

January 2013

## Citizens United, the Marketplace, and Influence

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Citizens United, the Marketplace, and Influence

By

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A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Master of Arts in Mass Communication  
Department Mass Communication  
College of Arts and Sciences  
University of South Florida

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Date of Approval:  
November 12, 2013

Keywords: Political Communication, Elections, Law, First Amendment, Corporate Speech

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## **ABSTRACT**

This study analyzes the rationale used by the Supreme Court in the 2010 case, *Citizens United v. Federal Election Commission*. The majority opinion and dissent were dissected and scrutinized for any weaknesses. After careful review and comparison with First Amendment theories and scholarly articles, it was found that the majority opinion and final decision were poorly reasoned and created a dangerous political communication landscape and a weakened Marketplace of Ideas.

## CHAPTER ONE:

### BACKGROUND

#### Introduction

The political communication landscape has undergone significant changes in the last three years. In 2010 the Supreme Court of the United States reached a decision in the case of *Citizens United v. Federal Elections Commission*<sup>1</sup> that changed the way election communication is regulated. The decision received high media coverage in the weeks that followed. Both the President and his soon-to-be political adversary commented on the possible repercussions of the case (Parloff, 2010 ). The case would give rise to new forms of political committees, new terminology, and intense criticism. The critics of the decision see *Citizens United* as a danger to political speech, the electoral process, and as the death of a true representative democracy (Parloff, 2010) while the Court majority find the decision to be a boon for the First Amendment.

The case itself involved a non-profit organization, Citizens United and its complaint against the Federal Election Commission (FEC) in response to a ban on electioneering communication in the days prior to a federal election. The Bipartisan Campaign Reform Act (BCRA)<sup>2</sup>, also known as the McCain-Feingold Act, of 2002 set limits on independent

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<sup>1</sup> 558 U.S. 310 (2010).

<sup>2</sup> Bipartisan Campaign Reform Act, Pub.L. 107-155, 116 Stat. 81 (2002).

expenditures made by corporations and political committees in the days leading up to primary and general elections. Specifically, the act banned independent expenditures on electioneering communications by corporations, non-profits, and political action committees in the 60 days leading up to a federal election.<sup>3</sup>

The provisions within the BCRA define an electioneering communication as a communication that refers to a clearly identified candidate for federal office, is publicly distributed on radio or television (including broadcast, cable, or satellite), is distributed during a specific time period before an election - within 30 days prior to a primary election or 60 days prior to a general election, and can be seen by more than 50,000 members of the electorate.<sup>4</sup> Citizens United brought an action against the FEC in regard to this specific provision of the BCRA.

Citizens United is a political organization with multiple branches, all dedicated to the pursuit “of principled conservative Republican leadership at all levels of government” (citizensunited.org). One branch of the organization is responsible for producing political documentaries. The film, *Hilary*, was one such documentary. Citing the BCRA’s ban on electioneering communication, the FEC forbade the non-profit, Citizens United from advertising *Hilary* before the 2008 presidential primaries. Citizens United brought an action, claiming that the terms of the BCRA and its definition of electioneering communication restricted the organization’s right to speak and therefore violated the First Amendment. The court case that transpired reversed parts of the BCRA, and overturned decisions in multiple cases that had regulated speech by such corporations.

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<sup>3</sup> Bipartisan Campaign Reform Act, Pub.L. 107-155, 116 Stat. 81 § 203 (2002)

<sup>4</sup> Bipartisan Campaign Reform Act, Pub.L. 107-155, 116 Stat. 81 § 201 (2002)

The *Citizens United* case not only removed limits on when communications could air, but also on who could spend money on those communications and how much money they are allowed to spend. In the wake of the *Citizens United* decision, corporations can now spend unlimited monies on independent expenditures,<sup>5</sup> and new forms of political committees have formed, namely SuperPACs, which retain the right to accept unlimited contributions and spend unlimited amounts in support or opposition of a candidate. This has raised some fears in the political community.

On one side of the issue, there are those who fear that elections will now be determined by the side with better corporate sponsorship; the average citizen will have little say in the outcome (Raskin 2012). The other side celebrates this decision as a victory for free speech in a country that was founded on limiting government's ability to regulate who can speak (cuvfec.com). The discussion herein hopes to identify the two arguments and assess their accuracy in the wake of the first presidential election following the decision. The paper will be divided into a case history, a discussion free speech theory, a literature review, a detailed analysis of the decision and the dissent, and a discussion of the current political environment.

## **Case History**

Before *Citizens United*, the U.S. court system dealt with corporate spending in elections in different ways. There are certain major cases mentioned in this current research and in the *Citizens United* case that should be discussed. The first of these cases is *Buckley v. Valeo*.<sup>6</sup> In this 1976 case, Senator James Buckley, 1968 presidential candidate Eugene McCarthy and others

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<sup>5</sup> *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).

<sup>6</sup> *Buckley v. Valeo* 424 U.S. 1 (1976).

brought an against members of the FEC, claiming that certain provisions in the Federal Election Campaign Act<sup>7</sup> violated their First and Fifth Amendment rights to freedom of expression and due process.<sup>8</sup> In addition to requiring candidate disclosure, the statute limited contributions to political candidates, independent expenditures, and candidate expenditures from personal funds.<sup>9</sup> While the Supreme Court upheld disclosure requirements and limits on contributions to political campaigns in *Buckley*, it struck down limits on expenditure and candidate expenditures from personal funds. In upholding restrictions on contributions Court noted that there was government interest in “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.”<sup>10</sup> and also felt these limits on contributions would “mute the voices of affluent persons and groups in the election process ...thereby... equalizing the relative ability of all citizens to affect the outcome of elections,”<sup>11</sup> and “brake on the skyrocketing cost of political campaigns,” opening “the political system more widely to candidates without access to sources of large amounts of money.”<sup>12</sup>

But the Court said that limitations on political expenditure were unconstitutional because, unlike contribution limits, expenditure limits were a direct imposition on the associational rights of organizations by precluding them “from effectively amplifying the voice of their adherents, which was the original basis for the recognition of First Amendment protection of the [right to] freedom of association.”<sup>13</sup>

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<sup>7</sup> Pub.L. 92-225, 86 Stat. 3 (1976)

<sup>8</sup> *Buckley v. Valeo*, 424 U.S. 1, 11 (1976).

