

## RECENT DEVELOPMENTS IN APPELLATE ADVOCACY

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|---|-----|
| I. An Era of Change in the U.S. Supreme Court:                  |     |
| Will Changes in Personnel Make a Difference? .....              | 196 |
| A. Justice John Paul Stevens' Term on the Court .....           | 196 |
| B. Appointment of Justice Elena Kagan to the Court.....         | 201 |
| C. Postscript on Justice Sotomayor.....                         | 207 |
| II. Pragmatic Jurisprudence (or Not) in the Supreme Court ..... | 209 |
| A. Free Speech, Campaign Finance, and Stare Decisis:            |     |
| The Court Giveth and the Court May Taketh Away .....            | 209 |
| B. Ineffective Assistance Appeals and Immigration Law:          |     |
| Justice Stevens Prevails upon the Court .....                   | 216 |
| III. Recent Developments in Federal Appellate Procedure .....   | 220 |
| A. New Disclosures in Briefs Filed by Amici Curiae .....        | 221 |
| B. New Definition of State .....                                | 223 |
| C. Revised Affidavit Accompanying Motions                       |     |
| for Permission to Appeal in Forma Pauperis .....                | 223 |

This article reviews the past year's significant developments related to appellate advocacy and procedure. Part I reviews the change in personnel on the U.S. Supreme Court with the retirement of Justice John Paul Stevens

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and the appointment of Justice Elena Kagan. Part II examines important opinions issued by that Court, including the controversial decision in *Citizens United v. Federal Election Commission*.<sup>1</sup> Part III summarizes amendments to the Federal Rules of Appellate Procedure, the most noteworthy of which requires disclosure of authorship and funding of briefs filed by amici curiae.

#### I. AN ERA OF CHANGE IN THE U.S. SUPREME COURT: WILL CHANGES IN PERSONNEL MAKE A DIFFERENCE?

It is always risky to make predictions about trends in the Supreme Court's decisions based on the makeup of its personnel. As some presidents have discovered, the appointment of an individual who appears to have a specific ideological bent does not always mean that the decisions of that individual will reflect that ideology, particularly over the course of many terms on the Court.<sup>2</sup> It is fair to say, however, that the recent resignation of Justice John Paul Stevens and confirmation of Justice Elena Kagan will affect the Court's decisions, even though these two justices might be characterized as politically similar.

##### A. *Justice John Paul Stevens' Term on the Court*

Justice John Paul Stevens made significant contributions to the development of the law in every legal area as a Supreme Court justice serving for well over three decades.<sup>3</sup> Not everyone agreed with Justice Stevens' decisions. Nevertheless, he was universally admired for his keen intelligence, integrity, and the respect he showed to his colleagues and the advocates who came before him.

He came from the heartland of the country, having been born in 1920 and raised in Illinois, the youngest of four children.<sup>4</sup> He attended the University of Chicago's private elementary school and high school, known as the Lab Schools, which were made famous by John Dewey's experiments in child education. Justice Stevens' family, which was quite conservative, was involved in the insurance and hotel management businesses and had amassed considerable wealth by the 1920s.<sup>5</sup> He attended college at the University of Chicago, where he excelled, achieving Phi Beta Kappa. He also played on the college's unbeaten tennis team and wrote for the student

1. 130 S. Ct. 876 (2010).

2. See generally Lee Epstein et al., *On the Perils of Drawing Inferences About Supreme Court Justices from their First Few Years of Service*, 91 JUDICATURE 168 (2008).

3. See generally William Michael Treanor, *Symposium: The Jurisprudence of Justice Stevens*, 74 FORDHAM L. REV. 1557, 1558 (2006).

4. BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 22 (2010).

5. *Id.* at 23–24.

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newspaper.<sup>6</sup> After graduating in 1941, he began graduate studies in English while taking classes in cryptanalysis. He joined the Naval Reserve in 1941 and was stationed in Hawaii, earning the Bronze Star.<sup>7</sup> After completing his tour of duty, he returned to Chicago to attend law school at Northwestern University School of Law.<sup>8</sup> He practiced at Poppenhusen, Johnston, Thompson & Raymond, developing an antitrust expertise. He later served on the U.S. Court of Appeals for the Seventh Circuit, having been appointed by Richard M. Nixon.<sup>9</sup>

Justice Stevens was nominated to the Supreme Court in 1975.<sup>10</sup> The confirmation process at that time bore little resemblance to the televised political production it has now become. Although it was the first confirmation after *Roe v. Wade* was decided in 1973, Justice Stevens was questioned about capital punishment and discrimination against women, but not abortion.<sup>11</sup> At the time, the average length of the transcript of confirmation hearings was 232 pages. The transcript of Justice Stevens' confirmation hearings was 229 pages long.<sup>12</sup> Three special interest groups participated.<sup>13</sup> This number is remarkable when compared with the statistics for the confirmation hearings that followed. For the next eight nominations, the average transcript was 1,845 pages in length and an average of eighteen special interest groups participated.<sup>14</sup> Forty-three special interest groups participated in the Clarence Thomas confirmation hearings.<sup>15</sup> That Justice Stevens' confirmation process was so brief is also remarkable when one considers that it could have been controversial. He is the only Supreme Court justice nominated by a president who was not chosen by voters in a national election. Gerald Ford, who nominated him, had been appointed by President Nixon to replace Spiro Agnew and became president when Nixon resigned.<sup>16</sup> Nevertheless, Justice Stevens was confirmed 98–0.<sup>17</sup>

During his tenure on the court, Justice Steven's judicial philosophy became more sharply defined. Always an independent thinker, he was elevated to the bench, not because of any political point of view, but because he was a political and judicial independent.<sup>18</sup> Some have called him an advocate for pragmatism in the law, referring to what "may be," as against Justice Scalia's

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6. *Id.* at 37.

7. *Id.* at 42–43, 51.

8. *Id.* at 53.

9. *Id.* at 135.

10. *Id.*

11. *Id.* at 182.

12. *Id.*

13. *Id.* at 183.

14. *Id.* at 182–83.

15. *Id.* at 183.

16. *Id.* at 182–83.

17. *Id.* at 183.

18. *Id.* at 222.

advocacy of tradition.<sup>19</sup> Justice Stevens' rejection of tradition as a philosophy was based on his view that Americans had fought the Revolution and enacted the Constitution to protect individual citizens against entrenched institutions and majority values.<sup>20</sup> He viewed "traditions"—especially traditions in the law—"as likely to codify the preferences of those in power, as they are to reflect necessity or proven wisdom."<sup>21</sup>

He became more liberal and more pragmatic throughout his tenure and came to believe that a willingness to change is "a critical element of a justice's job."<sup>22</sup> Four decisions show the contours of his general approach to decision making. In 1984, the Court decided *Chevron USA, Inc. v. National Resources Defense Council, Inc.*,<sup>23</sup> a 6–0 ruling that established rules under which courts and litigants must defer to the interpretation of regulatory agencies of laws governing their work. In the decision, Justice Stevens restated a view of judicial restraint based on the premise that judges are not experts in the field and are not part of the political branches of government. He believed that government agencies are entitled to make judgments based on the incumbent administration's policies and that courts should not impose their own policy preferences. Thus, *Chevron* was a conservative decision.<sup>24</sup>

Also decided that year, *Sony Corp. v. Universal City Studios, Inc.*<sup>25</sup> was a 5–4 majority decision, authored by Justice Stevens. There, the Court held that no violation of copyright was involved in the home use of Sony Beta-max videotape recorders. This liberal decision, which benefited consumers over business, helped launch the home entertainment industry. The decision was based on Justice Stevens' considerable antitrust expertise.<sup>26</sup>

In 2001, Justice Stevens authored an opinion for the 7–2 majority that is a classic example of judicial pragmatism.<sup>27</sup> In *PGA Tour, Inc. v. Martin*,<sup>28</sup> the Court decided that a professional golfer with disabilities had a right under the Americans with Disabilities Act (ADA) to ride the course in a golf cart in violation of tour rules. Justice Stevens wrote that the ADA had no value if it did not open doors for the disabled to engage in new and untried opportunities. Justice Stevens' opinion advanced social progress by holding that the ADA applied because both spectators and golfers were "customers" of the tour.<sup>29</sup>

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19. *Id.* at 234.

20. *Id.* at 235.

21. *Id.* at 237.

22. *Id.* at 223.

23. 467 U.S. 837 (1984).

24. BARNHART & SCHLICKMAN, *supra* note 4, at 223–34.

25. 464 U.S. 417 (1984).

26. BARNHART & SCHLICKMAN, *supra* note 4, at 224.

27. *Id.* at 225.

28. 532 U.S. 661 (2001).

