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FIRST AMENDMENT — CAMPAIGN FINANCE CONTRIBUTIONS —  
FOURTH CIRCUIT HOLDS THAT BAN ON CORPORATE DIRECT  
CONTRIBUTIONS DOES NOT VIOLATE FIRST AMENDMENT. —  
*United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012), *cert. denied*,  
No. 12-579, 2013 WL 656067 (U.S. Feb. 25, 2013).

The Supreme Court’s decision in *Citizens United v. FEC*,<sup>1</sup> ruling that the First Amendment prohibits restricting corporations’ independent political expenditures,<sup>2</sup> has deeply shaken the campaign finance landscape. Among the regulations potentially threatened by the Court’s reasoning is the federal ban on corporate direct contributions to candidates.<sup>3</sup> Recently, in *United States v. Danielczyk*,<sup>4</sup> the Fourth Circuit held that the ban remains constitutional.<sup>5</sup> This decision was correct under the principle of *Agostini v. Felton*,<sup>6</sup> which provides that only the Supreme Court can overrule its own decisions.<sup>7</sup> However, it allowed the Fourth Circuit to avoid important questions about the extent to which *Citizens United*’s antidiscrimination principle<sup>8</sup> — which bars speaker discrimination based on corporate form — has undermined relevant Supreme Court precedent.

Modern campaign finance jurisprudence began with *Buckley v. Valeo*,<sup>9</sup> in which the Supreme Court upheld limits on individuals’ direct campaign contributions but struck down limits on their independent political expenditures,<sup>10</sup> finding that the latter “impose[d] significantly more severe restrictions on protected freedoms.”<sup>11</sup> Later, in *First National Bank of Boston v. Bellotti*,<sup>12</sup> the Court struck down a statute banning corporate spending to influence ballot initiatives.<sup>13</sup> In

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<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> *Id.* at 913.

<sup>3</sup> 2 U.S.C. § 441b(a) (2006); see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 603–17 (2011) (arguing that *Citizens United*’s logic could threaten legal limits on foreign spending, judicial election spending, and direct contribution amounts); Jason S. Campbell, Note, *Down the Rabbit Hole with Citizens United: Are Bans on Corporate Direct Campaign Contributions Still Constitutional?*, 45 LOY. L.A. L. REV. 171, 202–06 (2011) (arguing that *Citizens United*’s logic renders the corporate direct contribution ban unconstitutional).

<sup>4</sup> 683 F.3d 611 (4th Cir. 2012), *cert. denied*, No. 12-579, 2013 WL 656067 (U.S. Feb. 25, 2013).

<sup>5</sup> *Id.* at 615.

<sup>6</sup> 521 U.S. 203 (1997).

<sup>7</sup> See *id.* at 237.

<sup>8</sup> This principle covers identity-based but not viewpoint discrimination, though both could be deemed antidiscrimination principles. See generally Kathleen M. Sullivan, *The Supreme Court, 2009 Term — Comment: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

<sup>9</sup> 424 U.S. 1 (1976) (per curiam).

<sup>10</sup> See *id.* at 58.

<sup>11</sup> *Id.* at 23. Direct contributions, although protected by a lower level of scrutiny, are still political speech. See *id.* at 20–23.

<sup>12</sup> 435 U.S. 765 (1978).

<sup>13</sup> See *id.* at 784, 795.

*Citizens United*, the Supreme Court reasoned that since *Buckley* protected independent expenditures, and *Bellotti* stood for the proposition that otherwise protected speech could not be regulated simply because it had a corporate source, limits on corporate independent expenditures were unconstitutional.<sup>14</sup> The Court also rejected several of the social interests it had previously held sufficient to justify restrictions on corporate speech: countering the distorting influence of corporate wealth on the political process;<sup>15</sup> protecting shareholders with opposing views;<sup>16</sup> and preventing the threat or appearance of corruption based on favoritism short of quid pro quo deal making.<sup>17</sup> Nonetheless, the Court explicitly declined to address the statutory ban on corporate direct contributions, which it had previously upheld in *FEC v. Beaumont*,<sup>18</sup> noting that *Citizens United* did not present that issue.<sup>19</sup>

