Chief Justice that there is "nothing more to it" than equality).

36. Here, Justice Stevens relied upon that part of *Austin* quoted *infra* note 63.

37. *Citizens United*, 130 S. Ct. at 970 n.69.

38. *Id.* at 970–72.

also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms."[39]

Justice Stevens then rejected the argument that the public's interest in hearing a corporation's ideas in the political marketplace justified First Amendment protection for corporate spending. Citing a long history of public concern about corporate interests dominating politics, Justice Stevens noted the political equality concerns behind *Austin*: large corporate spending could "marginalize[]" the opinions of "real people" by "drowning out non-corporate voices."[40] This in turn "can generate the impression that corporations dominate our democracy."[41] Significantly, throughout this discussion, Justice Stevens never acknowledged that these were political equality arguments.[42]

Justice Stevens then discussed the potential for corporations to gain "special advantages in the market for legislation"[43] through rent-seeking:[44] "Corporations . . . are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is far more destructive than what non-corporations are capable of."[45]

In concluding the dissent's section on the antidistortion interest, Justice Stevens returned to a concern about corporations drowning out other political ideas: "In the real world, we have seen, corporate

39. *Id.* at 972. Justice Stevens also noted that corporations actually wanted limits on spending to prevent officeholders from "shak[ing] them down for supportive ads." *Id.* at 973.

40. *Id.* at 974.

41. *Id.*; *see also id.* at 975–76 ("In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens willingness and capacity to participate in the democratic process.").

42. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143,147–48 (2010) ("While Justice Stevens disputes the majority's characterization of this interest as impermissibly advancing the 'equalization' of speaking power, his own description suggests that it is necessarily redistributive." (footnote omitted)).

43. *Citizens United*, 130 S. Ct. at 975. The dissent stated that corporations are "uniquely equipped" to engage in this "rent seeking." *Id.*

44. For more on the rent-seeking rationale as used in Justice Stevens' dissent, see generally Richard L. Hasen, *Lobbying, Rent Seeking, and the Constitution*, 64 STAN. L. REV. (forthcoming 2012), *draft available at* http://ssrn.com/abstract=1734428.

45. *Citizens United*, 130 S. Ct. at 975 (quotations and citations omitted).

domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process."[46] He stated that an exception for media corporations might be constitutionally required because of the unique information-providing role they play in society, but the exception for media corporations did not doom the constitutionality of corporate spending limits generally.[47]

There are many provocative and important ideas in Justice Stevens's dissent, but as a whole the antidistortion portion of the dissent does not cohere. Justice Stevens began by denying any difference between anticorruption and antidistortion arguments for limiting corporate spending, stating all the ideas are about improper influences on officeholders. He then turned to arguments that have nothing to do with quid pro quo corruption or undue influence (suggesting that his equation of anticorruption and antidistortion was incorrect): that corporations deserve less First Amendment protection than humans, that corporate spending can "drown out" the voices of non-corporate interests, that corporate spending can undermine voter confidence in our democracy, and that corporations can act in ways that undermine the efficiency of government. The second of these interests looks like the antidistortion rationale advanced in *Austin*, yet Justice Stevens denied he was making a political equality argument. The other three arguments are neither anticorruption nor antidistortion arguments. Whatever else may be said of this jumble, the dissent in its treatment of antidistortion did not offer a full-throated, carefully crafted endorsement of the rationale.

Oddly, Justice Stevens has offered political equality rationales for campaign finance laws in the past. For example, in *Randall v. Sorrell*, Justice Stevens speaking for himself alone argued in favor of the constitutionality of limits on candidate spending, based in part on a political equality rationale.[48] Perhaps Justice Stevens in *Citizens*

46. *Id.* at 975–76.

47. *Id.* at 976.

48. Randall v. Sorrell, 548 U.S. 230, 278 (2006) (Stevens, J., dissenting) ("Not only do [candidate spending] limits serve as an important complement to corruption-reducing contribution limits, but they

United was constrained in offering these arguments in order to keep the votes of other dissenters.[49] Or perhaps Justice Stevens did not feel comfortable embracing the political equality rationale fully when the government chose to abandon it.[50] Still, the fact that Justice Stevens chose to highlight the antidistortion interest in his *60 Minutes* interview shows that the rationale remained important in his mind, months after he completed his lengthy opinion and service on the Court.

II. THE COSTS OF ORPHANING THE ANTIDISTORTION RATIONALE

At first glance, the government's abandonment of the antidistortion rationale and Justice Stevens's distancing of himself from it seems inconsequential. The five-Justice majority would not have been swayed to decide the case differently had General Kagan or Justice Stevens wrapped themselves fully in the *Austin* antidistortion argument. As Kathleen Sullivan has explained,[51] the Justices in the majority in *Citizens United* embrace a view of the First Amendment that is liberty-protecting rather than equality-enhancing, and the

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also 'protect equal access to the political arena, [and] free candidates and their staffs from the interminable burden of fundraising.' These last two interests are particularly acute. When campaign costs are so high that only the rich have the reach to throw their hats into the ring, we fail 'to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government.' States have recognized this problem, but *Buckley*'s perceived ban on expenditure limits severely limits their options in dealing with it." (citations and footnote omitted)); *see also* Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting) ("Finally, I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns.").