29. BARNHART & SCHLICKMAN, *supra* note 4, at 225–26.

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In *Atkins v. Virginia*,<sup>30</sup> Justice Stevens wrote a majority opinion that was clearly a traditional liberal opinion in terms of its outcome.<sup>31</sup> In *Atkins*, the Court ruled that the mentally impaired were not subject to capital punishment.<sup>32</sup> The decision overruled a 1989 precedent that addressed the scope of the Eighth Amendment. He later issued other liberal decisions on gay rights,<sup>33</sup> affirmative action,<sup>34</sup> and habeas corpus in the war on terror.<sup>35</sup> These decisions were not pragmatic; they were based instead on what Justice Stevens believed were evolving standards of decency. *Martin* and *Atkins*, for example, reflect his long-held belief that the law must protect individual dignity, including that of criminal defendants. Then Solicitor General Ted Olson gave him credit for the liberal bent in the Court's 2003–04 term: "Justice Stevens led the charge. . . . The crafty and genial hand of Justice Stevens . . . was everywhere evident."<sup>36</sup>

But despite the fact that Justice Stevens authored a number of liberal decisions, his work cannot be characterized as uniformly liberal. For example, one would think of Chief Justice Roberts as leading the conservative wing of the Court, but five of twelve opinions holding a bare majority for the conservative justices were led by Stevens. Thus, a majority of the Court's twelve 5–4 conservative decisions were authored by Justice Stevens.<sup>37</sup>

Over the years, Justice Stevens' ability to affect outcomes grew as he began to draw the votes of his colleagues toward his pragmatic approach to the law.<sup>38</sup> Nevertheless, he remained a leading writer of dissents and concurrences throughout his tenure.<sup>39</sup>

With Justice Stevens' retirement, we lose not only the benefit of his lengthy tenure on the Court but also the long view that comes with experience. One aspect of this is Justice Stevens' wisdom about the interplay between politics and the judicial role. Throughout his tenure on the Court, he refused to attend presidents' State of the Union addresses, explaining that

[the] political aspect of a federal judge's career should end when his or her nomination is confirmed. It is, in my judgment a serious matter to replace an important symbol of the independence of the federal judiciary with an event that tends to blur the critical distinction between political and judicial services.<sup>40</sup>

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30. 536 U.S. 304 (2002).

31. BARNHART & SCHLICKMAN, *supra* note 4, at 226.

32. *Atkins*, 536 U.S. at 321.

33. *Lawrence v. Texas*, 539 U.S. 558 (2003).

34. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

35. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

36. BARNHART & SCHLICKMAN, *supra* note 4, at 226–27.

37. *Id.* at 229.

38. *Id.* at 228.

39. *Id.* at 229.

40. *Id.* at 254.

The importance of separating politics from judicial decision making was also evident in his harsh dissent in *Bush v. Gore*,<sup>41</sup> in which he wrote, “[a]lthough we may never know with complete certainty the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as the impartial guardian of the rule of law.”<sup>42</sup> Justice Stevens clearly revered the idea that an independent judiciary created a check on undue majority power, whether in the form of unconstitutional legislation or activist judges.

Similarly, in the Court’s recent decision in *Citizens United*,<sup>43</sup> he wrote a powerful ninety page dissent, warning that corporate money could undermine the political process:

At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized the 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. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.<sup>44</sup>

Justice Stevens observed that the decision would undermine the confidence of citizens in our democratic system:

When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. . . . Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation.

...

The marketplace of ideas is not actually a place where items—or laws—are meant to be bought and sold. . . .<sup>45</sup>

The loss of Justice Stevens also represents a loss in the diversity of the members of the Court in terms of their backgrounds. None of the current justices has served in the military. None has served in the legislature. And, for the first time in the history of the Court, there will no longer be a Protestant on the court.<sup>46</sup> It cannot be known whether this will matter,

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41. 531 U.S. 98 (2000).

42. *Id.* at 128–29.

43. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

44. *Id.* at 979.

45. *Id.* at 974–77.

46. John M. Scheb II et al., *A Supreme Court Without Protestants: Does It Matter?*, 94 JUDICATURE 12, 14 (2010).

although it is clear that justices' personal experiences do bear on their decisions. Certainly, Justice Stevens' experience in the military provided the Court with a richer background for understanding the many cases involving issues connected to the armed services. Similarly, it could only help the Court to have a justice who viewed the work of the legislative branch from having had first-hand experience with the process.

The question of religious background is more complex. In a recent article, one commentator concludes that "in terms of Supreme Court decision making, the absence of Protestants does not appear to be significant in terms of Court outputs."<sup>47</sup> However, he also explains that religion matters in a more general way: Jewish justices have been more liberal than their counterparts and Catholic justices more conservative but more important is the ideological orientation of the justices, which is determined by politics.<sup>48</sup>

### B. *Appointment of Justice Elena Kagan to the Court*

Justice Elena Kagan, the newest member of the Supreme Court, is also the youngest. She was born in New York on April 28, 1960.<sup>49</sup> After graduating from Princeton with a degree in history, she attended Oxford on a Sachs scholarship and received a degree of master of philosophy.<sup>50</sup> Then she attended Harvard Law School where she was supervising editor of the *Harvard Law Review*.<sup>51</sup> After graduation in 1986, she clerked for Judge Abner Mikva, a judge on the D.C. Circuit.<sup>52</sup> She then went on to clerk for Justice Thurgood Marshall.<sup>53</sup> After her clerkship, she was hired as an associate by Williams & Connolly in Washington, D.C.<sup>54</sup> After a three-year stint at the law firm, she commenced her career in academia, beginning at the University of Chicago, where she taught administrative and constitutional law.<sup>55</sup> She also briefly served as special counsel to Senator Joseph Biden, who

47. *Id.* at 40.

48. *Id.* Interestingly, Justice Stevens has been seen by some as anti-religion because of his singular nonliberal, nonconservative stance on two issues. He tended to oppose government support for religion (state aid) and exemptions for individual exercise of religious beliefs (the yarmulke). BARNHART & SCHLICKMAN, *supra* note 4, at 247.

49. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx>.

50. *Office of the Solicitor General: Elena Kagan*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/osg/aboutosg/osghistpage.php?id=45> (last visited Dec. 21, 2010) [hereinafter *DOJ Kagan*].

51. Tom Goldstein et al., *9750 Words on Elena Kagan*, SCOTUSBLOG (May 8, 2010), <http://www.scotusblog.com/2010/05/9750-words-on-elena-kagan/>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

then chaired the Judiciary Committee, during the confirmation hearings for Justice Ruth Bader Ginsberg.<sup>56</sup>

In 1995, Justice Kagan joined the Clinton administration, first as associate White House counsel and later as deputy assistant to the president for domestic policy and deputy director of the Domestic Policy Council.<sup>57</sup> In those positions, she focused on the executive branch's formulation, advocacy, and implementation of law and policy in areas ranging from education to crime to public health.<sup>58</sup> She worked closely with Domestic Policy Adviser Bruce Reed. John Podesta, then President Clinton's chief of staff, said Clinton "viewed her as an independent source of advice and wisdom in grappling with those difficult policy questions."<sup>59</sup> As part of her primary role to address policy issues, she worked on gun control; defended Clinton's economic policies; and worked to promote campaign finance reform, abortion rights, and affirmative action policies.<sup>60</sup> She worked particularly hard on the passage of antismoking legislation.<sup>61</sup>

In 1999, she accepted a teaching position at Harvard Law School and was named dean in 2003.<sup>62</sup> During her six-year tenure as dean, the school expanded and enhanced its faculty, modernized its curriculum, developed new campus facilities, promoted public service, and improved the student experience.<sup>63</sup> She left Harvard in 2009, after President Obama nominated her to serve as the first woman Solicitor General of the United States. Her first argument was in *Citizens United*,<sup>64</sup> a case the government lost.<sup>65</sup>

Her confirmation hearings were relatively uneventful, although it had been anticipated that they might be particularly revealing. She is well known to have criticized confirmation hearings as a "vapid and hollow charade" and called for nominees to be more forthcoming.<sup>66</sup> Indeed, she even suggested that senators dig deeply by asking the nominee straightforward questions about her judicial philosophy and substantive views on constitutional issues.<sup>67</sup> She commented further that it should not be necessary

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56. *Id.*; see also Tony Mauro, *Justice Ginsburg Eager for Kagan's Arrival*, BLT: THE BLOG OF LEGAL TIMES (July 9, 2010), <http://legaltimes.typepad.com/blt/2010/07/justice-ginsburg-eager-for-kagans-arrival.html>.

57. *DOJ Kagan*, *supra* note 50.

58. *Id.*

59. James Oliphant, *Kagan a Veteran of Clinton White House*, L.A. TIMES, May 10, 2010, available at <http://articles.latimes.com/2010/may/11/nation/la-na-kagan-profile-20100511>.

60. *Id.*

61. *Id.* (citing Dana Milbank, *Wonderwork*, NEW REPUBLIC, May 18, 1998).

62. Goldstein et al., *supra* note 51.

63. *DOJ Kagan*, *supra* note 50.

