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Constitutional Law—Elections: Citizens Divided: Balancing the First Amendment Right to Free Speech and the Role of Private Corporations in Our Nation's Elections

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CONSTITUTIONAL LAW—ELECTIONS: CITIZENS DIVIDED: BALANCING THE FIRST AMENDMENT RIGHT TO FREE SPEECH AND THE ROLE OF PRIVATE CORPORATIONS IN OUR NATION'S ELECTIONS

Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010)

ABSTRACT

In *Citizens United v. Federal Election Commission*, the United States Supreme Court lifted a decades-long ban on independent corporate political expenditures. An ideologically-divided Court delivered a 5-4 split decision overturning *Austin v. Michigan Chamber of Commerce* and part of *McConnell v. Federal Election Commission,* ruling the provision of the Bipartisan Campaign Reform Act of 2002 that prohibited all independent expenditures made by corporations, particularly those in support or opposition of a candidate, is a violation of the First Amendment. The Court ruled further, however, that the disclosure and disclaimer provisions of the Act did not violate the First Amendment, but served the public by providing information. Currently, the North Dakota Century Code bars a corporation from making a direct contribution to aid any candidate for public office or for any political purpose—a rule that will be significantly impacted, if not repealed, by the *Citizens United* decision. In North Dakota, the *Citizens United* decision will likely have a considerable impact on the role of corporations in future elections.

I. FACTS

In 2008, Citizens United, a nonprofit corporation, released a documentary entitled *Hillary: The Movie* (*Hillary*), which was critical of then-senator Hillary Clinton and her effort to seek the Democratic nomination for President of the United States.[1] The documentary was distributed in theaters and on DVD, and in order to increase its audience, Citizens United sought to release the documentary through video-on-demand.[2] In order to promote the program, Citizens United produced three advertisements, which it desired to pay for and show on cable and broadcast television thirty days before the primary election.[3]

The Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act, prohibits a corporation from using funds from its general treasury to make direct contributions or independent

1. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886-87 (2010).
2. *Id*. at 887. Video-on-demand allows a viewer to watch a program at any time through a digital cable subscription. *Id.*
3. *Id.* at 887-88.

expenditures in support or opposition of any candidate.[4] Additionally, as amended, the BCRA prohibits any "electioneering communication."[5] Under the Act, an "electioneering communication" is "any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office" made within thirty days of a primary election or sixty days of a general election and is publicly distributed.[6] Citizens United feared both the documentary and its promotional advertisements would fall under the BCRA's section 441(b) ban on corporate independent expenditures and sought an injunction in federal district court against the Federal Election Commission (FEC).[7]

Citizens United argued BCRA section 441(b) was unconstitutional as applied to *Hillary* and the disclosure and disclaimer requirements of BCRA sections 201[8] and 311[9] were unconstitutional as applied[10] to *Hillary* and its promotional advertisements.[11] The district court denied Citizens United's motion for a preliminary injunction and granted summary judgment in favor of the FEC.[12] On appeal, Citizens United raised two major issues while maintaining that various BCRA provisions, as applied, violated its First Amendment rights.[13] First, Citizens United questioned whether BCRA section 441(b), which prohibited corporate independent political expenditures, was constitutional as applied to *Hillary*.[14] Second, the corporation questioned whether the disclaimer and disclosure requirements under BCRA sections 201 and 311 were constitutional as applied to *Hillary*.[15] Before addressing either issue, the Court requested the parties first address whether it should overrule two earlier decisions: *Austin v. Michigan Chamber of Commerce*,[16] which held political speech may be banned based on a

4. *Id*. (citing 2 U.S.C. § 441(b) (2000); 2 U.S.C. § 441(b)(2) (2006)).

5. *Id*.

6. *Id*. (quoting 2 U.S.C. § 434(f)(3)(A); 11 C.F.R. § 100.29(a)(2) (2009)).

7. *Id*. at 888.

8. BCRA section 201 requires any person who spends in excess of $10,000 on electioneering communications must file a disclosure statement with the FEC. *Id*. at 914 (citing 2 U.S.C. § 434(f)(1)).

9. BCRA section 311 requires the inclusion of a disclaimer to any televised electioneering communication funded by anyone other than a candidate acknowledging the person or organization responsible for the advertisement. *Id*. at 913-14 (citing 2 U.S.C. § 441d(d)(2)).

10. An "as applied" challenge is one "claiming that a law or governmental policy, though constitutional on its face, is unconstitutional as applied, usually because of a discriminatory effect." BLACK'S LAW DICTIONARY 261 (9th ed. 2009).

11. *Citizens United*, 130 S. Ct. at 888.

12. *Id*.

13. *Id*. at 888, 893.

14. *Id*. at 888.

15. *Id*.

16. 494 U.S. 652 (1990).

speaker's corporate identity; and *McConnell v. Federal Election Commission*,[17] which relied on *Austin* to uphold a facial challenge to limits on electioneering communications, in order to assess whether Citizens United's claims could be resolved on narrower grounds.[18]

Before addressing the district court's ruling, the Supreme Court first held the application of BCRA section 441(b) could not be resolved on narrower grounds as applied to *Hillary* without chilling political speech and that it had to consider its holding in *Austin*.[19] Next, the Court overruled *Austin*, thus leaving no foundation for a limit on corporate independent expenditures.[20] The Court's ruling rendered invalid the section 441(b) prohibition on corporate independent expenditures, as well as the portion of *McConnell* that upheld such restrictions, stating such a prohibition is "an outright ban on speech."[21] Finally, affirming the district court's decision, the Supreme Court upheld the disclaimer and disclosure requirements of BCRA sections 201 and 311, noting such requirements "may burden the ability to speak, but impose no ceiling on campaign-related activities or prevent anyone from speaking."[22]