<sup>9</sup> formerly 18 U.S.C. §608a

<sup>10</sup> *Buckley v. Valeo* 424 U.S. 1, 25 (1976)

<sup>11</sup> *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976).

<sup>12</sup> *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976).

<sup>13</sup> *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)



Essentially, the Court said that while contributions were “symbolic expression,”<sup>14</sup> and so could be limited, expenditures were pure expression and, therefore, statutory limits on expenditures would be an unconstitutional infringement on the right to freedom of expression.

A few years later in *First National Bank of Boston v. Bellotti*,<sup>15</sup> a slim majority found no substantial reason to prohibit corporations from making independent expenditures or contributions to influence referenda proposals.<sup>16</sup> In his majority opinion, Justice Lewis Powell said that “the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue....Such power in government to channel the expression of views is unacceptable under U.S. Const. amend. I”<sup>17</sup>. This was the Court’s opinion regardless of the speaker’s corporate identity.

In *Bellotti*, the First National Bank and other banks and businesses wanted to use their corporate funds to publicize their views about a proposed constitutional amendment that would impose a graduated tax on individuals.<sup>18</sup> A Massachusetts electoral statute, however, prohibited these expenditures. The banks alleged in their action that the statute violated their rights to freedom of expression and equal protection in the First and Fourteenth amendments to the U.S. Constitution.<sup>19</sup> Francis X. Bellotti, former attorney general of Massachusetts had argued that corporations should only be allowed to speak in reference to those matters directly related to their business. But Powell, in his majority opinion said that “[i]f a legislature may direct business corporations to ‘stick to business,’ it also may limit other corporations -- religious, charitable, or civic -- to their respective ‘business’ when addressing the public. Such power in government to

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<sup>14</sup> Buckley v. Valeo, 424 U.S. 1, 58 (1976).

<sup>15</sup> 435 U.S. 765 (1978).

<sup>16</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1976)

<sup>17</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1976)

<sup>18</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765, 769 (1978).

<sup>19</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765, 770 (1978)

channel the expression of views is unacceptable under the First Amendment.”<sup>20</sup> In fact, the Court held the speech proposed by the bank was at the “heart of the First Amendment’s protection.”<sup>21</sup> Lewis noted that, “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,”<sup>22</sup> and the referendum question involved “the type of speech indispensable to decision making in a democracy.”<sup>23</sup> Regardless of whether the speech came from an individual or an entity, Powell said, it was protected. “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual,” Powell said.<sup>24</sup> Powell was joined by justices Warren Burger, Potter Stewart, Harry Blackmun, and John Stevens in his majority opinion.

However, Justice William Rehnquist said in his dissent that, because a corporation did not have all the rights of a natural person it should not enjoy the right to influence elections.<sup>25</sup> Justice Byron White, joined in his dissent by justices William Brennan and Thurgood Marshall, said that “the Court not only invalidates a statute which has been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity.”<sup>26</sup>

In 1982, the Supreme Court upheld the limitations on corporate contributions to candidates in the Federal Elections Campaign Act in the case of *FEC v. National Right to Life*

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<sup>20</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1976)

<sup>21</sup> *Id.* at 776.

<sup>22</sup> *Id.* at 777-78, citing Mills v. Alabama, 384 U.S. 214, 218 (1966).

<sup>23</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

<sup>24</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

<sup>25</sup> First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

<sup>26</sup> *Id.* at 803.

*Committee.*<sup>27</sup> This case centered around a nonprofit corporation that solicited funds for its Political Action Committee (PAC) from non-members for the purpose of contributing to political races. The Court upheld a statute<sup>28</sup> that outlines the disclosure requirements of corporations engaging in political speech. This case is important in emphasizing that while corporations have the right to speak, it has always been regulated. The Court in *National Right to Life* permitted “some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of ‘separate segregated [funds],’ which may be ‘utilized for political purposes.’”<sup>29</sup> Thus the Court acknowledged the right of corporate to speak while upholding limitations on the manner of speech.

Similarly, in the 1986 case, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,<sup>30</sup> the Supreme Court allowed an anti-abortion group to spend \$10,000 to distribute a newsletter encouraging people to vote for a particular pro-life candidate, because, the Court said, ideological groups aimed at spreading political ideas, rather than making profit did not pose a threat to the political process.<sup>31</sup>

However, in 1990, the Supreme Court upheld corporate independent expenditure limitations in *Austin v. Michigan Chamber of Commerce*.<sup>32</sup> The decision was unprecedented. In *Austin*, the Michigan Chamber of Commerce brought a suit to challenge the constitutionality of a section of the Michigan Campaign Finance Act that forbade corporations from using general treasury funds for independent expenditures for or against any candidate for state office.<sup>33</sup> In this

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<sup>27</sup> 459 U.S. 197 (1982)

<sup>28</sup> 2 U.S.C.S. § 441b(b)(4)(C)

<sup>29</sup> *FEC v. National Right to Life Committee*, 459 U.S. 197, 201 (1982)

<sup>30</sup> *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

<sup>31</sup> *Id.*

<sup>32</sup> 494 U.S. 652 (1990)

<sup>33</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)

case, Justice Thurgood Marshall held that limitations were “justified by a compelling state interest: preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries, which are amassed with the aid of favorable state laws and have little or no correlation to the public's support for the corporation's political ideas, will be used to influence unfairly election outcomes.”<sup>34</sup>

*Austin* had its genesis in 1985, when the Michigan Chamber of Commerce, comprising some 800 corporations, attempted to use treasury funds to support an electoral candidate. The Chamber challenged the section of the Michigan Campaign Finance Act that prohibited businesses from spending corporate treasury funds to support or oppose candidates for election to a state office and from making contributions and independent expenditures to state candidate elections.<sup>35</sup>

Marshall resisted the Chamber of Commerce’s claim of immunity on the basis that it was an ideological organization because it did not possess the characteristics of ideological organizations such as the requirement that the organization should be formed with the specific purpose of propagating political ideas, have no shareholders and be free from the influence of business.<sup>36</sup>

The Court said restrictions on corporate political speech that were narrowly tailored to serve a compelling government interest were constitutional, and that the Michigan statute was “narrowly tailored to serve [the] compelling state interest [of] eliminat[ing] the distortion caused

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<sup>34</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990)

<sup>35</sup> *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 655 (1986)

<sup>36</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664 (1990)

by corporate spending while also allowing corporations to express their political views” to prevent corruption of the electoral process by the influx of corporate funding.<sup>37</sup>

The Court in *Austin* spoke harshly of “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”<sup>38</sup>

The sentiment expressed by the Court in *Austin* paved the way for the passage of the Bipartisan Campaign Reform Act.