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

65. Goldstein et al., *supra* note 51.

66. Sheryl Gay Stolberg, *At Kagan Hearings, the Topic May Be Obama and Roberts*, N.Y. TIMES, June 27, 2010, at A1.

67. Goldstein et al., *supra* note 51.

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for a nominee to refrain from expressing her views, as long as she did not express a settled intent to vote a particular way on a particular case that might come before her.<sup>68</sup>

Before the hearings began, her judicial philosophy was not clear because she had never served as a judge. The committee had access to 160,000 pages of records from the nominee's tenure as an advisor to President Clinton and as a clerk for Justice Marshall, but admittedly these papers could not directly reflect on her personal judicial philosophy as she was serving others in those roles.<sup>69</sup> In the hearings, however, Justice Kagan laid out a clear judicial philosophy that, according to one commentator, "sees courts as having an obligation to defer to the choices of elected officials except in the most extreme cases."<sup>70</sup>

In her opening statement she made clear her view that the Court had an obligation to defer to other branches: "[T]he Supreme Court is a wondrous institution. But the time I spent in the other branches of government remind [sic] me that it must also be a modest one—properly deferential to the decisions of the American people and their elected representatives."<sup>71</sup> Carrying on this theme, she spoke to statutory interpretation in similar tones: "the most important thing in interpreting any statute, in fact, the only thing that matters is Congress' intent."<sup>72</sup> When the text of the statute is ambiguous, she endorsed the idea of using

whatever evidence is at hand to understand Congress' intent—including the statute's history—and that includes exploration of Congress' purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted and in what circumstances and by way of looking at legislative history.<sup>73</sup>

She also explained her views on interpreting the Constitution:

The Constitution is a document that does not change, that is timeless, and timeless in the principles that it embodies. But it, of course, is applied to new situations, to new facts, to new circumstances all the time. And in that process of being applied to new facts and new circumstances and new situations, development of our constitutional law does indeed occur.<sup>74</sup>

She continued, "in [some] cases, the original intent is unlikely to solve the question. And that might be because the original intent is unknowable

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68. *Id.*

69. Stolberg, *supra* note 66.

70. E.J. Dionne Jr., *A Judicial Change to Believe In*, WASH. POST, July 5, 2010.

71. ALLIANCE FOR JUSTICE, REPORT ON ELENA KAGAN'S TESTIMONY 1 (2010), available at [http://www.fed-soc.org/docLib/20100701\\_reportonkagantestimony.pdf](http://www.fed-soc.org/docLib/20100701_reportonkagantestimony.pdf).

72. *Id.* at 2.

73. *Id.*

74. *Id.* at 1–2.

or it might be because we live in a world that is very different from the world in which the framers lived. . . .”<sup>75</sup> She has also candidly written that courts should not engage in activism: “I think a judge should try to the greatest extent possible to separate constitutional interpretation from his or her own values and beliefs. In order to accomplish this result, the judge should look to constitutional text, history, structure and precedent.”<sup>76</sup>

In another analysis of the confirmation hearings, a commentator said that the hearings were about two men not even present, President Obama and Chief Justice Roberts.<sup>77</sup> With “an eye on the midterm elections,” the Democrats tried to put the Roberts Court on trial by painting it as beholden to corporate America. Republicans, on the other hand, used the hearings to put Obama “on trial over what they view as his Big Government agenda” and raise questions about whether his solicitor general would be sufficiently independent to keep that agenda in check.<sup>78</sup> During the confirmation hearings, Republicans expressed concern, not that nominee Kagan would be a judicial activist, but that she would be too reluctant to strike down laws. Of course, their concerns centered around Democrat-sponsored laws, such as health care reform.

One senator asked Justice Kagan whether the government could pass a law requiring Americans to eat fruits and vegetables. She initially gave a flip response: “It sounds like a dumb law.”<sup>79</sup> But she followed that with a cautious analysis that appeared to satisfy Republicans. After demonstrating her comprehensive body of knowledge on constitutional law, by the second day of hearings, Republicans no longer questioned her obviously deep and comprehensive legal experience.<sup>80</sup> And although she refused to promise Republicans that she would curtail congressional power, she also refused to criticize the current Court at the invitation of Democrats.<sup>81</sup>

Interestingly, commentators have observed that it may be difficult for the Court to assimilate her. Indeed, some have suggested that the tension between Justice Kagan and Chief Justice Roberts was obvious when she came before the Court as solicitor general.<sup>82</sup> Both are “savvy, ambitious,

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75. *Id.* at 2.

76. *Kagan's Notable Statements and Writings*, N.Y. TIMES, May 9, 2010, available at <http://www.nytimes.com/interactive/2010/05/10/us/politics/20100505-kagan-opinions.html>.

77. Stolberg, *supra* note 66.

78. *Id.*

79. James Oliphant, *Kagan Slips on Fruits and Vegetables in Senate Panel Questioning*, L.A. TIMES, July 1, 2010.

80. *Id.*

81. *Id.*

82. Dahlia Lithwick, *Roberts v. Kagan? Will There Be Friction Between the Chief Justice and Elena Kagan on the Supreme Court*, SLATE, July 20, 2010, available at [www.slate.com/id/2261947/](http://www.slate.com/id/2261947/).

and brilliant, as well as charming, outgoing, and persuasive,<sup>83</sup> and neither is known for deference to the opinions of others.<sup>84</sup> This could make their service on the same court, which has been truly Roberts' Court, with him in the majority 91 percent of the time, interesting.<sup>85</sup> Justice Kagan referred directly to the chief justice at her confirmation hearing, commenting on his suggestion that judging was like being an umpire:

Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court. A lot of them are very difficult. And people can disagree about how the constitutional text or precedent, how they apply to a case. But it's the law all the way down, regardless.<sup>86</sup>

She did agree with Roberts, however, that both judges and umpires should be free from bias.<sup>87</sup> She also observed that judges have a limited role in a democracy.

Many have observed that she is actually very like Chief Justice Roberts in many respects. Both are highly intelligent, and both appeared at their confirmation hearings "extremely relaxed, smart, and self-confident."<sup>88</sup> Like Justice Roberts, she used a mix of humor and moderation to avoid revealing much real substance. Both are Harvard Law School graduates, both clerked for iconic justices—Rehnquist and Marshall—and both are well connected to the White House, making them comfortable around Washington lawmakers and giving them a platform for their legal and policy positions.<sup>89</sup>

Although some say she has declared herself a progressive, she is not expected to change the balance on the Court because she is replacing Justice Stevens, whose decisions tended to be liberal.<sup>90</sup> Still, her experience at Harvard suggests she may be a consensus builder. Her legal writings have been described as "dense, hedged and moderate."<sup>91</sup>

Justice Kagan's confirmation to the Court filled some of the gaps in the experience of the Court's other personnel. Unlike the rest of the justices,

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83. *Id.*

84. *Id.*

85. *Id.*

86. ALLIANCE FOR JUSTICE, *supra* note 71, at 2.

87. As noted in Stolberg, *supra* note 66, before the hearings, Republicans said that it would be necessary to embrace the Roberts standard to win their support. "It's a powerful, correct description of what a judge does," said Senator Jeff Sessions. *Id.*

88. Bill Mears, *Kagan and Roberts United at Confirmation Hearings*, CNN POLITICS, June 30, 2010, available at [http://articles.cnn.com/2010-06-30/politics/senate.kagan.roberts\\_1\\_youngest-justice-chief-justice-john-roberts-supreme-court?\\_s=PM:POLITICS](http://articles.cnn.com/2010-06-30/politics/senate.kagan.roberts_1_youngest-justice-chief-justice-john-roberts-supreme-court?_s=PM:POLITICS).

89. *Id.*

90. Warren Richey, *Elena Kagan Confirmed to Supreme Court*, CHRISTIAN SCI. MONITOR, Aug. 5, 2010, available at <http://www.csmonitor.com/USA/Politics/2010/0805/Elena-Kagan-confirmed-to-Supreme-Court>.

91. Adam Liptak, *Obama's Choice for Solicitor General Has Left a Breach in a Long Paper Trail*, N.Y. TIMES, Jan. 6, 2009, available at <http://www.nytimes.com/2009/01/07/us/07kagan.html>.

she has never served as an appellate circuit judge, coming instead directly from academia and the executive branch. Her experience as a clerk for Justice Marshall and law school dean add to her unique background. She definitely tilts the Court toward the younger generation. At fifty, Justice Kagan will be the youngest justice on the Court.