II. LEGAL BACKGROUND

Citizens United is not the first case to challenge a federal elections statute, nor will it likely be the last.[23] The history of elections law in the United States has shown frequently that, as elections statutes are created, many legal challenges have resulted, thereby shaping elections law.[24] The *Citizens United* decision addresses, relies on, and even overturns some of the many legal challenges to federal elections statutes over the years.[25]

A. FEDERAL ELECTION LAW BEFORE *CITIZENS UNITED*

Regulation of corporate political expenditures in American law dates back to the early twentieth century.[26] In 1907, Congress enacted a law that

17. 540 U.S. 93 (2003).
18. *Citizens United*, 130 S. Ct. at 888.
19. *Id*. at 888-96.
20. *Id.* at 892-96.
21. *Id.* at 913.
22. *Id*. at 885 (syllabus) (internal citations omitted).
23. *See id.* at 886-87.
24. *Id.* at 900-01.
25. *Id.* at 913.
26. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 115-22 (2003) (providing an extensive history of campaign finance reform in the United States).

became the foundation of major campaign reform.[27] The law, known as the Tillman Act, prohibited any national bank or corporation from making monetary contributions in connection with any federal election.[28] Shortly thereafter, Congress amended the statute, with the Federal Corrupt Practices Act of 1925, to include disclosure requirements and expenditure limits.[29]

In 1943, the Smith-Conally Act extended the limit on contributions by corporations to include unions and labor organizations, and the Labor Management Relations Act of 1947 made permanent this extension.[30] In order to prevent organizations from circumventing the law by making contributions independent of candidates, the Taft-Hartley Act strengthened the prohibition on contributions by also including a prohibition on expenditures in connection with an election.[31] The Federal Election Campaign Act of 1971 (FECA) was an answer to inadequacies of the Federal Corrupt Practices Act and rising campaign costs.[32] FECA created a framework for campaign financing regulation by limiting personal contributions, establishing a ceiling on media expenditures, and requiring full public disclosure of receipts and expenditures.[33] FECA also provided the legislative framework for corporations and union organizations to create separate segregated funds, or political action committees, for their political purposes.[34]

In 1974, on the wake of political financing abuse stemming from the Watergate scandal, Congress amended FECA to create stringent regulatory policy by setting campaign spending limits, individual contribution limits, and limits on aggregate individual contributions.[35] The amendments also limited independent expenditures on behalf of a candidate and created the Federal Election Commission as a centralized agency to administer and enforce campaign law.[36] In 2002, the Bipartisan Campaign Reform Act (BCRA), commonly known as the McCain-Feingold Act, was adopted to

27. ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 12 (2005) (citing Tillman Act, ch. 420, 34 Stat. 864 (1907), *amended by* Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (codified at 2 U.S.C. §§ 241-248) (repealed 1972)).

28. *Id*.

29. *Id*. at 13 (discussing Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (codified at 2 U.S.C. §§ 241-248) (repealed 1972)).

30. *Id*. at 17 (discussing Smith-Connally amendment to War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943) (codified at 2 U.S.C. § 251) (repealed 1945)); Labor Management Relations Act, ch. 120, 61 Stat. 136 (1943) (codified as amended in scattered sections of 18 U.S.C.)).

31. *Id*.

32. *Id*. at 20 (discussing Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2 U.S.C.; 18 U.S.C.; 47 U.S.C.)).

33. *Id*. at 20-21.

34. *Id*.

35. *Id*. at 22 (discussing Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in scattered sections of 2 U.S.C.; 18 U.S.C.)).

36. *Id*.

curb a surge of previously unregulated issue advertisements.[37] These advertisements advocated for a particular issue without containing the "magic words" urging citizens to "vote for, elect, support, or defeat" particular candidates or measures.[38] As a result, the BCRA created a new prohibition on "electioneering communications," or those broadcasts that clearly identified a candidate for office, aired within a specific time period, and targeted a specific audience of 50,000 or greater.[39] Under the BCRA, corporations were prohibited from making independent expenditures for such electioneering communications.[40]

B. RELEVANT CASE LAW

While the *Citizens United* decision implicated a number of free speech limitations on certain federal campaign contribution regulations, it was not the first instance where such restrictions were addressed by the Supreme Court.[41] Shortly after the FECA amendment, the corporate contribution and expenditure provisions, as well as the disclosure requirements of the Act, were constitutionally challenged in *Buckley v. Valeo*.[42] FECA expressly limited contributions to candidates for federally elected office by individuals or groups, limited expenditures by individuals or groups "relative to a clearly identified candidate," and required detailed disclosure statements of contributions made.[43] The Court held the provision placing a ceiling on direct contributions made by individuals and corporations, as well as the disclosure requirement provision, were constitutional because they protect against the appearance of improper influence of large campaign contributions and safeguard the electoral process without violating the rights of citizens.[44] However, the Court invalidated the Act's ceiling on independent and overall expenditures because those provisions limited the political expression found "at the core of . . . the First Amendment freedoms."[45]

Just two years later, in *First National Bank of Boston v. Bellotti*,[46] the Supreme Court held regulations that prohibit corporations from influencing

37. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 132 (2003) (citing Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 441b)).
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 893 (2010).
42. 424 U.S. 1 (1976).
43. *Buckley*, 424 U.S. at 7.
44. *Id.* at 68.
45. *Id.* at 39 (citing Williams v. Rhodes, 393 U.S. 23, 32 (1968)).
46. 435 U.S. 765 (1978).