The Bipartisan Campaign Reform Act (BCRA)<sup>39</sup> of 2002, also known as the McCain-Feingold Act, named for its sponsors, Republican Senator John McCain and Democratic Senator Russell Feingold, restricted corporations from making electioneering communications within 60 days of a primary or 90 of a general election for federal office.<sup>40</sup> It was this act and these specific provisions that led to the *Citizens United* case. The act, which amended the Federal Election Campaign Act of 1971 (FECA) and the Communications Act of 1934,<sup>41</sup> restricted campaign spending of “soft money” by corporations and unions. “Hard money” is contributed directly to the candidate and is subject to regulation by the Federal Election Commission. Soft money is “money raised outside the limits and prohibitions of the federal campaign finance law” or “nonfederal money.”<sup>42</sup>

Soon after the BCRA was codified, opposition grew. A number of suits challenged the constitutionality of BCRA before *Citizens United*. In the 2003 case, *McConnell v. FEC*<sup>43</sup> a very

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<sup>37</sup> Federal Election Commission v. Massachusetts Citizens for Life, Inc, 479 U.S. 238, 660 (1986)

<sup>38</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)

<sup>39</sup> Pub.L. 107-155 , 116 Stat. 81 (2002)

<sup>40</sup> Bipartisan Campaign Reform Act, Pub.L. 107-155 , 116 Stat. 81 § 203 (2002)

<sup>41</sup> Communication Act of 1934, 47 U.S.C.S. § 151 (1934).

<sup>42</sup> FEDERAL ELECTION COMMISSION, Major Provisions of the Bipartisan Campaign Reform Act of 2002

<sup>43</sup> 540 U.S. 93 (2003)

mixed Supreme Court issued a slim 5-4 majority decision upholding the parts of the BCRA. First, the justices upheld the limits placed on “soft money” contributions. Because these contributions were made to parties for mixed-purposes on federal, state, and local levels, they were subject to Federal disclosure requirements. This provision was upheld in *McConnell* since there was “evidence indicating that many corporate [soft money] contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.”<sup>44</sup> The Court also upheld restrictions on ads that did not directly endorse or condemn a candidate for office.

“As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on ‘issue’ advocacy,”<sup>45</sup> the Court said in *McConnell*. Both of these limitations were upheld by the court in order to address the issue of corruption, or the appearance of corruption in the political process. Interestingly, instead of using the “strict” scrutiny standard, the required a finding of a compelling interest in *McConnell*, the majority merely required a finding that there was a “sufficiently important interest” requiring a restriction on political speech. Rehnquist, joined by Justice John Paul Stevens in his dissenting opinion, criticized the Court for using this lesser test.

While *McConnell's* 2003 challenge to the BCRA was a facial challenge that sought to disqualify the sections in the statute itself as being unconstitutional, in 2007, only three years before the *Citizen's United* decision, a newly constituted Supreme Court upheld an as-applied

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<sup>44</sup> *McConnell v. FEC*, 540 U.S. 93, 125 (2003)

<sup>45</sup> *McConnell v. FEC*, 540 U.S. 93, 129 (2003)

challenge to the statute in another narrow majority 5-4. In *FEC v. Wisconsin Right to Life, Inc*<sup>46</sup> the Supreme Court while leaving in tact the ban on issue ads in the 90 days leading up to elections, limited the ban to “express advocacy” or specific expressions in favor of or against a candidate. Notably, the majority opinion was written by the newly-appointed Chief Justice, John Roberts who was joined by Justice Samuel Alito. Justice Antonin Scalia in his concurrence, in which he was joined by justices Anthony Kennedy and Clarence Thomas, suggested that the decision in *McConnell* should be reconsidered because it set the Court “the unsavoury task of separating issue-speech from election-speech with no clear criterion.”<sup>47</sup> Justices John Paul Stevens, Stephen Breyer, David Souter and Ruth Bader Ginsburg, Interestingly, the Court was heavily divided along political lines, with the conservative justices carrying the majority. This decision, though not reversing the *McConnell* decision, effectively foreshadowed what would happen three years later in the *Citizens United* decision.

## Theory

In order to discuss the *Citizens United* case, it is important to understand the higher concepts at play. Each case involved with political expression, even in the form of contributions, is, in effect, a case concerning the First Amendment which provides, “Congress shall make no law... abridging the freedom of speech or of the press...”<sup>48</sup> When discussing the First Amendment, the Supreme Court often cites certain free speech philosophies. The most predominant theory is the marketplace of ideas, founded by John Milton and John Stuart Mill.

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<sup>46</sup> 551 U.S. 449 (2007)

<sup>47</sup> *Id.* at 484.

<sup>48</sup> U.S. Const., amend. I.

Mill, building on the work of Milton, wrote of an idealized state where all ideas had an equal right to be heard in the marketplace. He wrote that when an idea is prohibited from being publicly aired, it deprives humanity of valuable information. “If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced through its collision with error” (Mill, 2003, p.33).

Mill’s theory of an all-inclusive marketplace of voices was first included in the Supreme Court’s decisions in Justice Oliver Wendell Holmes, Jr.’s dissent in the 1919 case, *Abrams v. United States*<sup>49</sup> where he said:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>50</sup>

However, the ideal marketplace and reliance on the strength of truth to overthrow error did not account for the prevalence and power of the broadcast media. These forums, an integral issue in the *Citizens United* case, are themselves, limiters or reductive valves of opinion. As discussed in Jerome Barron’s (1967) criticism of the marketplace theory, the flaw in the marketplace is in the limited access to press. In order for the marketplace to achieve its goal, there would need to be equal access to the broadcast media for all speakers, so as to allow truth and error the space to collide. However, Barron (1967) observes that “a comparatively few private hands are in a position to determine not only the content of information but its very availability” (p. 1650). This limited access carries large implications for the marketplace ideal,

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<sup>49</sup> 250 U.S. 616 (1919)

<sup>50</sup> *Id.* at 630.



since there can be no marketplace where some voices are excluded because the lack resources. The restricted admission creates a market that is open only to those who can afford the cost of advertising time or space in media. This leaves a majority unable to be heard through the prevalent means of communication.