49. This possibility does not seem very likely. Justices Ginsburg and Breyer have endorsed a version of the political equality rationale in the past. *See* Richard L. Hasen, Buckley *is Dead: Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. FEC, 153 U. PA. L. REV. 31, 32 n.7 (2004). Justice Sotomayor has not weighed in on the political equality rationale, but she served as a member of the New York City campaign finance board, and her writings seem generally supportive of campaign finance regulation. Kenneth P. Vogel, *Sonya Sotomayor: No Empathy for Campaign Cash*, POLITICO, May 28, 2009, http://www.politico.com/news/stories/0509/23070.html.

50. After noting his earlier opinions accepting political equality rationales, Justice Stevens wrote in his *Citizens United* dissent: "I continue to adhere to these beliefs, but they have not been briefed by the parties or *amici* in this case, and their soundness is immaterial to its proper disposition." *Citizens United*, 130 S. Ct. at 963 n.65.

51. Sullivan, *supra* note 42, at 155.

antidistortion argument cannot be squared with this liberty-protecting reading.

But the absence of a forthright defense of the antidistortion rationale from the *Citizens United* dissent imposes real social costs. In a recent article in the *Minnesota Law Review*,[52] Justice Ginsburg explained the purposes served by dissenting opinions. Besides an "in-house" function to turn a dissent into a majority opinion or to influence the writing of a majority opinion,[53] dissents serve two key public purposes: "appeal[ing] . . . to the intelligence of a future day"[54] and "attract[ing] immediate public attention and, thereby, [propelling] legislative change."[55]

Citizens United has been an unpopular decision in the public,[56] and the source of that unpopularity seems to be tied to the public's acceptance of antidistortion and political equality concerns. When President Obama railed against the decision, he spoke of corporations "drown[ing] out the voices of everyday Americans."[57] Similarly, when Senator Arlen Specter gave his farewell speech upon leaving the United States Senate, he condemned the opinion as "effectively undermining the basic democratic principle of the power of one person/one vote."[58]

Yet when campaign finance reform advocates embrace these rationales and propose legislative changes based upon them, they face

52. Justice Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010).

53. Justice Ginsburg notes the possibility that drafting a dissent will sway a majority, something she says happens no more than four times per term. *Id.* at 4. As noted above, I do not believe a dissent could have served this purpose in this case. Note also Chief Justice Roberts's statement in his *Citizens United* concurrence: "We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues." *Citizens United*, 130 S. Ct. at 925 (Roberts, C.J., concurring).

54. Ginsburg, *supra* note 52, at 4 (quoting former Chief Justice Hughes).

55. *Id.* at 6.

56. Hasen, *supra* note 7, at 620 n.258 (discussing public opinion polling on *Citizens United*).

57. Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1, *available at* 2010 WLNR 1385136 ("President Obama called [the decision] '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.'").

58. *Specter Delivers Closing Argument*, CONG. DOC., Dec. 21, 2010, *available at* 2010 WLNR 25173103 (quoting Senator Specter). For a careful analysis of the basis of populist concern about the *Citizens United* decision, see Justin Levitt, *Confronting the Impact of Citizens United*, 29:1 YALE L. & POL'Y REV. 217 (2010).

an uphill battle. A four-Justice dissent in *Citizens United* fully embracing the political equality rationale and offering a considered and careful analysis of the question,[59] would have provided greater resonance for these rationales in the court of public opinion, and it would set the stage for eventual judicial acceptance of the rationale in the event that changes in Supreme Court personnel lead to a more receptive Court.

Stripped of even a four-Justice endorsement and careful exposition of the political equality rationale, legal advocates with an eye on the courts are forced to discuss their legislative proposals and legal arguments for campaign finance regulations solely in other terms, such as anticorruption and shareholder protection. While these may also be valid rationales to sustain some campaign finance laws, promoting political equality is the real unspoken motivating force behind many legislative proposals to ameliorate the effects of *Citizens United* and to defend existing campaign finance laws against First Amendment challenge. Some advocates appear to speak in "don't ask, don't tell" mode, motivated by political equality concerns, but voicing their concerns as something else.[60]

Aside from providing a public imprimatur of political equality as a key state interest to be balanced against First Amendment rights in campaign finance cases, a dissent expressly embracing the rationale could have provided greater clarity on thorny issues related to the political equality rationale, which would have benefitted legislators, the public, and eventually the courts.