state referenda violate the First Amendment.[47] In *Bellotti*, banking associations and business corporations wished to spend their funds to publicly express their views in opposition of a personal income tax proposal.[48] A Massachusetts statute, however, prohibited the banking associations and other specified business corporations from making contributions or expenditures aiding or promoting the election of any person or influencing a referendum vote.[49] The Supreme Court invalidated the statute, stating it hindered the liberty to publicly and truthfully discuss all matters of public concern, which is the very speech the First Amendment was meant to protect.[50]

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*)[51] the Supreme Court held FECA section 316, which prohibited direct expenditures of corporate funds in connection with any election, violated the First Amendment as applied to a nonprofit corporation.[52] The Court reasoned in order to be subject to FECA's prohibition, an expenditure must be the equivalent of "express advocacy."[53] *MCFL* also provided characteristics that may exempt an entity from the regulation, such as a corporation that was formed for the purpose of promoting political ideas, has no shareholders with a stake in its earnings, and was not established and does not receive contributions from a business corporation.[54]

In *Austin v. Michigan Chamber of Commerce*,[55] the Supreme Court rejected a First Amendment challenge to section 54(1) of the Michigan Campaign Finance Act, which prohibited corporations from using general funds for independent expenditures in support or opposition of any candidate for state office.[56] The Court ruled that, under *MCFL*, the Act did, in fact, burden political expression, but was justified in doing so by the compelling governmental interest of preventing corruption in the political arena because amassed corporate wealth may unfairly influence election outcomes in the form of independent expenditures.[57] The Court noted section

47. *Bellotti*, 435 U.S. at 767.
48. *Id.* at 771.
49. *Id.* at 768.
50. *Id.* at 795. Interestingly, Justice Stevens sided with the majority when it came to upholding corporate expenditures influencing referenda votes in *Bellotti*, but three decades later he spoke out against such expenditures relative to candidates for elections. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting).
51. 479 U.S. 238 (1986).
52. *MCFL*, 479 U.S. at 241.
53. *Id.* at 249.
54. *Id.* at 264.
55. 494 U.S. 652 (1990).
56. *Austin*, 494 U.S. at 655.
57. *Id.*

54(1) was precisely targeted to eliminate the distortion caused by corporate spending, but still allowed for a corporation's expression of its political views by expenditures through separate segregated funds.[58] Thus, the restriction was sufficiently narrowly tailored to achieve its objective.[59] Finally, the Court rejected the argument the statute could not be constitutionally applied to a nonprofit corporation, noting *Hillary* did not satisfy the three critical characteristics under *MCFL* that may exempt the corporation from the restriction.[60] The Court observed the chamber's purpose was not narrowly focused on the promotion of political ideas, its members included those who may disagree with its political activity, and, because its members were made up of business corporations, the chamber was not independent from the influence of such entities.[61] The dissenting opinions authored by Justices Scalia and Kennedy in *Austin*, greatly foreshadowed the reasoning of the *Citizens United* majority.[62]

Shortly after the BCRA was enacted, its constitutional validity was challenged.[63] In *McConnell v. Federal Election Commission*, the Supreme Court upheld the BCRA's regulation of electioneering communications, just as the Court previously upheld express advocacy in *MCFL*.[64] The Court extended the *MCFL* rule, which previously applied only to express advocacy, to any electioneering communications, relying on the anti-distortion interest recognized by the Court in *Austin*.[65] The Court noted corporations were still free to organize separate segregated funds in order to make political expenditures, thus refusing to consider the regulation a "complete ban" on expression.[66]

In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL*),[67] the Supreme Court relied on the *McConnell* "functional equivalent" test to create an "as applied" exception to BCRA section 203.[68] *WRTL* challenged BCRA section 203, which made it a federal crime for any

58. *Id*.
59. *Id*.
60. *Id*. at 662-64.
61. *Id*. at 664-65.
62. *Compare* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting), *and Austin*, 494 U.S. at 695 (Kennedy, J., dissenting), *with* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting) (criticizing the majority opinion as "essentially an amalgamation of resuscitated dissents").
63. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 114 (2003).
64. *Id*.
65. *Id*. at 204.
66. *Id*. The *Citizens United* majority did, however, refer to the same regulation as a "ban on speech." *Citizens United*, 130 S. Ct. at 898.
67. 551 U.S. 449 (2007).
68. *WRTL*, 551 U.S. at 456.

corporation to broadcast any communication that names a federal candidate for elected office and is targeted to the electorate, with a number of advertisements that encouraged voters to urge their elected Senators to oppose a filibuster.[69] The Court held the advertisements could not be reasonably interpreted as an appeal to vote for or against a specific candidate and thus were not the functional equivalent of express advocacy under *McConnell*; therefore, BCRA section 203 was unconstitutional as applied in *WRTL*.[70]

III. ANALYSIS

The *Citizens United* majority abandoned its previous decisions in *Austin* and *McConnell* by allowing corporations to make independent political expenditures, thereby paving the way toward a new chapter in campaign contributions by corporations.[71] The Court upheld the disclaimer and disclosure statements required by federal law, however, as regulations that further the public's knowledge, thus bolstering political speech.[72] Chief Justice Roberts concurred, defending the majority's turn from previous decisions,[73] while Justice Stevens, in his dissent, expressed his concern of the Court's stray from precedent, as well as his apprehension toward the potential for unlimited corporate spending, and his fear of political corruption as a result.[74]

A. MAJORITY OPINION

In its 5-4 split decision, primarily along ideological lines, the Supreme Court struck down nearly two decades of restrictions on corporate political contributions.[75] Justice Kennedy authored the majority opinion, in which Chief Justice Roberts, Justice Scalia, and Justice Alito joined.[76] Justice Thomas joined the majority as to all but Part IV, regarding disclaimer and disclosure requirements.[77]

The *Citizens United* Court first considered whether the claims might be resolved on an as applied basis, limited to the facts presented, or whether the Court needed to invalidate earlier precedent.[78] In its reasoning, the

69. *Id*. at 460.
70. *Id*. at 481-82.
71. *Citizens United*, 130 S. Ct. at 886.
72. *Id*. at 914.
73. *Id*. at 917 (Roberts, C.J., concurring).
74. *Id*. at 929 (Stevens, J., dissenting).
75. *Id*. at 886.
76. *Id.*
77. *Id*.
78. *Id*. at 888.