The Fourth Circuit encountered that issue two years later. William P. Danielczyk, Jr., was the chairman of Galen Capital Corporation.<sup>20</sup> In 2007, Danielczyk cohosted a fundraiser for Hillary Clinton's presidential campaign.<sup>21</sup> Danielczyk and another Galen officer allegedly had Galen reimburse attendees for \$156,400 in campaign donations.<sup>22</sup> In 2011, both were charged with illegally soliciting and reimbursing campaign contributions in violation of several federal statutes, including 2 U.S.C. § 441b(a), which bans corporate direct contributions to candidates for federal office.<sup>23</sup> The defendants filed motions to dismiss on several grounds, including that *Citizens United* rendered § 441b(a) unconstitutional as applied to them.<sup>24</sup>

The district court granted the defendants' motion to dismiss the charge arising from § 441b(a), holding the statute's ban on corporate direct contributions unconstitutional.<sup>25</sup> The court found the logic of

<sup>14</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 902–04 (2010). In dissent, Justice Stevens sharply criticized the majority's reading of precedent, particularly *Bellotti*. See *id.* at 957–60 (Stevens, J., concurring in part and dissenting in part).

<sup>15</sup> See *id.* at 904–05 (majority opinion). The Court overruled *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld a restriction on independent expenditures partly on this basis. *Citizens United*, 130 S. Ct. at 903, 913.

<sup>16</sup> See *Citizens United*, 130 S. Ct. at 911; *FEC v. Beaumont*, 539 U.S. 146, 154 (2003).

<sup>17</sup> See *Citizens United*, 130 S. Ct. at 909–10. The Court found that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 909.

<sup>18</sup> 539 U.S. 146, 149.

<sup>19</sup> See *Citizens United*, 130 S. Ct. at 909.

<sup>20</sup> *Danielczyk*, 683 F.3d at 614.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The two allegedly sought to conceal these activities in several ways. *Id.*

<sup>23</sup> *United States v. Danielczyk*, 788 F. Supp. 2d 472, 476 (E.D. Va. 2011). In addition to these violations of campaign finance statutes, the defendants were charged with conspiracy and obstruction of justice, and Danielczyk was charged with causing false statements. See *id.*

<sup>24</sup> See *id.* at 477; *Danielczyk*, 683 F.3d at 614.

<sup>25</sup> *Danielczyk*, 788 F. Supp. 2d at 494.

*Citizens United* “inescapable here”<sup>26</sup>: because *Buckley* implicitly found that direct contributions *within statutory limits*, like independent expenditures, do not create corruption or its appearance, there was no permissible basis to ban such corporate contributions.<sup>27</sup> While *Citizens United* did reaffirm *Buckley*’s concern with quid pro quo corruption, a statute that flatly bans corporations from making the same direct donations individuals can make<sup>28</sup> could not withstand *Citizens United*’s declaration that “the First Amendment does not allow political speech restrictions based on the speaker’s corporate identity.”<sup>29</sup>

Five days later, facing criticism for failing to consider *Beaumont*,<sup>30</sup> the district court requested additional briefing and argument.<sup>31</sup> In its subsequent ruling, the court acknowledged that under *Agostini v. Felton* it was “bound to apply controlling Supreme Court precedent, even where later Supreme Court rulings erode that precedent’s logical underpinnings.”<sup>32</sup> Yet it rejected the contention that *Beaumont*’s ruling upholding the ban on corporate direct contributions “directly controls” here.<sup>33</sup> The court instead construed *Beaumont* as being limited to nonprofit advocacy corporations.<sup>34</sup> Because Galen was for-profit, *Beaumont* did not “compel an outcome” against Danielczyk.<sup>35</sup> Further, the court found that while *Beaumont*’s limited holding “remains good law,” its reasoning could not be squared with *Citizens United*,<sup>36</sup> because “if corporations and individuals have equal political speech rights, then they must have equal direct donation rights.”<sup>37</sup>

The Fourth Circuit reversed.<sup>38</sup> Writing for a unanimous panel, Judge Gregory<sup>39</sup> held that *Beaumont* still supports the constitutionality

<sup>26</sup> *Id.*

<sup>27</sup> *See id.* at 493–94.

<sup>28</sup> An individual may contribute up to \$2000 to a candidate for federal office under 2 U.S.C. § 441a(a)(1)(A) (2006). However, this contribution limit and others are indexed for inflation; the limit in 2012 was \$2500. *See* FED. ELECTION COMM’N, CONTRIBUTIONS 1–2 (2013), available at [http://www.fec.gov/pages/brochures/contributions\\_brochure.pdf](http://www.fec.gov/pages/brochures/contributions_brochure.pdf).