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59. Justice Breyer, Cass Sunstein, Ned Foley and others have set out competing visions of political equality in the campaign finance context and how it may be reconciled with the First Amendment. *See, e.g.*, Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005). In setting out the rationale, a dissent would have benefitted from a cogent and thoughtful consideration of these sources or others.

60. Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND, Nov. 8, 2010, http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure/ ("[U]sing transparency as a weapon to combat inequality of voice is a dangerous game to play. It promotes forms of disclosure that are not narrowly tailored and invites closer Court scrutiny of disclosure laws.").

Political equality is a broad term, and antidistortion is just one way of conceptualizing it. Recall that in *Austin*, the Court conceived of equality in terms of the ability of corporate spenders to persuade voters how to vote and said that large corporate spending could distort the outcome of elections.[61] Similarly, in *Caperton v. Massey*, the Court held that a judge who benefitted from over $3 million in contributions to fund independent campaign spending on the judge's behalf had to recuse himself from a case involving the contributor. The contributor's hefty spending, making up the vast majority of the total spending supporting the judicial candidate in the election, had a "significant and disproportionate influence" on the candidate's election.[62] A variation on this antidistortion principle is that each speaker must have an equal opportunity to persuade, an idea that the Court in *Austin* appeared to reject.[63]

These antidistortion arguments are premised on the idea that voters respond to the sheer amount of advertising for a candidate in an election. It is not clear though whether the "drowning out" idea is more about the wealthy buying up all the available advertising space on limited media such as television than it is about large spenders so inundating viewers with a message that viewers are persuaded to vote in a particular way, even if there is contrary advertising from others.[64]

Other political equality arguments are premised less on the *electoral* results of unequal campaign spending and more on the *legislative* results. Independent spending favoring officeholders (or attacking their opponents) can help spenders curry favor with elected officials, and legislative actions therefore may be skewed toward the

61. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–60 (1990).

62. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009). Justice Kennedy authored both majority opinions and was the only Justice in the majority in both cases. On the tensions between Justice Kennedy's positions in *Caperton* and *Citizens United*, see Hasen, *supra* note 7, at 611–15.

63. "The Act does not attempt 'to equalize the relative influence of speakers on elections,' rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations." *Austin*, 494 U.S. at 660 (citations omitted). It was never clear to me that the Court here articulated a sensible distinction between the antidistortion argument it endorsed and the equality argument it purported to reject in this sentence.

64. The former argument is weaker than the latter to the extent that voters receive more information via sources with fewer limits on advertising, such as Internet web pages.

interests of the big spenders.[65] This is a distortion of legislative rather than electoral outcomes. The constitutional case for this type of equality argument might be different than an argument premised on concern about distortion of electoral outcomes.

Regardless of *which* type of political equality argument should be pursued, it will be important to articulate precisely how far the relevant equality principle can go consistent with protection of freedom of speech and association. As Richard Briffault explains:

> It is not possible to truly equalize influence over elections. Indeed, given the value of robust and uninhibited political participation and the extensive regulation it would take to assure total equality, assuring absolutely equal influence over elections is not even desirable. Nevertheless, dramatically unequal campaign spending that reflects underlying inequalities of wealth is in sharp tension with the one person, one vote principle enshrined in our civic culture and our constitutional law.[66]

How should the balance be struck? The specter of bureaucratic book-banning and Internet censoring figured heavily into the rhetoric of the *Citizens United* majority opinion, as did federal law's exceptionalism for media corporations. On top of these concerns are ones about campaign finance legislation, if passed by a legislature rather than through a voter initiative, that can serve to protect incumbents from political competition. These are weighty concerns, which should not be dismissed lightly by those believing political equality may serve as a compelling interest to justify campaign finance regulation.

Justice Breyer has given great thought to the intersection of the First Amendment and equality principles and argues for a careful balancing of rights and interests in this context, recognizing First

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65. I have long advocated this view of political equality in my writing on campaign finance. *See, e.g.*, Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996).

66. Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 577–78 (1999).

Amendment concerns on both sides of the controversy.[67] Under his "participatory self-government" variant of the political equality rationale, courts would closely scrutinize laws passed in the name of political equality, ensuring that the laws were not passed as incumbency protection measures and that there is robust political competition.[68] But Justice Breyer's ideas need further thinking going forward, as the Internet affects both the cost of campaign advertising and its effects on the electorate and as the public now experiences elections without corporate (and labor union) spending limits.

Resolution of all of these difficult, subsidiary questions, however, will have to wait for a day far in the future, in part because of the abandonment of the antidistortion rationale by the dissenters in *Citizens United*. It could well be another generation before the Court approaches these issues again, and at that point there will be some serious intellectual work ahead.

67. *See* Breyer, *supra* note 59.
68. I describe the rationale in Hasen, *supra* note 49.