Court tossed aside Citizens United's narrower argument that, among others, *Hillary* did not qualify as an "electioneering communication" or as the "functional equivalent of express advocacy" because it was an appeal, shown on television, to vote against a specific federal candidate, made within thirty days of a primary election.[79] The Court held the case could not be resolved as applied because *Hillary* could be considered either an electioneering communication or an independent expenditure; hence, the Court had to consider its decisions in *Austin* and *McConnell* and the facial validity of the restriction on corporate expenditures, which chilled political speech "central to the meaning and purpose of the First Amendment."[80]

In its consideration of the facial challenge of section 411(b), the Court noted a prohibition on corporate expenditures is a ban on speech, thus reducing overall political expression by restricting "the number of issues discussed, the depth of their exploration, and the size of the audience reached."[81] The Court noted, "Laws that burden political speech are 'subject to strict scrutiny,'" and thus applied strict scrutiny.[82] Strict scrutiny requires the statute be narrowly tailored to serve a compelling governmental interest.[83] The Court recognized, in previous opinions, First Amendment protection extended to corporations, stating "[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations . . . like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[84]

In reconsidering its decision in *Austin*, the majority addressed three issues in the *Austin* opinion's rationale.[85] First, the Court looked to the governmental interest in limiting political speech created by *Austin*—the antidistortion rationale—which justified a prohibition of independent expenditures in order to prevent corporations from obtaining an "'unfair advantage in the political marketplace' by using 'resources amassed in the economic marketplace.'"[86] In tossing out the justification, the Court looked to its reasoning in *Bellotti* and *Buckley*, both of which ruled political speech affords First Amendment protection no matter the identity of the source—be it individual, corporation, union, or association—and did not depend on

79. *Id*. at 889.
80. *Id*. at 892.
81. *Id*. at 898 (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976)).
82. *Id.* (quoting Fed. Elections Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).
83. *Id.*
84. *Id*. at 900 (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986)).
85. *Id*. at 903.
86. *Id*. at 904 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990)).

the speaker's "financial ability to engage in public discussion."[87] Further, because the law did not distinguish between corporations and media corporations, the Court observed the *Austin* rationale could produce the unintended consequence of a restriction on political speech by media corporations, in violation of the First Amendment.[88] Thus, the Court held the antidistortion rationale of *Austin* invalid.[89]

Next, the Court assessed the anticorruption interest provided in *Austin*.[90] Again, the Court looked to its pre-*Austin* decision of *Buckley*, which found this governmental interest "sufficiently important," but not enough to justify a ban on independent expenditures.[91] Instead, preventing corruption or the appearance of corruption is a just interest in regulating *direct* contributions, as held in *Buckley*.[92] The *Citizens United* opinion noted twenty-six states *do not* limit independent expenditures, and the government made no argument that corruption existed or appeared to exist in those states.[93] Similarly, the Court acknowledged the *McConnell* record contained "over 100,000 pages . . . yet [did] not have any direct examples of votes being exchanged for . . . expenditures,"[94] perhaps thereby recognizing, in short, "if it ain't broke, don't fix it."

Finally, the Court rejected the *Austin* argument that limiting independent expenditures protects a corporation's shareholders who may carry dissimilar political views, but again the Court pointed to the government's ability to bar the speech of media corporations, thereby finding no justification within the First Amendment.[95] Instead, the Court once again referenced the lack of abuse on record and suggested the problem was nothing that could not be resolved "through the procedures of corporate democracy."[96] Therefore, the *Austin* decision was abandoned, as well as the portion of *McConnell* that relied on the *Austin* antidistortion interest to uphold a more stringent restriction.[97] Instead, the Court looked back thirty years and relied on its *Buckley* and *Bellotti* decisions.[98]

87. *Id.* (quoting *Buckley*, 424 U.S. at 49)).
88. *Id.* at 905.
89. *Id.* at 906.
90. *Id.* at 908.
91. *Id.* (quoting *Buckley*, 424 U.S. at 25).
92. *Id.*
93. *Id.* at 908-09.
94. *Id.* at 910.
95. *Id.* at 911.
96. *Id.*
97. *Id.* at 913.
98. *Id.*

Alternatively, the Court upheld the disclaimer and disclosure requirements of BCRA sections 201 and 311 as satisfactory means of regulating political speech.[99] In an as applied challenge, the Court once again relied on *Buckley* and reasoned disclosures and disclaimers provide the electorate with information, thereby insuring that voters are conversant as to whom is providing support.[100] These acts of transparency were justified as less restrictive alternative regulations of speech, for "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'"[101] However, the Court cautioned, in the presence of threat, harassment, or reprisal, such restrictions might be warranted if shown; in *Citizens United*, though, no such evidence existed.[102]

B. CONCURRENCES

Chief Justice Roberts, with whom Justice Alito joined, concurred, outlining his justification for straying from precedent.[103] The Chief Justice powerfully noted, "[W]e must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."[104] Importantly, the concurrence suggested it takes a "big court" to admit it erred in previous decisions, but to refrain from doing so would undermine the principle reason *stare decisis* exists.[105]

Justice Scalia, along with Justice Alito and, in part, Justice Thomas, authored a separate concurrence, aimed directly at the dissenters' apparent disdain for the First Amendment protection of corporations.[106] In a cutting response, Justice Scalia referenced the dissent's "corporation-hating quotations[.]"[107] Instead, Justice Scalia offered his own Originalist response that the dissent offered "no evidence—none whatever—that the First Amendment's unqualified text was originally understood to exclude such associational speech from its protection."[108] Seemingly proud of the majority,

99. *Id*. at 914.
100. *Id*. at 915.
101. *Id*. at 914 (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003); Buckley v. Valeo, 424 U.S. 1, 64 (1976)).
102. *Id*.
103. *Id*. at 917.
104. *Id*. at 920.
105. *Id*.
106. *Id*. at 925 (Scalia, J., concurring).
107. *Id*.
108. *Id*. at 927.