Restricted access is not the only scarcity. Bambauer (2006) noted that, “information consumers create a second type of scarcity because we possess a limited amount of intellectual attention and interest. The marketplace model at times encourages increased government regulation to ensure access, while limiting governmental controls over content” (p. 654). Jerome Barron (1967), echoing the sentiment of Justice Murphy, states “[t]hat public information is vital to the creation of an informed citizenry is, I suppose, unexceptionable” (p. 1697). Another First Amendment philosopher would agree.

Alexander Meiklejohn (1961) wrote about the power and utility of free speech in a democracy. Information, both expressed and received, was a defining aspect of representative democracy in Meiklejohn’s eyes. “The revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people” (Meiklejohn, 1961, p. 254). The principle here is that, in a democracy, the people govern themselves and, to do so, they must have unabridged freedom of speech. Only a well-informed citizenry can effectively govern (Meiklejohn, 1961). Voting, Meiklejohn (1961) argues, “is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them” (p. 255). Furthermore, this theory of “[s]elf government can only exist insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express” (Meiklejohn, 1961, p. 255). In

these ways, freedom of expression, access to information and voting all combine to create the ideal representative democracy that the Framers intended.

## CHAPTER TWO:

### RESEARCH

#### Research Questions

In this study, a serious inquiry into the Supreme Court's decision will take place. The rationale used by the five justice majority will be tested against the rationale of the dissenting justices. The Court used multiple tests to determine the constitutionality of the *Citizens United* decision. These tests and their rationale are scrutinized in the opinion of the Court and the subsequent dissent.

RQ1: What was the rationale of the Supreme Court decision in the *Citizens United* case?

RQ2: What flaws did the minority find in the Court decision?

#### Methodology

The research questions above will be answered through a detailed case study of the *Citizens United* majority decision and dissent, followed by a discussion of the case in the context of the theories introduced in the previous sections. The case study will detail the rationale used in deciding the case. This rationale will then be tested against the reasoning in the dissent, the political communication theories above, and critiques by scholars.

## The Case

### Majority Opinion

The *Citizens United* decision was concerned with specific sections of the 2002 Bipartisan Campaign Reform Act<sup>51</sup>.

Historically, corporations and unions were prohibited “from using general treasury funds to make direct contributions to candidates.”<sup>52</sup> The 2002 BCRA amended the law so that corporations or unions were also prohibited from making independent expenditures on any electioneering communications.<sup>53</sup> These electioneering communications are defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election.<sup>54</sup> The *Citizens United* case began when the nonprofit created a movie that was critical of the democratic candidate, Hillary Clinton, which the organization wanted to make available through video-on-demand within the 30 day period preceding the 2008 primary elections.<sup>55</sup> However, because they believed that both the film and the advertisements related to it fell within BCRA’s section 441b ban on corporate-funded independent expenditures, and its broadcast might, therefore subject the organization to civil and criminal penalties,<sup>56</sup> Citizens United brought an action to the Federal District Court for the District of Columbia seeking “declaratory and injunctive relief against the FEC,” on the grounds that the ban was unconstitutional as it applied

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<sup>51</sup> 2 U.S.C. § 441b(b)(2)

<sup>52</sup> *Citizens United v. FEC*, 558 U.S. 310, 320 (2010)

<sup>53</sup> 2 USCS § 441b

<sup>54</sup> 2 USCS § 434(f)(3)(A)

<sup>55</sup> *Citizens United v. FEC*, 558 U.S. 310, 321(2010)

<sup>56</sup> *Id.*

to the “Hillary” movie and that BCRA's disclaimer and disclosure requirements,<sup>57</sup> were unconstitutional as applied to the movie and to the three ads promoting it.<sup>58</sup> The lower court denied the request for an injunction, and the case was appealed up to the Supreme Court.

The Supreme Court first addressed Citizen United’s claim that the ban under section 441b did not apply to the movie, *Hillary* because it was not technically an electioneering communication. Citizens United argued that, although the movie met the requirements of a cable communication with a clearly identified candidate for federal office, it was not an electioneering communication because of its video-on-demand status. They contended that video-on demand did not fall within the “publicly distributed” requirement because the movie would be viewed only by a requesting single household, far short of the 50,000 persons noted in the electioneering communication definition of the BCRA.<sup>59</sup> The lower court ruled in favor of the FEC. On appeal, the Supreme Court also agreed that the defining factor in the requirement was the amount of cable subscribers, rather than the persons per household requesting the movie. Since the movie had the ability to reach more than 30 million subscribers, the Court said, it fell within the definition of an electioneering communication.<sup>60</sup> The Court moved on to Citizen United’s second claim that “BCRA's disclaimer and disclosure requirements...are unconstitutional as applied to Hillary and to the three ads for the movie.”<sup>61</sup> The Court also upheld the constitutionality of the disclaimer and disclosure requirements. Once these smaller, narrower claims were settled, the court moved on to the larger issue of whether § 441b of the BCRA which banned electioneering communications between the days immediately preceding the elections was constitutional, or if

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<sup>57</sup> §§ 201 and 311, 116 Stat. 88, 105,

<sup>58</sup> Citizens United v. FEC 558 U.S. 310, 321 (2010)

<sup>59</sup> *Id.* at 323

<sup>60</sup> Citizens United v. FEC 558 U.S. 310, 324 (2010)

<sup>61</sup> Citizens United v. FEC 558 U.S. 310, 321 (2010)

the Court should overrule *Austin v. Michigan Chamber of Commerce*<sup>62</sup> and parts of *McConnell v. Federal Election Commission*,<sup>63</sup> both of which had upheld these types of bans. The Court sought to determine this time the facial validity of the § 441b ban instead of focusing on an as-applied challenge for a number of reasons. The court found that “even if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from...addressing the facial validity of section 441b (the ban on electioneering) in this case.”<sup>64</sup> Furthermore, the Court noted, Citizens United’s main claim was that the statute was a violation of the First Amendment.<sup>65</sup> This meant that the Court had to determine whether the statute, as a whole, violated the constitution. The Court fastened onto three rationalizations for examining the constitutionality of the entire statute, as opposed to the smaller exemption.

First, the Court pointed out Citizens United’s argument that, because is the organizations was only partially funded by corporations, it should be exempt from these provisions. The Court found that, if there are to be exceptions for entities which are partially corporate, there would be confusion in the process of determining which entities could speak and which could not.<sup>66</sup> The decision would, thus, burden the speaker and the court with bookkeeping minutia, the Court said.