<sup>29</sup> *Danielczyk*, 788 F. Supp. 2d at 494 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 903 (2010)) (internal quotation marks omitted).

<sup>30</sup> *See, e.g.,* Nicholas Confessore, *Judge Voids Ban on Campaign Donations by Business*, N.Y. TIMES, May 28, 2011, at A15.

<sup>31</sup> Order at 1, *Danielczyk*, 788 F. Supp. 2d 472 (No. 1:11cr85).

<sup>32</sup> *United States v. Danielczyk*, 791 F. Supp. 2d 513, 515 (E.D. Va. 2011).

<sup>33</sup> *Id.* at 517 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

<sup>34</sup> *Id.* at 516.

<sup>35</sup> *Id.* at 517.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* at 520. The court thus denied the government’s motion to reconsider but clarified that it held § 441b(a) unconstitutional as applied to Danielczyk’s case, not on its face. *Id.*

<sup>38</sup> This ruling was consistent with two other circuit decisions since *Citizens United*. *See* Ognibene v. Parkes, 671 F.3d 174, 195 n.21 (2d Cir. 2012); Thalheimer v. City of San Diego, 645 F.3d 1109, 1125 (9th Cir. 2011). Another circuit has subsequently reached a similar determination. *See* Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 879 (8th Cir. 2012) (en banc).

<sup>39</sup> Judge Gregory was joined by Chief Judge Traxler and Judge Diaz.

of § 441b(a)'s ban on corporate direct contributions.<sup>40</sup> After reiterating the *Agostini* principle, the Fourth Circuit rejected the district court's narrow view of *Beaumont*, noting that the case cited longstanding precedent upholding corporate direct contribution bans and emphasizing similarities between nonprofit and for-profit corporations.<sup>41</sup>

The court then considered the impact of *Citizens United*, rejecting the notion that it repudiated *Beaumont*.<sup>42</sup> Leaping to the conclusion that *Citizens United*'s "corporations-are-equal-to-people" logic applies to direct contributions as well as to independent expenditures would, the court asserted, ignore "well-established" doctrinal distinctions between the two types of spending.<sup>43</sup> Since *Buckley*, the Court has held that independent expenditure limits must survive strict scrutiny, while direct contribution limits need only be "closely drawn to match a sufficiently important interest."<sup>44</sup> This latter test could still be passed, because *Citizens United* left intact two of the government interests recognized in *Beaumont*: preventing actual or perceived quid pro quo corruption, and avoiding use of the corporate form to circumvent limits on individual contributions.<sup>45</sup> Thus, *Citizens United* did not require dismissal of the contested charges.<sup>46</sup>

The Fourth Circuit appropriately adjudicated *Danielczyk* under the *Agostini* principle. This approach, however, had the effect of allowing the court to avoid important questions about the extent to which *Citizens United*'s antidiscrimination principle has undermined *Beaumont*. In determining the applicable level of scrutiny and in applying that scrutiny, the full impact of *Citizens United* remains unclear.

The Fourth Circuit correctly recognized that *Agostini* controlled this case. In *Agostini*, the Supreme Court rejected the idea that lower courts should *ever* decide it had overruled an earlier case by implication.<sup>47</sup> The case for such an implication was especially weak here, since *Citizens United* expressly declined to address the issue — constitutional protection of direct contributions — that *Beaumont* decided.<sup>48</sup>

<sup>40</sup> *Danielczyk*, 683 F.3d at 615.

<sup>41</sup> *See id.* at 615–17.

<sup>42</sup> *Id.* at 617.

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

<sup>44</sup> *Id.* (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)) (internal quotation mark omitted).

<sup>45</sup> *See id.* at 618–19.

<sup>46</sup> *See id.* at 619.

<sup>47</sup> *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In *Agostini*, the relevant precedent "had not just been rendered suspect by subsequent Supreme Court decisions; it had been eviscerated." Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151, 180 (2009).

<sup>48</sup> *See Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010). The *Agostini* principle is sometimes criticized as inefficient where lower courts reasonably believe the Supreme Court will overrule a decision. *See, e.g.,* Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 975 (2000). This criticism has far less force, however, where the Court has explicitly reserved a question for itself.