Justice Scalia called for celebration rather than condemnation of the new addition of speech to public debate.[109]

C. DISSENT

Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, issued a scathing response to the majority's opinion in a ninety-page dissent.[110] Justice Stevens pointed to the majority's apparent inaccurate classification of a corporation's place in a constitutionally protected society.[111] He noted corporations, while valued contributors to society, are not actually members of it.[112] Justice Stevens went so far as to mention that lawmakers might in fact have a constitutional duty to guard against undue corporate influence in election processes.[113] Justice Stevens offered his own Originalist understanding of the role of corporations in the elections process, which Justice Scalia's concurrence explicitly addressed.[114] Justice Stevens referenced his understanding of the original role of corporations as "entities designed to serve a social function for the state."[115] The dissenter continued, "[I]t seems implausible that the Framers believed 'the freedom of speech' would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections."[116] Justice Stevens also disagreed with the majority's interpretation that the challenged provisions were actually a "ban on corporate speech" at all, and instead opined the provisions are nothing of the sort.[117] He reasoned, under *Austin* and *McConnell*, the availability of exemptions for separate segregated funds and the creation of political action committees provided sufficient opportunity to engage in the political process.[118]

The dissent expressed at length its disappointment in the majority's unnecessary stray from precedent, claiming *Citizens United* could have been resolved on narrower grounds.[119] Particularly, the dissent pointed to interests of preventing corruption and the undue influence of corporations

109. *Id.* at 929.
110. *Id.* (Stevens, J., dissenting).
111. *Id.* at 930.
112. *Id.*
113. *Id.*
114. *Id.* at 948.
115. *Id.* at 949.
116. *Id.* at 950.
117. *Id.* at 942.
118. *Id.*
119. *Id.* at 933 ("The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics.").

as sufficient to uphold the restriction.[120] Pointedly, Justice Stevens called out the majority's activism: "In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results . . . . The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court."[121] Justice Stevens, in his opposition, did not suggest he had lost his faith in the body politic but instead expressed his concern for the integrity of the electoral process.[122] He suggested instead the electorate may make its most informed decision with the comfort and common sense that the integrity of the process is not corrupted by the undue influence of unlimited corporate wealth.[123]

IV. IMPACT AND APPLICATION TO NORTH DAKOTA

The landmark Supreme Court decision in *Citizens United* left the corporate political expenditure election laws of twenty-four states in question.[124] In North Dakota, the *Citizens United* decision likely invalidates certain provisions of the North Dakota Century Code, but leaves other election sections unaffected.[125]

A. INDEPENDENT EXPENDITURES

North Dakota Century Code section 16.1-08.1-03.3 provides, "A corporation, cooperative corporation, limited liability company, or association may not make a direct contribution . . . [t]o aid any candidate for public office or for nomination to public office."[126] Specifically, North Dakota law defines "contribution" as:

> A gift, transfer, conveyance, provision, receipt, subscription, loan, advance, deposit of money, or anything of value, made for the purpose of influencing the nomination for election, or election, of any person to public office or aiding or opposing the circulation or

120. *Id.* at 961.

121. *Id.* at 941-42.

122. *Id.* at 931 ("The path [the Court] has taken to reach its outcome will, I fear, do damage to this institution.").

123. *Id.* at 979. The Court stated:

> At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense.

Id.

124. *Life After* Citizens United, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 4, 2011), http://www.ncsl.org/default.aspx?tabid=19607.

125. *See* N.D. CENT. CODE tit. 16.1 (2009) (concerning North Dakota state election law).

126. *Id.* § 16.1-08.1-03.3(1)(c).

> passage of a statewide initiative or referendum petition or measure . . . .[127]

However, the North Dakota Century Code does not expressly address any amount of money spent in support or opposition of specific candidates, so long as the corporation operates *independently* of such candidates, political organizations, or political parties, which makes the *Citizens United* decision relevant to North Dakota law and will likely shape necessary future legislation.[128] No definitive distinction rests within the state law that distinguishes a "direct contribution," banned by North Dakota statute, from an "independent expenditure," upheld by the Court in *Citizens United*.[129]

Unlike North Dakota state law, federal law makes the distinction between a direct contribution and an independent expenditure.[130] The United States Code states an independent expenditure is one "expressly advocating the election or defeat of a clearly identified candidate [and] is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."[131] It is the "independent expenditure" contribution that the Supreme Court expressly upheld as constitutional in *Citizens United*.[132] Under *Citizens United*, the North Dakota statute, without first distinguishing between an "independent expenditure" and a "contribution" made directly to a candidate, a candidate's organization, or political party, may not be constitutionally regulated by the state and will likely be found invalid.[133]

As if the statutory waters were not already sufficiently murky, the North Dakota Century Code also prohibits corporations from making a direct contribution "[f]or any *political purpose*[134] or the reimbursement or indemnification of any person for money or property so used."[135] This

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127. *Id.* § 16.1-08.1-01(3).