Second, the Court was concerned about the time restriction in section 441b, which meant that, were the court to adopt exemptions and exceptions, it could cause confusion and a slowing of the political speech process, when the weeks before an election, the very time period during which the BCRA prohibited advertisements that named candidates, were the most vital to the political process.

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<sup>62</sup> 494 U.S. 652 (1990)

<sup>63</sup> 540 U.S. 93 (2003)

<sup>64</sup> Citizens United v. FEC 558 U.S. 310, 330 (2010)

<sup>65</sup> Citizens United v. FEC 558 U.S. 310, 331 (2010)

<sup>66</sup> Citizens United v. FEC 558 U.S. 310, 331 (2010)

Justice Anthony Kennedy, in his majority opinion said that “[a] speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit.”<sup>67</sup>

Speech that may be effective in the weeks before an election may never see the light of day if the speakers must first prove their ability to speak in court, the Court majority said. The Court noted that the *Citizens United* case was a prime example of this, as Citizens United first brought its action in 2008, but the case was not decided for another two years, well after the election had ended.

Third, the Court noted, “is the primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating political speech, any speech arguably within their reach is chilled.”<sup>68</sup> Thus, the Court likened the extensive burden placed on corporate speech to licensing laws in 16th- and 17th-century England, which the Court said were exactly the type of “laws and governmental practices” that the First Amendment aimed to prohibit.<sup>69</sup> These licensing laws created an environment of fear, a fear of battling the government in order to speak. This fear, the Court said, creates a chilling effect. Essentially, the Court said that persons, or corporations, faced with defending their speech against the FEC, may decide instead to abstain from speaking, thereby leading to a chilling effect on speech.<sup>70</sup>

The Court said that the section 441b prohibition was an outright ban on corporate speech, punishable as a felony<sup>71</sup> and any law that bans speech, regardless of the speaker’s corporate identity, was in direct conflict with the First Amendment. The Court dismissed the FEC

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<sup>67</sup> *Citizens United v. FEC* 558 U.S. 310, 334 (2010)

<sup>68</sup> *Citizens United v. FEC* 558 U.S. 310, 334 (2010)

<sup>69</sup> *Citizens United v. FEC* 558 U.S. 310, 335 (2010)

<sup>70</sup> *Citizens United v. FEC* 558 U.S. 310, 335 (2010)

<sup>71</sup> *Citizens United v. FEC* 558 U.S. 310, 337 (2010)

argument that PACs provided an alternate means of communication for corporations that would negate the finding that corporations were without a political voice under BCRA. The Court did not see PACs as representing the corporation. The Court said:

A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak--and it does not--the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.<sup>72</sup>

Thus, the Court struck down the argument that PACs are valid alternatives to corporate speech.

The Court's majority opinion was that a restriction on corporate independent expenditures limits the amount and quality of speech in the political process.<sup>73</sup> Political speech, Kennedy said in his majority opinion, is an "essential mechanism of democracy," and "must prevail against laws that would suppress it."<sup>74</sup> The Court majority thus saw section 441b's ban on speech as a direct violation of the First Amendment insofar as it burdened corporations and viewed some speakers more favorably than others. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints," Kennedy said in his majority opinion in which he was joined by justices Scalia, Thomas, Roberts and Alito.<sup>75</sup> Limiting corporations from speaking in any way, the Court said, amounted to favoring certain speakers, and was, perhaps, a form of censorship. "Speech restrictions based on

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<sup>72</sup> Citizens United v. FEC, 558 U.S. 310, 337 (2010)

<sup>73</sup> Citizens United v. FEC, 558 U.S. 310, 339 (2010)

<sup>74</sup> Citizens United v. FEC, 558 U.S. 310, 339-340 (2010)

<sup>75</sup> Citizens United v. FEC, 558 U.S. 310, 340 (2010)



the identity of the speaker are all too often simply a means to control content,” Kennedy said in his majority opinion.<sup>76</sup>

The Court noted that corporations and labor unions have been limited in their direct contribution to candidates for centuries, while independent expenditures have been the subject of a back-and-forth debate. Congress first limited independent expenditures by corporations and labor unions in 1946.<sup>77</sup> This regulation was subject to scrutiny for years and was finally nullified in *Buckley v. Valeo*<sup>78</sup> and again in *First National Bank of Boston v. Bellotti*.<sup>79</sup> Justice Kennedy said “it is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.”<sup>80</sup> Justice Kennedy admits, though, that the *Bellotti* case was decided in reference to referenda issues and not to the election of candidates.<sup>81</sup> The law remained in place until the BCRA was passed and the Supreme Court rendered its *Austin* decision.

The Court carefully distinguished the decision in *Austin*, where the Michigan Chamber of Commerce was prohibited from endorsing a candidate for office. In *Austin* the law was upheld by the Court based on a new rationale: antidistortion. “*Austin* found a compelling governmental interest in preventing ‘the corrosive and distorting effects of immense aggregations of wealth.’”<sup>82</sup> This rationale is noted in the BCRA but is combined with two other rationales: anticorruption and shareholder protection. The Court took issue with both of these rationales.

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<sup>76</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)

<sup>77</sup> 15 U.S.C. § 1021

<sup>78</sup> 424 U.S. 1 (1976)

<sup>79</sup> 435 U.S. 765 (1978)

<sup>80</sup> *Citizens United v. FEC*, 558 U.S. 310, 347 (2010)

<sup>81</sup> *Citizens United v. FEC*, 558 U.S. 310, 347 (2010)

<sup>82</sup> *Citizens United v. FEC*, 558 U.S. 310, 348 (2010)

First, if the antidistortion rationale were legitimate, the Court said, then the government could ban any form of communication by a corporation based solely on the speaker's identity. Although, the Court said, the FEC had argued that it has never "applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge."<sup>83</sup> This rationale for the ban on speech conflicted with the spirit of the First Amendment. Although in *Austin* the Supreme Court held that the government had a responsibility to limit corporations' ability to speak in order to balance the marketplace of ideas, "*Buckley* rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections,'"<sup>84</sup> the Court said. This is the case even if the public's contributions to the corporation have little to do with the political leaning of the corporation.<sup>85</sup> This provision would also need to make exceptions for news corporations. It has been established that exceptions to laws for media are unconstitutional.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale...the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.<sup>86</sup>