Given her background, it will be interesting to see how her term plays out. Some observers are anxious to see whether the religion and class,<sup>92</sup> issues that concerned some during Justice Kagan's confirmation process, will be a factor. Regarding Second Amendment issues, she has already said that she will follow the precedents set in *McDonald v. City of Chicago*<sup>93</sup> and *District of Columbia v. Heller*,<sup>94</sup> indicating unequivocally that when the Court has decided a case, she considers the decision to be binding.<sup>95</sup> Regarding abortion rights, she has indicated that she agrees with *Roe v. Wade*<sup>96</sup> that there is a constitutional right to privacy covering the right to terminate a pregnancy.<sup>97</sup>

There are a number of cases in the executive power area in which her background as an aid to President Clinton may be important. Given her background in the executive branch, it would not be surprising if she tilted the Court to the right on issues involving executive branch power.<sup>98</sup> In a 2001 *Harvard Law Review* article, she contended that the idea of the unitary executive expanded under Clinton and defended that expansion because "Congress generally has declined to preclude the President from controlling administration in this manner."<sup>99</sup> In the article, however, she makes clear that she believes that this power is not unlimited. She urges courts to allow "presidential control of administration in its most attractive, which means its most public, form while still appropriately bounding the presidential role."<sup>100</sup>

She also has some background in the law of war. Once again, her support of executive power may lead to conservative majorities in this area. She has noted that it is relatively clear that the Constitution grants the president detention authority in wartime but that questions remain regarding the extent of the government's detention authority and the definition

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92. See, e.g., Larry Abramson, *The Harvard-Yalification of the Supreme Court*, NPR, May 16, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=126802460> ("the half-nelson grip on entry to the high court by top-ranked Yale and Harvard is a little odd to some observers").

93. 130 S. Ct. 3020 (2010).

94. 554 U.S. 570 (2008).

95. ALLIANCE FOR JUSTICE, *supra* note 71, at 3.

96. 410 U.S. 113 (1973).

97. ALLIANCE FOR JUSTICE, *supra* note 71, at 3.

98. *Id.* at 3-4.

99. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001).

100. *Id.* at 2385.

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of an enemy where someone is captured outside the battlefield. She has commented that habeas rights should not extend to detainees at military bases like Bagram, Afghanistan.<sup>101</sup> Similarly, she is likely to support strong federal authority on immigration issues, which she will likely have to address in the Arizona cases that may come before the Court. Turning to campaign finance, she believes that Congress has established a compelling interest in preventing corruption sufficient to justify restrictions in the McCain-Feingold Act. She has indicated, however, that she will accept *Citizens United* as binding on the Court: “[I]t’s entitled to all the weight that precedent usually gets.”<sup>102</sup>

One drawback of her background as solicitor general is that she is likely to recuse herself from many cases, particularly in her initial years on the Court. Indeed, she had already disqualified herself in about half of the fifty-four cases on the docket as of October 2, 2010.<sup>103</sup> Some fear that these recusals increase the likelihood of 4–4 deadlocks that automatically affirm the ruling below.<sup>104</sup> She recused herself from two important preemption cases. One involves whether federal law preempts a lawsuit filed by a plaintiff who was injured in a car that met federal seatbelt requirements; the other was filed by the parents of a girl injured by a vaccine seeking to recover under a state law, despite the existence of a federal statute protecting vaccine makers.<sup>105</sup> She will likely recuse herself from fewer cases than did her mentor Thurgood Marshall, who was the last solicitor general appointed to the Court. He had to recuse himself from a majority of cases in his first term.<sup>106</sup> In his second term, Marshall recused from an additional eight cases.<sup>107</sup> If she must recuse herself less often, it will be due in part to the reduction in the number of merits cases involving the United States as a party since 1967.<sup>108</sup>

### C. *Postscript on Justice Sotomayor*

It has now been more than a year since Justice Sotomayor joined the Supreme Court. According to the *Los Angeles Times*, “[t]he early returns are in, and Justice Sonia Sotomayor is proving herself to be a reliable liberal vote on the Supreme Court.”<sup>109</sup> In cases involving campaign speech, religion,

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101. ALLIANCE FOR JUSTICE, *supra* note 71, at 4.

102. *Id.*

103. Adam Liptak, *Supreme Court Term Offers Hot Issues and Future Hints*, N.Y. TIMES, Oct. 3, 2010, at A1.

104. *Id.*

105. *Id.*

106. Goldstein et al., *supra* note 51.

107. *Id.*

108. *Id.*

109. David G. Savage, *Sotomayor Votes Reliably with Supreme Court’s Liberal Wing*, L.A. TIMES, June 8, 2010.

juvenile crime, federal power, and *Miranda* warnings, she voted with the liberal bloc. She wrote dissents only in cases where, in her view, the conservative majority failed to follow the law. This was the case in *Berghuis v. Thompkins*,<sup>110</sup> which concerned a suspect who was warned of his rights but unambiguously failed to call for a halt in questioning. She wrote that the decision “turns *Miranda* upside down.”<sup>111</sup>

The Court decided a number of important cases in her first term and she participated in most of them. She wrote the decision in *Krupski v. Costa Crociere S.p.A.*,<sup>112</sup> a unanimous decision in which the Court held that the determination of whether an amended complaint should relate back to the filing of the original complaint depends on when the defendant knew or should have known it was a proper party. In *Mohawk Industries, Inc. v. Carpenter*,<sup>113</sup> she once again wrote the decision for a unanimous court, holding that orders deciding attorney-client privilege issues do not fall within the collateral order doctrine and are not immediately appealable as a matter of right.

In *Astrue v. Ratliff*,<sup>114</sup> Justice Sotomayor concurred in a decision in which the Court determined that in an Equal Access to Justice Act (EAJA) case, the fees awarded by the court belong to the plaintiff, not to the lawyer, and therefore can be offset by the plaintiff's debt to the government. In her concurrence, which was joined by Justices Ginsberg and Stevens, Justice Sotomayor wrote as follows:

I join the Court's opinion because I agree that the text of the [EAJA] and our precedents compel the conclusion that an attorney's fee award under [this statute] is payable to the prevailing litigant rather than the attorney. . . . That conclusion, however, does not answer the question whether Congress intended the Government to deduct moneys from EAJA fee awards to offset a litigant's pre-existing and unrelated debt. . . . In my view, it is likely both that Congress did not consider that question and that, had it done so, it would not have wanted EAJA fee awards to be subject to offset.

...

The EAJA's admirable purpose will be undercut if lawyers fear that they will never actually receive attorney's fees to which a court has determined the prevailing party is entitled. . . . Subjecting EAJA fee awards to administrative offset for a litigant's debts will unquestionably make it more difficult for persons of limited means to find attorneys to represent them.<sup>115</sup>

110. 130 S. Ct. 2250 (2010), *reh'g denied*, 131 S. Ct. 33 (2010).

111. *Id.* at 2278.

112. 130 S. Ct. 2485 (2010).

113. 130 S. Ct. 599 (2009).

114. 130 S. Ct. 2521 (2010).

115. *Id.* at 2529–31.

She also joined a number of dissents. In *Purdue v. Kenny A. ex rel. Winn*,<sup>116</sup> Justice Sotomayor joined a four-justice dissent. The majority held that lodestar fees can be enhanced only in exceptional circumstances when the attorney's hourly rate does not measure the market value of the services or when the attorney has financed expenses for a significant period of time or there has been an unusual delay in payment.

In two arbitration decisions, Justice Sotomayor also joined the dissents. In *Rent-a-Center, West, Inc. v Jackson*,<sup>117</sup> the majority ruled that if a clause in the agreement says the arbitrator is to decide the enforceability of the agreement, the court determines the enforceability of that clause. In *Granite Rock Co. v. International Brotherhood of Teamsters*,<sup>118</sup> the Court held that courts, not arbitrators, determine whether an agreement has been ratified. In both decisions, the dissents argued that the arbitrator should make these decisions.

The addition of Justice Sotomayor to the Court, while not causing it to lean further in any particular direction, has served to keep its jurisprudence ideologically balanced. More importantly, her appointment has had the long-lasting benefit of diversifying the Court at a time when the country itself has become more diverse.

## II. PRAGMATIC JURISPRUDENCE (OR NOT) IN THE SUPREME COURT

The Supreme Court's decisions this year centered heavily on corporate and criminal law. Two rulings in particular represent major departures from established doctrine and illustrate the boundaries of sharp disagreement within the Court on matters of constitutional interpretation and jurisprudence, as Justice Stevens contemplated retirement and Justice Sotomayor found her bearings. Both decisions will have lasting consequences for Americans, the conduct of the Court, and appellate argument generally.

### A. *Free Speech, Campaign Finance, and Stare Decisis: The Court Giveth and the Court May Taketh Away*

In one of its most controversial and momentous decisions of recent years, the Supreme Court reversed course in the field of corporate independent political expenditures by invalidating a federal ban on such expenditures for electioneering communications. It did so on the basis that political speech cannot be suppressed because of the speaker's corporate identity. Writing for a bare majority in *Citizens United*,<sup>119</sup> Justice Kennedy inspired a blister-

116. 130 S. Ct. 1662 (2010).

117. 130 S. Ct. 2772 (2010).

118. 130 S. Ct. 2847 (2010).

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

ing ninety-page dissent by Justice Stevens and multiple concurrences. The Court's decision triggered a rare comment and open antagonism during President Obama's first State of the Union address, new legislation, public calls for a constitutional amendment to reinstate the finance restriction that the Court declared unconstitutional, at least one state court decision invalidating a long-standing campaign finance restriction, and a surge of corporate expenditures and editorials leading up to the midterm elections.