128. *See id.* § 16.1-08.1-03.3 (explaining the current actions that are prohibited).

129. *Id.*

130. *See* 2 U.S.C. § 431(8), (17) (2006).

131. *Id.* § 431(17)(A)-(B).

132. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

133. *Id.*

134. The term "political purpose" is defined in the North Dakota Century Code as:

> [A]ny activity undertaken in support of or in opposition to the election or nomination of a candidate to public office and includes using "vote for", "oppose", or any similar support or opposition language in any advertisement whether the activity is undertaken by a candidate, a political committee, a political party, *or any person.*

N.D. CENT. CODE § 16.1-08.1-01(10) (2009) (emphasis added). For election law purposes, the North Dakota Century Code defines a "person" as "an individual, partnership, political committee, association, *corporation, cooperative corporation, limited liability company*, or other organization or group of persons." *Id.* § 16.1-08.1-01(7) (emphasis added).

135. *Id.* § 16.1-08.1-03.3(1)(d) (emphasis added).

section of the code, when applied to any political activity contributed to by any person, including a corporation,[136] may be constitutionally invalid if that contribution was considered an "independent expenditure" as outlined in *Citizens United*, causing a questionable ambiguity between the two bodies of law.[137]

Federal law classifies an independent expenditure by a corporation as one that expressly advocates the election or defeat of a candidate that is not made in cooperation with such candidate.[138] In comparison, North Dakota's statutory language prohibiting direct contributions for any political purpose makes no mention of coordination with a candidate.[139] Instead, it suggests that current state law prohibits the very actions upheld by the court in *Citizens United*, leaving this provision ambiguous and potentially unconstitutional under the First Amendment.[140] Alternatively, the "*direct* contribution" language in section 16.1-08.1-03.3 may insinuate the law excludes an independent expenditure.[141] Thus, the greatest impact on North Dakota election law as a result of the *Citizens United* opinion rests upon a determination of whether the statute's language, which bars contributions that "aid" any candidate or are made for "political purposes," in fact designates an independent expenditure or simply a direct contribution to the candidate or candidate's committee.[142]

It is important to observe that the Supreme Court in *Citizens United* did not address a ban on corporations contributing directly to or in coordination with candidates and political organizations and parties, but the Court has ruled in separate decisions that such prohibitions found in the BCRA are constitutional.[143] In North Dakota, if section 16.1-08.1-03.3 of the code's present language, stating a corporation is prohibited from making a direct contribution to "aid any candidate . . . for any political purpose," was to be interpreted as a direct contribution distinguished from an independent expenditure, such a regulation would be upheld under both North Dakota and federal law.[144]

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136. *Id.*

137. *See Citizens United*, 130 S. Ct. at 913.

138. *See* 2 U.S.C. § 431(17) (2006) (defining "independent expenditure").

139. *See* N.D. CENT. CODE § 16.1-08.1-01(7) (describing activity in support or opposition of a candidate in an advertisement when the activity is assumed by any person).

140. *Id.* § 16.1-08.1-03.3.

141. *Id.*

142. *See id.* ch. 16.1-08.1 (regarding campaign contribution statements).

143. *See generally* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Buckley v. Valeo, 424 U.S. 1 (1976) (ruling direct contributions by corporations may be regulated to protect *quid pro quo* corruption).

144. N.D. CENT. CODE § 16.1-08.1-03.3(1); *see* 2 U.S.C. § 431(17) (2006) (defining "independent expenditure").

In order to remain consistent with the holding of *Citizens United*, it is likely necessary under North Dakota law to clarify or distinguish the extent—or lack thereof—to which corporations may make independent expenditures and direct political contributions by a separate statute.[145] As it presently reads, the state's prohibition on corporations making any direct contribution for a political purpose, which includes advertisements undertaken by persons as defined in the code, cannot be administered constitutionally under *Citizens United* and should be amended as necessary.[146]

B. REGIONAL ELECTION LAW COMPARISON

While North Dakota does not distinguish an "independent expenditure" from a "contribution" by a corporation by statute, various other states' election codes make the distinction.[147] South Dakota's election statute does not expressly permit or prohibit corporate independent expenditures, but does provide a distinct definition of such contributions.[148] South Dakota election law provides an independent expenditure is one that is made:

> To expressly advocate the election or defeat of a clearly identified candidate or the placement of a ballot question on the ballot or the adoption or defeat of any ballot question, but which is not made to, controlled by, coordinated with, requested by, or made upon consultation with a candidate, political committee, or agent of a candidate or political committee.[149]

Alternatively, in South Dakota, direct contributions by corporations are prohibited by distinct statutory language not found in North Dakota law.[150] Section 12-27-18 of South Dakota law states, "No organization[151] may make a contribution *to a* candidate committee, political action committee, or political party."[152] This simple distinction prohibiting contributions made directly "to a" political entity is absent in North Dakota law, but

145. N.D. CENT. CODE § 16.1-08.1-01.

146. *See id.*; *Citizens United*, 130 S. Ct. at 913 (upholding a federal ban on independent political expenditures by corporations).

147. *See* N.D. CENT. CODE § 16.1-08.1-03.3. *But cf.* IOWA CODE § 68A.404(1) (2010); S.D. CODIFIED LAWS § 12-27-1(11) (Supp. 2010); 2010 Minn. Laws 1564-65.

148. S.D. CODIFIED LAWS § 12-27-1(11).

149. *Id.*

150. *Id.* § 12-27-18. *But see* N.D. CENT. CODE § 16.1-08.1-03.3 (concerning prohibitions on political contributions by corporations).