The court was therefore right to conclude that *Beaumont* governed the case against Danielczyk, and to reject the district court's interpretation of *Beaumont* as limited to nonprofit corporations.<sup>49</sup> That interpretation was implausible for at least two reasons. First, it ignored *Beaumont*'s reasoning,<sup>50</sup> which implicitly assumed that for-profit corporations would present an even *stronger* case for regulation.<sup>51</sup> Second, the district court's insistence that *Beaumont* "remains good law" as applied to nonprofit advocacy corporations alone<sup>52</sup> is incompatible with its broad reading of *Citizens United*. Taken together, these propositions would yield the odd result that Congress could not distinguish between a person and a corporation for First Amendment purposes, but it could distinguish between corporations so long as it imposed certain restrictions only on corporations created for the purpose of advancing political speech through association.<sup>53</sup>

While the Fourth Circuit correctly decided *Danielczyk* under *Agostini*, this approach allowed the court to avoid important questions about the extent to which *Citizens United* has undermined *Beaumont*'s reasoning. In *Citizens United*, the Supreme Court appeared to announce a new and broad principle recognizing no contextual limit: "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."<sup>54</sup> If taken seriously, this principle would represent a major departure from prior cases.<sup>55</sup> It would also have unavoidable implications for § 441b(a), which bans direct contributions of *any* amount based purely on corporate identity while allowing individuals to contribute up to a specified limit.<sup>56</sup> The *Danielczyk* panel did not consider these implications because, it noted, *Citizens United* did not indicate that its antidiscrimination principle "necessarily applies in the context of direct contributions."<sup>57</sup>

<sup>49</sup> The district court's narrow reading of *Agostini* as implicated only when an earlier case "compel[s] an outcome," *United States v. Danielczyk*, 791 F. Supp. 2d 513, 517 (2009), is inapposite to *Agostini*. The quoted language pertains instead to the standard for federal habeas relief. See *id.* at 516–17; *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997).

<sup>50</sup> As the Fourth Circuit noted, lower courts are bound to follow not only the results of Supreme Court decisions, but also the key underlying reasoning. See *Danielczyk*, 683 F.3d at 616.

<sup>51</sup> See *FEC v. Beaumont*, 539 U.S. 146, 159–60 (2003).

<sup>52</sup> *Danielczyk*, 791 F. Supp. 2d at 517.

<sup>53</sup> The Supreme Court has suggested that, were it to treat these types of corporations differently, those resembling "[v]oluntary political associations" rather than business firms might be entitled to *greater* protection. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986).

<sup>54</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 903 (2010).

<sup>55</sup> While *Citizens United* purported to draw this principle from *Bellotti*, see *id.*, that case's holding was expressly limited to the ballot-initiative context, see *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 787–88 & n.26 (1978). In fact, *Bellotti* warned that campaigns for public office present a "quite different context" that might justify different rules. *Id.* at 788 n.26.

<sup>56</sup> By disallowing corporate contributions entirely, § 441b(a) does not even allow the "symbolic expression" of a small donation. See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam).

<sup>57</sup> 683 F.3d at 617.

The court's reliance on *Beaumont*, however, obscures at least two ways in which *Citizens United*'s antidiscrimination principle may undermine *Beaumont*'s reasoning. First, it may require a higher level of scrutiny. The *Citizens United* Court suggested, contrary to *Beaumont*,<sup>58</sup> that discrimination between speakers is an instrument of censorship similar to content discrimination.<sup>59</sup> If so, laws that disfavor corporate speech might be subject to strict scrutiny regardless of context,<sup>60</sup> and the *Danielczyk* panel's reliance on the lower scrutiny historically applied to direct contributions would be misplaced.