This turmoil has flowed not only from the considerable political implications of the decision but also from its procedural unorthodoxy. The Court reached its decision after sua sponte ordering supplemental briefing and reargument on a facial challenge claim that had been dismissed by stipulation.<sup>120</sup> Its ruling turned on a technical treatment of stare decisis and renunciation of *Austin v. Michigan Chamber of Commerce*.<sup>121</sup>

As remarkable as the majority's procedural maneuver, however, is the dissent's impassioned advocacy of a pragmatic jurisprudence. Fueled by his distress over the shifting balance between individual and corporate power, Justice Stevens invoked not only the thrust of the Court's previous decisions in the field but every conceivable mode of circumspection: the multiplicity of relevant policy interests, the public's inevitable focus on the Court's bottom line, the fallacy of the majority's concern with the impact of a contrary outcome, unintended consequences of the ruling, and a missed opportunity to remand for evidentiary proceedings.

The backdrop of the case included several election finance decisions by the Court and, more immediately, its defense of judicial impartiality in *Caperton v. A.T. Massey Coal Co.*<sup>122</sup> *Caperton* had mandated the recusal of a state supreme court judge where, due to the litigant's massive earlier contributions to his election campaign, there was a constitutionally intolerable probability of actual bias.<sup>123</sup>

At issue in *Citizens United* was § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>124</sup> That law had prohibited nonmedia corporations from using their general treasury funds to support preelection advocacy that referred to any clearly identified candidate for federal office, in this case Hillary Clinton. Under implementing regulations, such an "electioneering communication" was prohibited only if it was "publicly distributed," meaning, in the case of a presidential primary, that it could be received by

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120. *Id.* at 888.

121. 494 U.S. 652 (1990), *overruled by* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

122. 129 S. Ct. 2252 (2009).

123. *Id.* at 2263–64. *Caperton* is discussed more fully in Mary R. Vasaly et al., *Recent Developments in Appellate Advocacy*, 45 TORT TRIAL & INS. PRAC. L.J. 179, 191–94 (2010).

124. 2 U.S.C. § 441b(b)(2) (2006).

50,000 or more persons in the primary state.<sup>125</sup> The law did not prohibit the use of political action committees (PACs) funded by corporate shareholders and employees or union members, expenditures more than thirty days before a primary or sixty days before a general election,<sup>126</sup> or issue-directed advertising. It did not address direct campaign contributions by corporations and unions, which are prohibited separately by BCRA.<sup>127</sup>

The nonprofit appellant, Citizens United, was financed primarily by individuals but also by for-profit corporations. It had produced and promoted a polemic, *Hillary: The Movie (Hillary)*, in theaters, on DVD, and through free-of-charge video-on-demand. Fearing the criminal penalties of § 203, Citizens United had sought declaratory and injunctive relief to air *Hillary* just before the 2008 presidential primary.<sup>128</sup> The federal court for the District of Columbia denied a preliminary injunction and granted the Federal Election Commission's motion for summary judgment. The district court held that § 203 was both facially constitutional under *McCormell v. Federal Election Commission*<sup>129</sup> and constitutional as applied to *Hillary*. It also upheld the statute's disclosure and disclaimer requirements.<sup>130</sup> Following initial briefing and argument, the Supreme Court asked the parties to address "whether we should overrule either or both *Austin* and the part of *McCormell* which addresses the facial validity of 2 U.S.C. § 441b."<sup>131</sup>

Justice Kennedy first disposed of narrower grounds of decision. He declined to split hairs among different forms of media for fear that such fine-tuning would chill the exercise of protected speech and yield questionable decisions.<sup>132</sup> The Court likewise rejected as lukewarm and unworkable the alternative argument that an exception should be carved out for nonprofit corporations that, like Citizens United, are funded overwhelmingly by individuals. Rather, it insisted that a bright line be drawn because breathing room is needed for speech to survive<sup>133</sup> and because the Court "must give the benefit of any doubt to protecting rather than stifling speech."<sup>134</sup>

The majority proceeded to the facial challenge of § 203, even though that claim had been dismissed by stipulation. It defended its prerogative to

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125. 11 C.F.R. § 100.29(a)(2), (b)(3)(ii).

126. 2 U.S.C. § 434(f)(3)(A).

127. *Id.* § 441b(b)(2); *id.* § 434(f)(3)(A); 11 C.F.R. § 100.29(a)(2).

128. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 887 (2010).

129. 540 U.S. 93 (2003).

130. *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 279–81 (D.D.C. 2008).

131. *Citizens United*, 130 S. Ct. at 888 (citations omitted).

132. *Id.* at 891.

133. *Id.* at 892 (quoting *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007) (Roberts, C.J.)).

134. *Id.* at 891 (quoting *Wis. Right to Life*, 551 U.S. at 469 (Roberts, C.J.)).

review an issue that was “not pressed [below] so long as it has been passed upon . . .” even minimally.<sup>135</sup> Remarkably, the Court reasoned that facial and as-applied challenges are variants of a single contention that need not be separately pleaded and go only to the breadth of a remedy.<sup>136</sup> Justice Kennedy explained: “[t]he parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved.”<sup>137</sup> In other words, in the view of the dissent, a patient who is admitted for surgery by scalpel may not complain when his doctor insists on using a machete.<sup>138</sup>

Deciding the matter on this broader basis, the Court stressed the importance of expanding rather than contracting the universe of information available to the voting public.<sup>139</sup> The majority derided restrictions based on the identity of a speaker as a surrogate for control of content<sup>140</sup> and found in its precedents no basis to distinguish among corporations, other associations, and individuals.<sup>141</sup> Justice Kennedy highlighted the value of all contributions to the democratic process, in which ostensibly well-informed citizens exercise ultimate electoral power.<sup>142</sup>

The majority read its pre-*Austin* decisions as validating this identity neutrality. *Buckley v. Valeo*<sup>143</sup> had upheld the ban on direct corporate campaign contributions based on a compelling concern with political corruption and the appearance of corruption. The *Citizens United* majority clung to *Buckley*'s focus on the potential for quid pro quo corruption raised by direct contributions, in contrast to independent expenditures, a ban on which was not then at issue.<sup>144</sup> The majority read *First National Bank of Boston v. Bellotti*,<sup>145</sup> which struck down a Massachusetts prohibition on corporate expenditures relative to referenda, as further demonstrating that the circumstances of speech, not the identity of the speaker, are decisive.<sup>146</sup>

Against this background, Justice Kennedy painted *Austin*, from which he had dissented, as an aberration. *Austin* “interfere[d] with the ‘open market-

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135. *Id.* at 892 (citation omitted). The district court had rejected the facial challenge summarily in the injunctive phase, before the stipulation was entered, because it could not ignore the precedent of *McCormell*.

136. *Id.* at 893 (citations omitted).

137. *Id.*

138. *Id.* at 933.

139. *Id.* at 899 (noting the need of voters for diverse sources of information).

140. *Id.*

141. *Id.* at 900.

142. *Id.* at 910 (“The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”).

143. 424 U.S. 1 (1976).

144. *Citizens United*, 130 S. Ct. at 901–02.

145. 435 U.S. 765 (1978).

146. *Citizens United*, 130 S. Ct. at 902–03.

place' of ideas protected by the First Amendment"<sup>147</sup> because it recognized a new antidistortion interest arising from the corporate form. *Austin* had "found a compelling governmental interest in preventing '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.'"<sup>148</sup> The *Citizens United* majority considered this economic postulate to be misleading and immaterial, rejecting any qualitative distinction between wealth amassed by a corporation and that of an individual.<sup>149</sup> The Court further reasoned that the traditional economic function of a corporation should not constrain its participation in the electoral process.<sup>150</sup>

Having concluded that *Austin* was wrongly decided, the majority was quick to find that stare decisis, a mere principle of policy, did not compel adherence to it.<sup>151</sup> The majority noted that the government's argument all but abandoned reliance on *Austin*'s antidistortion rationale, in favor of the governmental interests in preventing corruption and protecting the interests of corporate shareholders.<sup>152</sup> The Court concluded that other stare decisis interests were not at stake; it weakly asserted that technological changes cut against application of the principle and dismissed as inconsequential any reliance interest arising from legislative bans on corporate expenditures following *Austin*.<sup>153</sup>

In his concurrence, Chief Justice Roberts also addressed stare decisis and judicial restraint. Judicial restraint is not justified for its own sake, he maintained, and does not "trump our obligation faithfully to interpret the law."<sup>154</sup> In other words, the Court must not adhere to precedent in the interest of developing the law in a principled fashion where such adherence will do more to damage the rule of law than to advance it.<sup>155</sup> The Chief Justice supplemented the majority's grounds to disengage from *Austin* by replacing to the destabilizing effect of that decision, evidenced by the spirited dissents and internal disagreement that it triggered and the difficulty of limiting *Austin*'s rationale to its facts.<sup>156</sup> He reiterated the error of *Austin*'s rationale, i.e., the efficacy of a speaker's participation should

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147. *Id.* at 906 (citations omitted).

148. *Id.* at 903 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

149. *Id.* at 905.

150. *Id.* at 904.