151. In South Dakota, "organization" includes "any business corporation, limited liability company, nonprofit corporation, limited liability partnership, limited partnership, partnership, cooperative . . . ." S.D. CODIFIED LAWS § 12-27-1(16).

152. *Id.* § 12-27-18 (emphasis added).

yields a compliant prohibition on contributions in South Dakota under federal law.[153]

Similarly, current Minnesota law expressly authorizes corporate independent expenditures while prohibiting direct or indirect contributions.[154] In allowing independent expenditures, Minnesota law states, "A corporation may not make an expenditure . . . to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office, *unless the expenditure is an independent expenditure*."[155] As a legislative response to *Citizens United*, Minnesota law additionally requires any corporation wishing to make an independent expenditure to form and register an "independent expenditure political fund"[156] if the expenditure is greater than one hundred dollars.[157] In contrast, Minnesota law still independently prohibits direct contributions, dictating "[a] corporation may not make a contribution . . . directly or indirectly . . . to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office."[158]

Iowa's election law takes a similar approach, restricting direct corporate political contributions.[159] Per Iowa statute, an insurance company, savings and loan association, bank, credit union, or corporation shall not make a monetary or in-kind contribution to a candidate or committee except for a ballot issue committee.[160] While Iowa law clearly bars direct contributions by corporations, like those statutes found in South Dakota and Minnesota, its statutory permission of independent expenditures is distinct.[161] Iowa law requires "[a]n entity . . . shall not make an independent expenditure[162] . . . without the authorization of a majority of the entity's

153. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 908 (2010); *see* S.D. CODIFIED LAWS § 12-27-18 (Supp. 2010). *But see* N.D. CENT. CODE § 16.1-08.1-03.3 (lacking distinct language as to whom contributions may or may not be made).

154. *See* 2010 Minn. Laws 1565 (amending MINN. STAT. §§ 211B.15(2), (3) (2005)).

155. *Id.*

156. An "independent expenditure political fund" is a political fund that makes only independent expenditures and disbursements permitted under section 10A.121, subdivision 1. MINN. STAT. § 10A.12(1)(a). Revised Minnesota law permits expenditures to pay costs associated with fundraising and general operations, pay for communications that do not constitute contributions or approved expenditures, and make contributions to other independent expenditure political committees or independent expenditure political funds. 2010 Minn. Laws 1565.

157. MINN. STAT. § 10A.12(1)(a); *see supra* note 124.

158. 2010 Minn. Laws 1564 (amending MINN. STAT. § 211B.15(2)).

159. *See* IOWA CODE § 68A.503 (Supp. 2010).

160. *Id.* § 68A.503(1).

161. *Compare id.*, *with* 2010 Minn. Laws 1564-65 *and* S.D. CODIFIED LAWS § 12-27-1(11) (Supp. 2010).

162. For election law purposes, Iowa statute defines "independent expenditure" as "one or more expenditures . . . for a communication that expressly advocates . . . [a] candidate . . . without the prior approval or coordination with a candidate . . . ." IOWA CODE § 68A.404(1).

board of directors, executive council, or similar organizational leadership body of the use of treasury funds for an independent expenditure involving a candidate or ballot issue committee."[163] The Iowa statute, amended in 2010 as a result of the *Citizens United* decision, meets the decision's requirements by allowing a corporation to make independent expenditures but takes the furthest action of those addressed by creating an additional restriction requiring a majority of an entity's governing body to authorize such expenditures.[164]

State laws found in South Dakota, Minnesota, and Iowa each required revision as a result of the *Citizens United* decision.[165] Though each state reversed old law barring independent expenditures by corporations, South Dakota, Minnesota, and Iowa all took a different approach to the level of regulation each state now requires of such expenditures.[166] No matter the extent to which North Dakota may choose to regulate independent political expenditures by corporations, some statutory distinction must be made for its laws to remain constitutionally enforceable.[167]

C. DISCLOSURE REQUIREMENT OF EXPENDITURES

The campaign finance disclosure statement requirements outlined by section 16.1-08.1-04.1 of the North Dakota Century Code will likely remain unchanged as a result of *Citizens United* because the Supreme Court upheld such requirements as constitutional.[168] While no provision requiring the disclosure of direct contributions to candidates by corporations[169] or of independent expenditures for political purposes[170] exists under current North Dakota law, the introduction of such a disclosure requirement is likely needed if a distinction between a direct contribution and an independent expenditure is made.[171] The *Citizens United* decision does not prohibit corporations from establishing a "separate segregated fund" or political

163. *Id.* § 68A.404(2)(a).

164. *Id.*; *cf.* MINN. STAT. § 211B.15(3) (2008) (amending previous campaign law in response to *Citizens United*); S.D. CODIFIED LAWS § 12-27-1(11) (amending previous campaign law in response to *Citizens United*).

165. *See supra* note 124.

166. *Id.*

167. *See* N.D. CENT. CODE § 16.1-08.1-03.3 (2009).

168. *Id.* § 16.1-10-04.1; *see* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914-15 (2010) (upholding political advertisement disclosure and disclaimer requirements).

169. The North Dakota Century Code prohibits direct contributions in section 16.1-08.1-03.3, thus no disclosure requirement is currently necessary. *See* N.D. CENT. CODE § 16.1-08.1-03.3.