*Citizens United* could also be read to go even further, announcing a categorical rule against speech restrictions based on corporate form regardless of the possible government interests at stake.<sup>61</sup> Such an approach would depart from the more flexible, context-specific First Amendment jurisprudence the Court has developed to date.<sup>62</sup> But given the Court's propensity to dismiss corruption concerns as a matter of law,<sup>63</sup> strict scrutiny might lead to the same outcomes anyway.<sup>64</sup>

If corporate-form discrimination triggers heightened scrutiny in the independent-expenditure context, should it do the same for direct contributions? The answer may depend on the nature of corporate speech rights. In *Bellotti* and *Citizens United*, the Supreme Court justified its protection of corporations' right to make independent expenditures with a marketplace-protection rationale.<sup>65</sup> This justification does not translate well into the direct-contribution context, where spending must be transformed into a political message by a candidate.<sup>66</sup> Yet other language in *Citizens United* suggested that corporations enjoy an intrinsic and fundamental right to speak, indistinguishable from the

<sup>58</sup> See *FEC v. Beaumont*, 539 U.S. 146, 161–62 (2003).

<sup>59</sup> See *Citizens United*, 130 S. Ct. at 898–99.

<sup>60</sup> See *id.*; *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (“[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny.”).

<sup>61</sup> See 130 S. Ct. at 913 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

<sup>62</sup> See *id.* at 946 (Stevens, J., concurring in part and dissenting in part).

<sup>63</sup> See, e.g., *id.* at 909 (majority opinion); see also Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. COLLOQUY 203, 219–20 (2011) (arguing that “[e]vidence that corporate independent expenditures give rise to an appearance of corruption is extensive,” *id.* at 219, and that “[a]stonishingly, there isn’t any” factual basis for *Citizens United*’s contrary conclusion, *id.* at 220).

<sup>64</sup> Indeed, the Court recently applied *Citizens United* to strike down a Montana state regulation despite record evidence that corporate independent expenditures had previously led to corruption there. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam).

<sup>65</sup> See *Citizens United*, 130 S. Ct. at 898; *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (emphasizing the role of corporate speech “in affording the public access to discussion, debate, and the dissemination of information and ideas”). *Bellotti* also rejected a narrower conception of corporate speech rights because “corporate activities that are widely viewed as educational and socially constructive could be prohibited.” 435 U.S. at 782 n.18.

<sup>66</sup> See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam).

speech rights of natural persons.<sup>67</sup> If this latter conception is now the Court's understanding, then disfavoring a corporation's right to contribute to candidates may be no different from disfavoring its right to independently communicate valuable information to the public.<sup>68</sup>

Second, even if *Citizens United* did not change the applicable level of scrutiny, its logic appears to require an inquiry the *Danielczyk* panel never made: is a statute banning direct contributions by corporations constitutional, *given that it allows individuals to make such contributions*?<sup>69</sup> Under the Court's traditional approach, such restrictions may pass "closely drawn" scrutiny if justified by sufficiently important government interests.<sup>70</sup> But following *Citizens United*'s rejection of several of the government interests *Beaumont* recognized,<sup>71</sup> it is unclear whether the remaining interests are sufficient to justify the type of corporate-form discrimination that the Court has newly highlighted.

One remaining interest noted in *Danielczyk* is the prevention of actual or perceived quid pro quo corruption.<sup>72</sup> *Beaumont* suggested that this interest might justify different treatment of corporations' direct contributions.<sup>73</sup> Yet this determination assumed that corruption included "undue influence,"<sup>74</sup> while *Citizens United* explicitly defined this interest only in terms of quid pro quo corruption.<sup>75</sup> Especially under a narrowed anticorruption interest, there is no obvious reason why a corporate direct contribution within statutory limits is any more corrupting than an equivalent contribution made by an individual.<sup>76</sup>

The Fourth Circuit also recognized the continued viability of the anticircumvention interest, which more directly implicates the distinction between corporations and individuals.<sup>77</sup> This interest could justi-

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<sup>67</sup> See 130 S. Ct. at 899–900, 906. *Citizens United* also firmly rejected the notion that the availability of political action committees satisfied the speech interests at stake. See *id.* at 897.

<sup>68</sup> This reasoning would represent a major departure from *Beaumont*. See *FEC v. Beaumont*, 539 U.S. 146, 161 n.8 (2003).

<sup>69</sup> The other circuits to consider § 441b(a)'s ban on corporate direct contributions since *Citizens United* also have not made this inquiry, see cases cited *supra* note 38, though the Eighth Circuit found that *Citizens United*'s reasoning left *Beaumont*'s "precedential value on shaky ground." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (en banc).

<sup>70</sup> See, e.g., *Buckley*, 424 U.S. at 25.

<sup>71</sup> The rejected antidistortion interest might justify broad disparate treatment of corporations.