151. *Id.* at 912.

152. *Id.*

153. *Id.* at 912–13.

154. *Id.* at 919.

155. *Id.* at 920–21.

156. *Id.* at 922–23.

be irrelevant to the validity of its speech,<sup>157</sup> and declared that adherence to such erroneous precedent cannot be justified by the new principles espoused by the government.<sup>158</sup>

In an acerbic concurrence, Justice Scalia attacked the dissent for indulging in a dubious, extratextual historiography of the Framers' dislike of the corporate form. The dissent, he wrote, had "dredged up" "corporation-hating quotations,"<sup>159</sup> ignored the lack of a textual exception for speech by corporations,<sup>160</sup> and discounted the right of an individual to speak in association with other individuals.<sup>161</sup> It would be wrong and unnecessary to a strict reading of the Free Speech Clause to "muzzle the principal agents of the modern free economy."<sup>162</sup>

In turn, the dissent castigated the majority for its procedural dereliction and cavalier dismissal of *stare decisis*.<sup>163</sup> The Court abandoned not only plausible narrower grounds of decision but also all pretense of judicial restraint.<sup>164</sup> Justice Stevens argued that the majority had impermissibly reconceptualized the litigant's claims, upending "the basic relationship between litigants and courts,"<sup>165</sup> in that *Citizens United* had dropped its facial challenge in the district court, its subsequent jurisdictional statement did not even mention *Austin*, and its merits brief did not seek facial invalidation.<sup>166</sup> The majority did not cite any exceptional circumstances to justify its expansion of the claim on appeal.<sup>167</sup> Yet, having made that procedural leap, the Court then hypocritically complained about the lack of an evidentiary record to validate a fear of electoral distortion—a record that, the dissent remarked, was thin precisely because the facial challenge had been abandoned.<sup>168</sup>

One major casualty in the process was *stare decisis*. In an "amalgamation of resuscitated dissents,"<sup>169</sup> the Court had rushed to the merits, ignoring both its own previous adherence to *Austin*<sup>170</sup> and a diverse chorus of corporate, labor, and nonprofit amici that favored that steady course.<sup>171</sup> The resulting procedural detour disrespected a co-equal branch of government.<sup>172</sup>

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157. *Id.* at 923.

158. *Id.* at 924.

159. *Id.* at 925.

160. *Id.* at 926–27.

161. *Id.* at 928.

162. *Id.* at 929.

163. *Id.* at 931.

164. *Id.* at 937–38.

165. *Id.* at 935.

166. *Id.* at 931–32.

167. *Id.* at 932.

168. *Id.* at 933, 966–67.

169. *Id.* at 942.

170. *Id.* at 957.

171. *Id.* at 941 nn.23–26.

172. *Id.* at 940.

The dissent painted the Court's ruling as no less misguided on the merits. The decision had trashed Congress's "careful adjustment of electoral laws" based on legitimate concerns with corporate funding.<sup>173</sup> Justice Stevens repeatedly characterized § 203 as an appropriate time, place, and manner restriction on political speech that did not preclude the use of PACs.<sup>174</sup> He rejected the majority's insistence that precedent precluded distinctions based on the identity of the speaker, pointing out that even the disclaimer and disclosure provisions of the BCRA, which the Court simultaneously upheld, themselves embody such distinctions.<sup>175</sup>

According to the dissent, several perspectives support this different treatment of corporate and individual electoral participation: the Framers focused on speech by individuals, not corporate entities, which were few and disfavored;<sup>176</sup> since corporations cannot vote, corporate electoral financing is speech by proxy;<sup>177</sup> more than individuals' political speech, corporate participation is motivated less by ideology than by practical considerations;<sup>178</sup> and the deployment of huge corporate wealth inhibits the free trade in ideas that is so vital to the electoral process.<sup>179</sup> On the last point especially, Justice Stevens was insistent. He rejected the majority's "crabbed view of corruption" as grossly unrealistic and expounded on the fluid nature of political corruption.<sup>180</sup> Soft money has more potential to distort democratic process than the odd bribe.<sup>181</sup> Unlike the majority, Justice Stevens pointed to the explicit recognition of that reality in *Caper-ton* and the need for prophylactic measures against such corruption.<sup>182</sup> To advance this pragmatic analysis, he pointed to the enactment of the very restrictions at issue and opinion polls<sup>183</sup> as evidence that the large majority of voters, the listeners whose rights so concerned the majority,<sup>184</sup> believe that soft corporate money is a corrupting influence.<sup>185</sup>

The dissent predicted that the Court's ruling would immediately open the "floodgates of corporate and union general treasury spending."<sup>186</sup> In

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173. *Id.* at 954–55 (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982) (Rehnquist, J.)).

174. *Id.* at 930, 941, 943.

175. *Id.* at 946 n.47 (citing ARISTOTLE, POETICS 43–44 (M. Heath, trans., Penguin Books 1996)).

176. *Id.* at 949.

177. *Id.* at 972.

178. *Id.* at 955.

179. *Id.*

180. *Id.* at 961 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 152 (2003) (Kennedy, J.)).

181. *Id.* at 962.

182. *Id.* at 968.

183. *Id.* at 963 n.64.

184. *Id.* at 974, 976.

185. *Id.* at 962.

186. *Id.* at 968.

fact, *Citizens United* not only opened the floodgates of corporate spending before the midterm elections, but also those of political rhetoric and judicial anxiety. President Obama's now famous, televised castigation of the Court during his first State of the Union address provoked a real-time retort by Justice Alito, not to mention subsequent, public criticism by the chief justice of the breach of protocol by the chief executive.<sup>187</sup>

While it has heated political rhetoric and activity, the ruling has chilled judicial practice. Of the twenty-four state laws that prohibit or restrict corporate or union spending on candidate elections,<sup>188</sup> Montana's has the most colorful roots. It arose from disgust following the political blackmail exercised by nineteenth-century Copper Kings, who suspended thousands of workers after an unfavorable court ruling in order to force new legislation.<sup>189</sup> Constrained by *Citizens United*, a Montana judge granted summary judgment to corporate plaintiffs, declaring the law unconstitutional as applied to independent corporate expenditures.<sup>190</sup> The State of Montana had joined twenty-five other states urging affirmance of *Austin* in *Citizens United*.<sup>191</sup>

Defenders and detractors of *Citizens United* undoubtedly will further extend the Court's internal debate into the lower courts, state and federal legislatures, and the media.<sup>192</sup> Though far less certain, the implications of the decision for Supreme Court decision making may well be more significant.

### B. *Ineffective Assistance Appeals and Immigration Law: Justice Stevens Prevails upon the Court*

While it was thwarted in *Citizens United*, Justice Stevens' pragmatic jurisprudence prevailed in a different context. Countermanding the consistent approach of federal and state appellate courts throughout the country, the Supreme Court this term declared the effective assistance guarantee applicable to immigration-related consequences of criminal plea agreements. In *Padilla v. Kentucky*,<sup>193</sup> the Court held 7–2 that every noncitizen criminal

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187. See Andrew Malcolm, *Very Troubling: Chief Justice Roberts on Obama's Court Criticism to Joint Session of Congress*, L.A. TIMES, Mar. 9, 2010; Peter Baker, *Obama v. Roberts: The Struggle to Come*, N.Y. TIMES, Apr. 18, 2010 (addressing the tensions between the president and chief justice and the implications of *Citizens United* on the choice of successor for Justice Stevens), available at <http://www.nytimes.com/2010/04/18/weekinreview/18baker.html>.

188. See *Citizens United and the States: Life After Citizens United*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 19, 2010), <http://www.ncsl.org/default.aspx?tabid=19607> (tabulating and comparing state laws).

189. *W. Tradition P'ship, Inc. v. Att'y Gen. of Montana*, No. BDV-2010-238, at 2 (Mont. Jud. Dist. Ct. Oct. 18, 2010), available at [http://www.mtstandard.com/article\\_bc78c824-dba8-11df-ae66-001cc4c03286.html](http://www.mtstandard.com/article_bc78c824-dba8-11df-ae66-001cc4c03286.html).

190. *Id.*

191. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 941 n.26 (2010).

192. *Citizens United and the States*, *supra* note 188 (noting the introduction of congressional and state legislation to amend in various ways the laws affected by *Citizens United*).

193. 130 S. Ct. 1473 (2010).

defendant has a constitutional right to be advised by his or her defense attorney that a proposed plea would render the defendant deportable or that the plea creates a risk of serious immigration consequences about which the defendant may wish to consult an immigration attorney.<sup>194</sup> The ruling creates a new and powerful avenue of appeal for nonresident aliens whose criminal case dispositions unwittingly have jeopardized their immigration status.