170. North Dakota statute currently makes no reference to corporate independent expenditures. *See id.* ch. 16.1-08.1.

171. *See id.* (concerning campaign contribution statements).

action committee to expressly advocate a particular candidate with direct contributions,[172] and consequently, the analogous North Dakota statute will likely remain unchanged.[173] North Dakota Century Code section 16.1-08.1-03.3(2) expressly permits the "establishment, administration, and solicitation of contributions to a separate and segregated fund to be utilized for political purposes by a corporation, cooperative corporation, limited liability company, or association."[174] Political action committees[175] maintain the ability to make contributions to candidates and other political committees and to coordinate any independent expenditure with candidates and political committees for political purposes.[176]

Once established for the purpose of administering a segregated fund for political purposes, the North Dakota Century Code requires all political action committees to disclose any contribution in an aggregate amount in excess of two hundred dollars to the Secretary of State.[177] The disclosure statement, by statute, requires the name and mailing address of each contributor and must include the date the contribution was made and the date the contribution was received during each reporting period, and again in a year-end statement that in duration covers the entire calendar year.[178] Such disclosure statement requirements remain constitutional under *Citizens United*, and the requisite statute in North Dakota will likely remain unaffected.[179]

D. DISCLAIMER REQUIREMENT FOR ADVERTISEMENTS

Because *Citizens United* upheld the requirement that an advertisement or communication for political purposes includes a disclaimer that identifies the person or group who is financially responsible for it as constitutional, the provisions outlined by the North Dakota Century Code that require the same will likely remain intact.[180] North Dakota Century Code section 16.1-10-04.1 contains a disclosure requirement that necessitates certain political advertisements to identify the sponsor.[181] Because North Dakota law

172. *Citizens United*, 130 S. Ct. at 881 (syllabus).

173. *See* N.D. CENT. CODE § 16.1-08.1-03.3(2).

174. *Id*.

175. "Political committee" includes any committee, club, association, or other group of persons which receives contributions or makes expenditures for political purposes. *Id*. § 16.1-08.1-01(8)(a).

176. *Id*. § 16.1-08.1-03.3(2).

177. *Id*. § 16.1-08.1-03.3(3).

178. *Id*.

179. *Id*.; *see* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914-15 (2010) (upholding BCRA's disclaimer and disclosure provisions as applied).

180. N.D. CENT. CODE § 16.1-10-04.1; *Citizens United*, 130 S. Ct. at 914-15.

181. N.D. CENT. CODE § 16.1-10-04.1. Specifically, it requires:

considers corporations to be "persons" by statute,[182] section 16.1-10-04.1 may constitutionally apply to a corporation if it distributes and funds a political advertisement as an independent expenditure for or against a candidate.[183] Of course, current North Dakota law prohibits corporations from making any direct contribution to aid any candidate or for any political purpose in general, so it is plausible that corporate expenditures of this nature were not originally intended to be included within the reach of the statute requiring disclaimers.[184] However, it is likely that North Dakota must make election law revisions that include the extent to which corporations may make independent expenditures, and doing so may subject such expenditures to the general disclaimer requirements outlined in section 16.1-10-04.1.[185] Thus, in order to avoid any further ambiguity, it would be appropriate to amend the North Dakota Century Code by explicitly extending the disclaimer requirements in section 16.1-10-04.1 to corporations, cooperative corporations, and limited liability companies, with distinct language pertaining to independent political expenditures.[186]

President Obama, in his 2010 State of the Union Address, echoed Justice Stevens and the dissenters' sentiment.[187] In his speech, the President sternly stated, "I don't think American elections should be bankrolled by America's most powerful interests," and further criticized the majority, noting the decision would "open the floodgates for special interest—including foreign corporations—to spend without limit in our elections."[188] Thus, the citizens are divided. Justice Kennedy's majority submitted the power of the electorate rests with the ability of voters to make informed decisions.[189] The unrestricted ability of corporations to make independent political expenditures and attachment of a strict disclosure

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> Every political advertisement . . . designed to assist, injure, or defeat the candidate by reflecting upon the candidate's personal character or political action . . . must disclose on the advertisement the name of the person . . . paying for the advertisement.

Id. The statute further states, "The name of the person paying for any radio or television broadcast containing any advertising announcement for or against any candidate for public office must be announced at the close of the broadcast." *Id*.

182. "Person" is defined as an "individual, partnership, political committee, association, corporation, cooperative corporation, limited liability company, or other organization or group of persons." *Id*. § 16.1-08.1-01(7).

183. *Id.* § 16.1-10-04.1.

184. *Id*. § 16.1-08.1-03.3.

185. *Id*.

186. *Id*.

187. 156 CONG. REC. 418 (2010).

188. *Id*.

189. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 908 (2010) (concluding "[t]he First Amendment confirms the freedom to think for ourselves"); *id*. at 899 (observing "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes").

requirement do not prevent citizens from making a learned decision, but instead empowers them to do so.[190] The constitutional attachment of a disclaimer or disclosure to corporate advocacy, with which the dissent did not object,[191] furthered this reasoning.[192]

V. CONCLUSION

In *Citizens United*, the United States Supreme Court overturned its decisions in *Austin* and *McConnell*, thereby lifting the restriction on independent political expenditures by corporations.[193] In addition, the Court upheld the disclosure and disclaimer requirements pertaining to such expenditures.[194] The *Citizens United* decision unearths a number of ambiguities in the North Dakota Century Code relating to First Amendment constitutionality that need to be addressed and amended in the near future.[195]

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190. *Id*. at 907 ("By suppressing the speech of manifold corporations . . . the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."). "Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false." *Id*. (quoting JAMES MADISON, THE FEDERALIST NO. 10 (Alexander Hamilton) (Clinton Rossitor ed., 1961)).

191. *See id*. at 929 (Stevens, J., concurring in part and dissenting in part).

192. *Id*. at 915 (quoting First Nat'l Bank v. Belotti, 435 U.S. 765, 792 (1978)). "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 915. *See also id.* at 916 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

193. *Id.* at 913.

194. *Id*. at 916.

195. *See* discussion *supra* Part IV (discussing *Citizens United*'s impact on North Dakota law).

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