Kennedy also noted that the BCRA did not target large aggregations of wealth, but simply the corporate forms of wealth. If the laws aimed at preventing corruption by the wealthy, Kennedy

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<sup>83</sup> *Citizens United v. FEC*, 558 U.S. 310, 349 (2010)

<sup>84</sup> *Citizens United v. FEC*, 558 U.S. 310, 350 (2010)

<sup>85</sup> *Citizens United v. FEC*, 558 U.S. 310, 351 (2010)

<sup>86</sup> *Citizens United v. FEC*, 558 U.S. 310, 352 (2010)

said, the law should be defined as such.<sup>87</sup> “Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures.”<sup>88</sup>

The Court also disapproved of the anticorruption rationale in *Austin*. The Court in *Citizens United* said, the FEC had argued that “corporate political speech can be banned in order to prevent corruption or its appearance.”<sup>89</sup> In *Buckley* the Court had limited corporations’ ability to make direct contributions to candidates based on the fear of *quid pro quo* corruption.<sup>90</sup> This limitation did not extend to independent expenditures because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”<sup>91</sup>

Another rationale for section 441b’s ban is that the government has an interest in protecting dissenting shareholders in corporations. However, Justice Kennedy found the statute “both underinclusive and over inclusive.” The Court said:

...the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders.<sup>92</sup>

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<sup>87</sup> *Citizens United v. FEC*, 558 U.S. 310, 352 (2010)

<sup>88</sup> *Citizens United v. FEC*, 558 U.S. 310, 356 (2010)

<sup>89</sup> *Citizens United v. FEC*, 558 U.S. 310, 356 (2010)

<sup>90</sup> *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)

<sup>91</sup> *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)

<sup>92</sup> *Citizens United v. FEC*, 558 U.S. 310, 362 (2010)

While Kennedy acknowledged concerns about foreign influence over politics,<sup>93</sup> he nonetheless, attacked the *Austin* decision.

According to Kennedy, *Austin* stands as the only case in which the court found that corporate independent expenditures may be banned. Thus, the majority in *Citizens United* found itself bound to abandon the principle of *stare decisis*, the principle in British law that past judgments should stand and that undergirds the doctrine of precedent. *Stare decisis*, Kennedy said, was not an absolute rule of law, but was a guide.<sup>94</sup> Kennedy noted that there were certain principles that the Court could apply to circumvent precedent. The majority in *Citizen United* found that *Austin* was not well reasoned, and therefore should be overruled. Kennedy explained that, when defending the decision in *Austin*, the Court had focused on the corruption rather than the antidistortion rationale. This avoidance, the majority saw as an admission of the weakness of the Court's rationale. On the basis of this and a few other reasons, the Court found that it was justified in overruling *Austin*, *Austin* and returning "to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity." The Court added, "No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."<sup>95</sup>

In addition to *Austin*, The Supreme Court decision partly overturned *McConnell*. And, with *Austin* gone, the Court eliminated all restrictions on corporate independent expenditures, thereby invalidating "not only "BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy."<sup>96</sup>

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<sup>93</sup> *Citizens United v. FEC*, 558 U.S. 310, 362 (2010)

<sup>94</sup> *Citizens United v. FEC*, 558 U.S. 310, 363 (2010)

<sup>95</sup> *Citizens United v. FEC*, 558 U.S. 310, 363 (2010)

<sup>96</sup> *Citizens United v. FEC*, 558 U.S. 310, 363 (2010)

However, the Court resisted Citizen’s United’s challenge to the disclaimer and disclosure requirements in the BCRA.

## **Dissent**

Justice John Paul Stevens wrote the dissent, joined by justices Ginsberg, Breyer and Sonia Sottomayor, in what is generally considered a spirited argument. Justice Stevens disagreed with nearly every rationale used by the majority to reach its decision. The first point made by Stevens was that the question of whether or not to overturn *Austin* and parts of *McConnell* should never have been addressed by the Court because there was no basis for revisiting the decision based on the arguments before the Court<sup>97</sup> Justice Stevens said, “Our colleagues’ suggestion that ‘we are asked to reconsider *Austin* and, in effect, *McConnell*,’ would be more accurate if rephrased to state that ‘we have asked ourselves’ to reconsider those cases.”<sup>98</sup>

Stevens said that Citizens United had never filed a facial challenge to the BCRA at the Supreme Court level. The facial challenge filed at the district court level had been dismissed and had not been revisited by Citizens United in its appeal to the Supreme Court.<sup>99</sup> Thus, Citizens United’s challenge to *Austin*, was done on an as-applied basis and was not a challenge to the constitutionality of the decision.

The Court’s decision to invalidate *Austin* and *McConnell*, Stevens wrote, stems from a lack of judicial restraint.<sup>100</sup> Justice Stevens cites a long standing principle of the Court that it

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<sup>97</sup> Citizens United v. FEC, 558 U.S. 310, 396 (2010)

<sup>98</sup> Citizens United v. FEC, 558 U.S. 310, 396 (2010)

<sup>99</sup> Citizens United v. FEC, 558 U.S. 310, 397 (2010)

<sup>100</sup> Citizens United v. FEC, 558 U.S. 310, 399 (2010)

should never anticipate a constitutional issue where none is being argued, and that the Court should act with prudence so as not to undermine good law. Justice Stevens used a grand analogy, “The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well.”<sup>101</sup>

When Citizens United first brought its action against the FEC, they did so on a facial challenge against section 203 of the BCRA. In preliminary hearing at the District Court level, the FEC requested time to gather evidence of the actual effects of section 203 on corporations and labor unions. Before such information could be gathered, Citizens United retracted its facial challenge in favor of the as-applied challenge. Hence a facial challenge was never before the Court and when the Supreme Court decided to rule on a facial challenge, it gave Citizens United “perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal,” Stevens said.<sup>102</sup>

Stevens therefore challenged the Court’s decision to rule on the facial validity rather than on an as-applied basis, accusing the majority decision of overreach. He said, “[t]he fact that a Court can hypothesize situations in which a statute might, at some point down the line, pose some unforeseen as-applied problems, does not come close to meeting the standard for a facial challenge.”<sup>103</sup>

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<sup>101</sup> Citizens United v. FEC, 558 U.S. 310, 399 (2010)

<sup>102</sup> Citizens United v. FEC, 558 U.S. 310, 400 (2010)

<sup>103</sup> Citizens United v. FEC, 558 U.S. 310, 400 (2010)