The now familiar standard for determining ineffective assistance of counsel was established in *Strickland v. Washington*.<sup>195</sup> “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.”<sup>196</sup> Deficiency requires a showing that the representation “fell below an objective standard of reasonableness . . . under prevailing professional norms.”<sup>197</sup> Prejudice requires a showing of a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>198</sup>

The Sixth Amendment guarantee is equally applicable to plea agreements. In the context of a guilty plea, a defendant must show that, but for counsel’s error, the defendant would have rejected the plea, and that a decision to reject the plea would have been rational under the circumstances.<sup>199</sup>

In the years since *Strickland*, numerous courts of appeal have held that deportation is a collateral concomitant to criminal conviction.<sup>200</sup> Moreover, most courts have held that counsel’s failure to advise a defendant of a plea’s collateral consequence is not a legally sufficient ground for the plea to be withdrawn or vacated.<sup>201</sup> Thus, federal courts have held that erroneous advice or a lack of advice by defense counsel concerning deportation consequences does not constitute ineffective assistance of counsel.<sup>202</sup> Nor have most courts been willing to revisit those holdings in light of changes

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194. *Id.* at 1486.

195. 466 U.S. 668 (1984).

196. *Id.* at 687.

197. *Id.* at 688.

198. *Id.* at 694.

199. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000); see also *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (“a reasonable probability that, but for counsel’s errors, [defendant] would not have pleaded guilty and would have insisted on going to trial”); *United States v. Isom*, 85 F.3d 831, 837 (1st Cir. 1996); *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994).

200. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 n.9 (2010) (listing jurisdictions); *United States v. Quin*, 836 F.2d 654, 655 (1st Cir. 1988).

201. See, e.g., *Quin*, 836 F.2d at 655; *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989) (deportation is a civil proceeding that is not enmeshed in the criminal proceeding); *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963); *United States v. Parrino*, 212 F.2d 919, 921–22 (2d Cir. 1954).

202. See, e.g., *Quin*, 836 F.2d at 655; *United States v. Yearwood*, 863 F.2d 6, 7 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 766–67 (11th Cir. 1985); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977).

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in immigration law concerning the relationship between deportation and conviction.<sup>203</sup>

The standard for ineffective assistance under state constitutional provisions appears equivalent to the federal standard.<sup>204</sup> Following the lead of federal circuits, state courts have distinguished between direct and collateral consequences in evaluating such claims. For example, the Massachusetts Appeals Court has held that, but for state statute,<sup>205</sup> “there would be no obligation on a judge to warn or inform the defendant of such [adverse immigration] consequences in order to render the plea a voluntary and intelligent one.”<sup>206</sup>

However, the Court this term rejected that approach to immigration-related ineffective assistance claims. Laying the historical groundwork for a fresh analysis and displaying again his devotion to a pragmatic jurisprudence, Justice Stevens reviewed sea changes in immigration law during the past century that “have dramatically raised the stakes of a noncitizen’s criminal conviction. . . . [D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>207</sup>

The Court eschewed lower courts’ distinction between direct and collateral consequences in defining the scope of constitutionally required professional assistance. Instead, the Court reasoned that, because deportation is “uniquely difficult to classify as either a direct or a collateral consequence” of conviction, it is “not categorically removed from the ambit of the Sixth Amendment right to counsel.”<sup>208</sup>

In *Padilla*, counsel affirmatively and erroneously had advised the defendant that his pleading guilty to transportation of a controlled substance posed no immigration problem.<sup>209</sup> However, the Court explicitly did not restrict its historic holding to cases of affirmative misadvice by counsel. It declared that “there is no relevant difference ‘between an act of commission and an act of omission’ in this context.”<sup>210</sup>

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203. See, e.g., *United States v. Gonzalez*, 202 F.3d 20, 26–27 (1st Cir. 2000).

204. See, e.g., *Smiley v. Maloney*, 422 F.3d 17, 21 (1st Cir. 2005).

205. See MASS. GEN. LAWS ch. 278, § 29D (1989).

206. *Commonwealth v. Hason*, 545 N.E.2d 52, 54 (Mass. App. Ct. 1989) (citing *Commonwealth v. MacNeil*, 505 N.E.2d 558, 559 (Mass. App. Ct. 1987)).

207. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (footnote omitted) (noting that a 1990 law abolished criminal trial judges’ long-standing prerogative to recommend against deportation while sentencing a defendant).

208. *Id.* at 1482.

209. *Id.* at 1477.

210. *Id.* at 1484 (quoting Brief for Respondent at 30, *Padilla*, 130 S. Ct. 1473 (2010) (No. 08–651)).

The constitutional entitlement to effective assistance is not undermined or satisfied where a defendant receives notice of possible immigration consequences on a plea form or in a colloquy with the trial judge, as occurs in many jurisdictions.<sup>211</sup> The Court reasoned that such notice only underscores the severity of the immigration consequences and the need for consultation.<sup>212</sup> Although the Court did not so state, it also is clear that, unlike advice of counsel, notice in the plea form or colloquy occurs when a plea is entered and does not allow the defendant a meaningful opportunity to inquire and deliberate about the contemplated plea and its crucial implications.

The Court thus concluded that the failure of Padilla's defense counsel to advise him of adverse immigration consequences abridged his constitutional right to effective assistance. It remanded to afford Padilla an evidentiary hearing on the issue whether he had been prejudiced by that error under *Strickland*.<sup>213</sup>

Although the facts of *Padilla* involved a guilty plea, the Court's holding turns not on the form of the disposition but on its immigration impact. The ruling therefore applies equally to a continuance without a finding upon an admission of sufficient facts, which under immigration laws constitutes a conviction, even if it leaves the defendant with no conviction for purposes of state law and criminal record information systems.<sup>214</sup> Thus, appellate relief now may be available for any alien who once admitted to sufficient facts to avoid trial and potential incarceration, received a continuance without a finding, served an uneventful probation, believed he was left with no criminal record, and unhappily has learned that he is deportable and cannot become a naturalized citizen.<sup>215</sup>

Indeed, it may be easier to demonstrate prejudice and obtain relief where the underlying disposition was a continuance than where it was a plea. As the Court noted, most ineffective assistance claims are asserted

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211. *Id.* at 1486 n.15 (citing twenty state laws).

212. *Id.* at 1486.

213. *Id.* at 1487.

214. See 8 U.S.C. § 1101(a)(48)(A) (defining "conviction"). Contrast, for example, *Commonwealth v. Jackson*, 700 N.E.2d 848, 851–52 (Mass. App. Ct. 1998) (continuance without finding is not a conviction for purposes of Massachusetts law).

215. As the Court noted, deportable offenses include crimes of moral turpitude if the disposition occurred within five years of arrival and carried a sentence of one year or more. *Padilla*, 130 S. Ct. at 1479; see also 8 U.S.C. §§ 1101(a), 1227(a)(2)(A)(i). Congress last amended § 1227, which enumerates the grounds of deportability, in 1996 by the Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104–208, div. C., 110 Stat. 3009–546 (1996). Admission to sufficient facts, though not guilty, under these circumstances permanently prevents the alien from establishing good moral character necessary to naturalize and will deny him admission to this country after traveling abroad. See 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1225(b)(1)(A)(i).

in habeas petitions and fully seventy percent of habeas proceedings result from convictions at trial.<sup>216</sup> Since proving prejudice is harder once a defendant has been adjudged guilty or has admitted guilt,<sup>217</sup> the Court concluded that ineffective assistance claims are self-limiting and rejected the dissent's concern that its holding would open appellate floodgates.<sup>218</sup> Unlike a defendant who pleads guilty, one who admits to sufficient facts has not thereby admitted legal guilt. *Padilla's* already wide path to relief is therefore better paved in such a case.

The Court does not elaborate on the standard for proving prejudice due to unconstitutional misadvice or silence of defense counsel. *Strickland's* progeny speaks of prejudice, i.e., a different outcome, as a lost opportunity to try the case.<sup>219</sup> However, proof that a case reasonably might have been resolved by plea or continuance based upon an immigration-neutral lesser offense<sup>220</sup> also might constitute a different result of the proceeding, so as to satisfy the prejudice requirement for new trial.<sup>221</sup>

Chief Justice Roberts and Justice Alito in their dissent took issue only with the breadth of the Court's holding. They would have held unconstitutional not the mere silence of defense counsel concerning the immigration consequences of a plea but only affirmative misadvice by counsel, as occurred in *Padilla*.<sup>222</sup> Justice Alito reasoned that immigration law is specialized, that evaluating immigration consequences of a plea is not a simple matter, that such consequences are not what defense attorneys are retained to address, and that defense counsel should be required only to avoid misstatement.<sup>223</sup> Justices Alito and Roberts neither noted nor rejected the pragmatic jurisprudence that Justice Stevens reasserted, this time for the majority.

### III. RECENT DEVELOPMENTS IN FEDERAL APPELLATE PROCEDURE

On December 1, 2010, amendments to the Federal Rules of Appellate Procedure took effect. These include new disclosure requirements in briefs filed by amici curiae, a new definition of *state*, and a revised affidavit accompanying motions for permission to appeal in forma pauperis.

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216. *Padilla*, 130 S. Ct. at 1485 nn.13–14 (collecting statistics).

217. *Id.* at 1485 n.12.

218. *Id.* at 1485.

219. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

220. For example, a continuance without a finding or plea as to simple assault and battery, unlike indecent assault and battery, entails no moral turpitude or aggravating element, hence no risk of deportation.

221. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

222. *Padilla*, 130 S. Ct. at 1487.

223. *Id.* at 1488–90.

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### A. *New Disclosures in Briefs Filed by Amici Curiae*

The most significant amendment for appellate practitioners is a new subdivision (c)(5) to Rule 29. Subdivision (c)(5) adds disclosure requirements regarding authorship and funding for briefs filed by all amici curiae except the United States, its officers and agencies, and states.<sup>224</sup> Private party amici will be required to include a separate statement in the brief indicating whether (1) “a party’s counsel authored the brief in whole or in part”;<sup>225</sup> (2) “a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief”;<sup>226</sup> and (3) “a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.”<sup>227</sup>

The statement must identify any person other than the amicus who contributed money toward preparing or submitting the brief.<sup>228</sup> The Advisory Committee Note to the amendment clarifies that the word *person* as used in subdivision (c)(5) “includes artificial persons as well as natural persons.”<sup>229</sup>

The new disclosure requirement is modeled on Supreme Court Rule 37.6,<sup>230</sup> and according to the Advisory Committee Note, “serves to deter counsel from using an amicus brief to circumvent page limits on the parties’ briefs.”<sup>231</sup> The note cites an observation by one court “that amicus briefs are often used as a means of evading the page limitations on a party’s briefs.”<sup>232</sup> The note goes on to state that the amendment “may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.”<sup>233</sup>

The amendment raises questions regarding what it means to author an amicus brief in part. The Advisory Committee Note provides some guidance in explaining that the disclosure requirement does not extend to “mere coordination” between an amicus and a party, including “sharing drafts of

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224. FED. R. APP. P. 29(c)(5); *see also* FED. R. APP. P. 29(a).

225. FED. R. APP. P. 29(c)(5)(A).

226. FED. R. APP. P. 29(c)(5)(B).

227. FED. R. APP. P. 29(c)(5)(C).

228. *Id.*

229. FED. R. APP. P. 29(c)(5) advisory committee’s note.

230. The only significant difference between the two rules is the placement of the disclosure. In amicus briefs filed in the Supreme Court, the disclosure must be “made in the first footnote on the first page of text.” SUP. CT. R. 37.6. In briefs filed in the circuit courts of appeals, the disclosure must be made in a separate statement following the statement of the identity and interest of the amicus. FED. R. APP. P. 29(c)(4)–(5).

231. FED. R. APP. P. 29(c)(5) advisory committee’s note.

232. *Id.* (citing *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003)); *see also* *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (noting that “amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs”).

233. FED. R. APP. P. 29(c)(5) advisory committee’s note.

briefs.”<sup>234</sup> This does not necessarily resolve all ambiguities arising from the rule, however. One commentator observed with regard to an earlier version of the amendment that

proposing specific language is a normal part of the coordination between lawyers. If a party’s counsel sends the amicus’s counsel a proposed point of 10 pages for inclusion in the amicus brief and the amicus includes it, either verbatim or with editorial revisions, did the party “author” the amicus brief “in part” within the meaning of the proposed rule? If not, then the rule will be toothless. By contrast, what about proposing one paragraph? Or a sentence?<sup>235</sup>

The Advisory Committee Note indicates that interpretations of Supreme Court Rule 37.6 may be instructive in clarifying the disclosure requirement.<sup>236</sup> A leading treatise on Supreme Court practice suggests that party counsel’s review of an amicus brief for inaccuracies or repetition of argument would not constitute authoring the brief in part, even if this review “result[s] in advice by party counsel that the amicus counsel rewrite, delete, or add certain matter. . . .”<sup>237</sup> On the other hand, authoring an amicus brief in part would “include any instance in which party counsel takes an active role in writing or rewriting a substantial or important ‘part’ of the amicus brief, with the word ‘part’ interpreted to mean something more substantial than editing a few sentences.”<sup>238</sup> Despite this guidance, the precise boundary between mere coordination and authoring the brief in part remains hazy. Appellate attorneys must use common sense in light of the circumstances and should contact the clerk’s office for advice in borderline situations.<sup>239</sup>

Other questions arise from the requirement to disclose the identities of persons other than the amicus who have contributed money to fund preparation or submission of the brief.<sup>240</sup> The language of the rule does not appear to require disclosure of the dollar amount of any contribution, but merely the identity of the person who made it.<sup>241</sup> The Advisory Committee Note further instructs that “[a] party’s or counsel’s payment of general

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234. *Id.* Indeed, the note characterizes such coordination as “desirable, to the extent that it helps to avoid duplicative arguments.” *Id.*

235. Steven Finell, *Amendments to the Federal Rules of Appellate Procedure*, APP. PRAC. J., Winter 2009, at 5, available at [http://www.abanet.org/litigation/litigationnews/trial\\_skills/amendments-federal-rules-appellate-procedure.html](http://www.abanet.org/litigation/litigationnews/trial_skills/amendments-federal-rules-appellate-procedure.html).

236. See FED. R. APP. P. 29(c)(5) advisory committee’s note (citing EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 739 (9th ed. 2007), for proposition that mere coordination between amicus counsel and party counsel need not be disclosed).

237. GRESSMAN, *supra* note 236, at 739.

238. *Id.*

239. *Id.*

240. See FED. R. APP. P. 29(c)(5)(B)–(C).

241. See *id.*; see also GRESSMAN, *supra* note 236, at 740 (reaching same conclusion with respect to SUP. CT. R. 37.6).

membership dues to an amicus need not be disclosed.”<sup>242</sup> The note seems to anticipate a situation where, for example, a trade association files an amicus brief in an appeal to which one of its existing members is a party. But suppose the amicus conditions filing a brief upon the party’s joining the organization and paying for a new membership? Although this may raise doubts as to whether “the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief,”<sup>243</sup> disclosure would likely be unnecessary unless the payment is “specifically earmarked to defray the expense of the amicus brief.”<sup>244</sup> Once again, appellate attorneys must exercise common sense and refer borderline situations to the clerk’s office.

### B. *New Definition of State*

The amendments add a new subsection (b) to Rule 1 defining the term *state* to include “the District of Columbia and any United States commonwealth or territory.”<sup>245</sup> The amendments also revise Rule 29(a) in accordance with this new definition.<sup>246</sup> Rule 29(a) had previously provided that “[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court.”<sup>247</sup> The new definition of state in Rule 1(b) makes redundant the reference to a “Territory, Commonwealth, or the District of Columbia” in Rule 29(a).<sup>248</sup> Rule 29(a) is accordingly amended to refer simply to “[t]he United States or its officer or agency or a state.”<sup>249</sup>

### C. *Revised Affidavit Accompanying Motions for Permission to Appeal in Forma Pauperis*

The new amendments revise Form 4 to comply with privacy requirements.<sup>250</sup> Form 4 is the affidavit accompanying motions for permission to appeal in forma pauperis. Earlier rule amendments had revised Rule 25(a)(5) to incorporate the new privacy protections of Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, and Federal Rule of Criminal Procedure 49.1.<sup>251</sup> These protections were added in response

242. FED. R. APP. P. 29(c)(5) advisory committee’s note.

243. *See id.* (noting that this is one purpose of the disclosure requirements).

244. *See* GRESSMAN, *supra* note 236, at 740.

245. FED. R. APP. P. 1(b).

246. FED. R. APP. P. 29(a).

247. FED. R. APP. P. 29(a) (2009) (amended 2010).

248. FED. R. APP. P. 29(a) advisory committee’s note.

249. FED. R. APP. P. 29(c); *see also* FED. R. APP. P. 29(a) advisory committee’s note.

250. FED. R. APP. P. FORM 4.

251. *See generally* Paul K. Sun Jr., *New Federal Rule of Appellate Procedure 25(a) Adopts Privacy Provisions of Bankruptcy, Civil, and Criminal Rules*, APP. PRAC. J., Winter 2008, at 19.

to § 205(c)(3)(A)(i) of the E-Government Act of 2002, which required the Supreme Court to prescribe rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically or converted to electronic form.”<sup>252</sup>

The prior rule amendments, however, did not revise Form 4, which required the inclusion of information that Rule 25(a)(5) forbids: (1) the full names of minors who rely on the movant or the movant’s spouse for support; (2) the full address of the movant’s legal residence; and (3) the movant’s full Social Security number.<sup>253</sup> The new Form 4 is revised to comply with Rule 25(a)(5) by requiring only (1) the initials of minors; (2) the city and state of the movant’s legal residence; and (3) the last four digits of the movant’s Social Security number.<sup>254</sup>

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252. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2914, as amended by Pub. L. No. 108-281, 118 Stat. 889 (2004); see FED. R. APP. P. 25(a)(5) advisory committee’s note, 2007 amendments; see also generally Sun, *supra* note 251, at 19.

253. FED. R. APP. P. FORM 4 (2009) (amended 2010).

254. FED. R. APP. P. FORM 4.