<sup>72</sup> 683 F.3d at 618.

<sup>73</sup> See 539 U.S. at 155.

<sup>74</sup> *Id.* at 156 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)); see also *id.* at 155–56.

<sup>75</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 909–10 (2010); see also *id.* at 961–64 (Stevens, J., concurring in part and dissenting in part) (decrying this conception as myopic and ahistorical).

<sup>76</sup> See *id.* at 909 (majority opinion); *United States v. Danielczyk*, 788 F. Supp. 2d 472, 493–94 (E.D. Va. 2011). *Citizens United*'s assertion that "few if any contributions to candidates will involve quid pro quo arrangements," 130 S. Ct. at 908, may also reveal broad skepticism about the corrupting potential of contributions.

<sup>77</sup> See *Danielczyk*, 683 F.3d at 618–19.

fy disparate treatment, since individuals might use corporations to evade legal limits on their direct contributions, whereas (per *Buckley*) their independent expenditures are unlimited.<sup>78</sup> Yet the anticircumvention interest — considered a form of the anticorruption interest<sup>79</sup> — has never, by itself, been held sufficient to justify a restriction on corporate speech.<sup>80</sup> Moreover, as the *Danielczyk* district court noted, such prevaricating conduct is already barred by other campaign finance rules, including some under which *Danielczyk* was charged;<sup>81</sup> thus, even if the anticircumvention interest is important, § 441b(a)'s ban on corporate direct contributions might not be “closely drawn” to match it.

*Citizens United*'s antidiscrimination principle is crucial because, if read consistently with its broad language, the principle could have profound and far-reaching consequences. Justice Stevens asserted in dissent that, carried to its logical end, the principle would require giving foreigners and multinational corporations the same speech rights afforded American citizens.<sup>82</sup> Professor Richard Hasen argues that, given *Citizens United*'s narrow conception of the anticorruption interest, rules limiting spending in judicial elections and even the current direct contribution limits may also be threatened.<sup>83</sup> To take a more surprising example, FDA oversight of speech by regulated companies might need to be revisited, since the identity of a speaker typically drives what speech is deemed “commercial” and may therefore be regulated.<sup>84</sup>

Thus, *Danielczyk* was decided based on a precedent that, while not overruled, has had its reasoning thrown into significant doubt by the current Supreme Court. In making the correct ruling under *Agostini*, the Fourth Circuit avoided important questions about the potentially sweeping reach of *Citizens United*'s antidiscrimination principle.<sup>85</sup> Until the Supreme Court clarifies the state of campaign finance law,<sup>86</sup> lower courts will continue dealing with the fallout.

<sup>78</sup> See *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (per curiam).

<sup>79</sup> *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 456.

<sup>80</sup> Campbell, *supra* note 3, at 204.

<sup>81</sup> See *United States v. Danielczyk*, 791 F. Supp. 2d 513, 518 (E.D. Va. 2011). The court noted that for the purposes of 2 U.S.C. § 441f, which “mak[es] it illegal to ‘make a contribution in the name of another person,’” *id.* at 518, “person” is defined to include a corporation. *Id.* n.6.

<sup>82</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 947–48 (2010) (Stevens, J., concurring in part and dissenting in part).

<sup>83</sup> Hasen, *supra* note 3, at 611–17.

<sup>84</sup> See Nathan Cortez, *Can Speech by FDA-Regulated Firms Ever Be Noncommercial?*, 37 AM. J.L. & MED. 388, 402–03 & n.94 (2011).

<sup>85</sup> Consequentialist doubts appear prominent in several judicial opinions questioning whether *Citizens United*'s reasoning should be taken seriously. See, e.g., *Citizens United*, 130 S. Ct. at 947 (Stevens, J., concurring in part and dissenting in part) (“If taken seriously, our colleagues’ assumption . . . would lead to some remarkable conclusions.”); *Danielczyk*, 791 F. Supp. 2d at 518.

<sup>86</sup> The Court recently agreed to hear a challenge to federal statutory limits on individuals’ aggregate direct contributions. See *McCutcheon v. FEC*, No. 12cv1034, 2012 WL 4466482 (D.D.C. Sept. 28, 2012), *prob. juris. noted*, No. 12-536, 2013 WL 598469 (Feb. 19, 2013).