Apart from the fact that the majority's decision fell outside of the scope of the original case, Stevens also criticized the 'chilling effect' rationale used by the Court to justify the facial challenge of section 203 of the BCRA. There was no evidence, the Justice said, that these provisions have had any negative effect on the amount or quality of political speech. In fact, previous Supreme Court cases, namely *FEC v Wisconsin Right to Life, Inc.*<sup>104</sup> carved out specific protection for all corporate speech on topics other than express advocacy. Thus, the narrowest grounds had already been established by the Court in *Wisconsin Right to Life*, leaving little room for a facial challenge.<sup>105</sup>

While Justice Stevens acknowledged that the majority's claim that certain as-applied challenges led invariably to questions of constitutionality had some merit,<sup>106</sup> The challenge brought by Citizens United was that provisions of the BCRA did not apply to the movie *Hillary* because of its video-on-demand status and the organization's status as a non-profit funded by individuals. "Success on either of these claims would not necessarily carry any implications for the validity of § 203 as applied to other types of broadcasts, other types of corporations, or unions," Stevens said.<sup>107</sup>

After reviewing the reason why the Court was erroneous in its decision to rule on facial validity rather than the as-applied challenge that was before it, Justice Stevens noted that there were three ways the Court could have decided the case in favor of Citizens United on narrower grounds that did not interfere with the precedent. First, the Court could have ruled that video-on-demand broadcasts do not qualify as electioneering communication under section 203 of the

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<sup>104</sup> 551 U.S. 449 (2007)

<sup>105</sup> Citizens United v. FEC, 558 U.S. 310, 404 (2010)

<sup>106</sup> Citizens United v. FEC, 558 U.S. 310, 404 (2010)

<sup>107</sup> Citizens United v. FEC, 558 U.S. 310, 404 (2010)

BCRA.<sup>108</sup> Secondly, the Court could have expanded the exceptions carved out in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*<sup>109</sup> These exceptions were made for groups whose sole purpose was political activity and whose treasury funds were funded predominantly through individuals and not for-profit corporations. An expansion of these exceptions “would be perfectly easy to understand and administer.”<sup>110</sup> Lastly, the Court could have simply accepted Citizens United’s as-applied constitutional challenge.

Justice Stevens moved on to look at the Court’s rationale for overturning *Austin*, and its subsequent divergence from the principle of *stare decisis*. Stevens said that the Court majority took the decision to overturn *Austin*, not because of evidence of its weakness, but because of a general distaste for the case. Thus, Stevens said there was no empirical evidence of either the claim by the majority that *Austin* was poorly reasoned or that it has been subsequently ‘undermined by experience,’ but.<sup>111</sup> Furthermore, Stevens said by abandoning *stare decisis*, and in overturning *Austin*, the Court effectively undermined every case at the federal and state level that had relied on its findings. “The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating BCRA,” Stevens said. “The total record it compiled was 100,000 pages long. Pulling out the rug beneath Congress after affirming the constitutionality of § 203 six years ago shows great disrespect for a coequal branch.”<sup>112</sup> Justice Stevens eloquently asserts that “the only thing that has changed since *Austin* and *McConnell* is the composition of this Court.”<sup>113</sup>

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<sup>108</sup> Citizens United v. FEC, 558 U.S. 310, 406 (2010)

<sup>109</sup> 479 US 238 (1986)

<sup>110</sup> Citizens United v. FEC, 558 U.S. 310, 407 (2010)

<sup>111</sup> Citizens United v. FEC, 558 U.S. 310, 409 (2010)

<sup>112</sup> Citizens United v. FEC, 558 U.S. 310, 412 (2010)

<sup>113</sup> Citizens United v. FEC, 558 U.S. 310, 414 (2010)



The dissent also questioned the merits of the majority’s rationale for overturning *Austin*. First, Stevens said, the majority’s claim that *Austin*, *McConnell*, and section 203 of the BCRA constitute a ‘ban’ on political speech was incorrect since *Austin* and *McConnell* both “provide exemptions for PACs, separate segregated funds established by a corporation for political purposes.”<sup>114</sup> The BCRA also left stockholders, families, and employees free to create separate funds for purposes of their political speech. The majority had said that the PACs are burdensome to administer, but Justice Stevens countered that PACs are no more burdensome than the disclosure and disclaimer requirements upheld by the majority opinion.<sup>115</sup> Stevens said:

In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all Citizens United needed to do to broadcast Hillary right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America," Citizens United Political Victory Fund, <http://www.cupvf.org/>.<sup>116</sup>

Justice Stevens also took exception to the majority’s assertion that the cases and provisions overturned in *Citizens United* discriminated on the basis of the speaker’s identity and that such discrimination was unconstitutional. But Stevens noted that, “we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.”<sup>117</sup> For Stevens, these exceptions were appropriate when the government had a legitimate interest in curtailing the speaking rights of these individuals. Justice Stevens agreed with the majority that political speech was afforded the most protection under the First

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<sup>114</sup> Citizens United v. FEC, 558 U.S. 310, 415 (2010)

<sup>115</sup> Citizens United v. FEC, 558 U.S. 310, 416 (2010)

<sup>116</sup> Citizens United v. FEC, 558 U.S. 310, 419 (2010)

<sup>117</sup> Citizens United v. FEC, 558 U.S. 310, 420 (2010)

Amendment. Nonetheless, even this type of speech, the Justice said, can be regulated in special circumstances.<sup>118</sup> In cases involving the corporate form rather than the individual, regulating political speech is even more reasonable to Justice Stevens.

To illustrate his point, Justice Stevens provided a historical account of what the Framers regarded as the corporate form and what rights these institutions held. The Justice does this also to point out some seeming inconsistencies with the majority's idea of the First Amendment's original intention. Justice Stevens also quoted historical scholars who identify that "[t]hose few corporations that existed at the founding were authorized by grant of a special legislative charter. Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation's powers and purposes."<sup>119</sup> Thus, corporation had traditionally relied on the government for the authority to use any powers, whether or not the power related to speech. The constitutional framers, Stevens, argues, would have had a distrust of the corporate business form and almost certainly did not envision corporations taking advantage of the First Amendment's free speech clause.<sup>120</sup>

From the historical context of the Free Speech Clause, Justice Stevens looked to the legislative history of corporate speech. The first piece of legislature that the Justice looked upon was the 1907 Tillman Act.<sup>121</sup> This act banned all corporate donations to candidates or parties. The act noted the evils that corporate wealth could bring to electoral process. The act had two basic considerations: "first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of

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<sup>118</sup> Citizens United v. FEC, 558 U.S. 310, 422 (2010)

<sup>119</sup> Citizens United v. FEC, 558 U.S. 310, 426 (2010)

<sup>120</sup> Citizens United v. FEC, 558 U.S. 310, 429 (2010)

<sup>121</sup> 34 Stat. 864

corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed.”<sup>122</sup> Justice Stevens also noted the Taft-Hartley Act of 1947<sup>123</sup> which extended the ban on corporate contributions to include corporate independent expenditures.

From this point, Justice Stevens turned to the Federal Election Campaign Act (FECA) of 1971<sup>124</sup> in which the government “codified the option for corporations and unions to create PACs to finance contributions and expenditures forbidden to the corporation or union itself.”<sup>125</sup> This piece of legislature, Stevens said, prompted the decision in *Buckley v Valeo* in which the constitutionality of FECA was challenged almost entirely. In this case, the Court had distinguished between contributions and expenditures, “but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures,” Stevens said.<sup>126</sup> These treatments were carefully explored in *FEC v Wisconsin Right to Life, Inc.* and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* In both cases, special exemptions were made to allow corporations to use general treasury funds to make independent expenditures, and in both cases “Not a single Justice [in the majority or dissent] suggested that regulation of corporate political speech could be no more stringent than of speech by an individual.”<sup>127</sup> Justice Stevens also listed several court decisions that had affirmed the holding in *Austin*, the next in the line of cases that support the dissent.

Stevens pointed to the fact that corporations were still, after *Austin* circumventing the regulations that sought to prevent them from making these independent expenditures. It was this

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<sup>122</sup> *Citizens United v. FEC*, 558 U.S. 310, 433 (2010)

<sup>123</sup> 29 U.S.C. § 401-531

<sup>124</sup> 86 Stat. 3

<sup>125</sup> *Citizens United v. FEC*, 558 U.S. 310, 436 (2010)

<sup>126</sup> *Citizens United v. FEC*, 558 U.S. 310, 436 (2010)

<sup>127</sup> *Citizens United v. FEC*, 558 U.S. 310, 438 (2010)

environment that led to the adoption of the BCRA and its infamous § 203. These regulations, nonetheless, had been affirmed in *McConnell* where the majority cites, again, the rationale of *Austin* and its protection from the large aggregates of wealth amassed with help of the corporate form.<sup>128</sup>

Justice Stevens also disagreed with the majority's use of *Buckley* and *Bellotti*, to discount *Austin* as an outlier in campaign jurisprudence. "In the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970's."<sup>129</sup> The majority saw the equalization of voices as a notion that was foreign in First Amendment law and cited a paragraph from *Buckley* to illustrate this point. However, Stevens said, this interpretation of *Buckley* was erroneous. Stevens said that *Austin's* rationale was not based mainly in the equalization of voices, or favoring some voices over others, but rather on "the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars."<sup>130</sup> He, therefore, found it implausible "that *Buckley* covertly invalidated FECA's separate corporate and union campaign expenditure restriction, § 610 (now codified at 2 U.S.C. § 441b), even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after."<sup>131</sup>

Justice Stevens also questioned the majority's adherence to *Bellotti*. The Court, Stevens says, relies on a faulty view of *Bellotti* that rests on *Bellotti's* holding that forbade distinctions between individual and corporate independent expenditures.<sup>132</sup> Justice Stevens said that the *Bellotti* Court ruled with a designed limitation. The majority in *Bellotti* noted that "our

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<sup>128</sup> Citizens United v. FEC, 558 U.S. 340, 440 (2010)

<sup>129</sup> Citizens United v. FEC, 558 U.S. 340, 441 (2010)

<sup>130</sup> Citizens United v. FEC, 558 U.S. 340, 442 (2010)

<sup>131</sup> Citizens United v. FEC, 558 U.S. 340, 443 (2010)

<sup>132</sup> Citizens United v. FEC, 558 U.S. 340, 443 (2010)

consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office."<sup>133</sup> Unlike the *Citizens United* case, the issue in *Bellotti* was one of referenda and the ban on expenditures in Massachusetts at that time had left no alternatives for corporations to speak through PACs or any other means. These distinctions, Stevens argued, align the rationale of *Bellotti* with that of *Austin* and *McConnell*.

Next, Justice Stevens tackled the rationales and the interests at stake in the cases discussed above and reasons why these interests were pertinent to *Citizens United*'s case. Justice Stevens turned first to the anticorruption rationale. He said the Court's position on corruption was that a "belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics."<sup>134</sup> This idea did not, however, align with the evidence that Congress found when preparing the BCRA. The Judge tasked with reviewing this record found many "relationships of dependency" and "threats of corruption that are far more destructive to a democratic society than the odd bribe."<sup>135</sup> Even the appearance of corruption is rationale enough for regulating campaign finance. The *Buckley* Court noted this in its opinion. The confidence of the voters is key in a representative democracy. "A democracy cannot function effectively when its constituent members believe laws are being bought and sold."<sup>136</sup> While *Buckley* left the question of independent expenditures out of its final opinion, it left the door open to allow later regulations to be passed. "The opinion reasoned that an

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<sup>133</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978)

<sup>134</sup> *Citizens United v. FEC*, 558 U.S. 340, 443, 448 (2010)

<sup>135</sup> *Citizens United v. FEC*, 558 U.S. 340, 443, 449 (2010)

<sup>136</sup> *Citizens United v. FEC*, 558 U.S. 340, 443, 453 (2010)

expenditure limitation covering only express advocacy (i.e., magic words) would likely be ineffectual, a problem that Congress tackled in BCRA.”<sup>137</sup>

Justice Stevens’ views on the anticorruption rationale center around the reports made in the months leading up to the BCRA. These reports catalogue corruption in the form of independent expenditures. Although the majority had said there was no actual proof of corruption in the form of selling votes for expenditures, Stevens reasoned that “[i]t would have been quite remarkable if Congress had created a record detailing such behavior by its own Members.”<sup>138</sup> Justice Stevens quotes the briefings in his dissent, noting that “[o]ne prominent lobbyist went so far as to state, in uncontroverted testimony, that ‘unregulated expenditures--whether soft money donations to the parties or issue ad campaigns--can sometimes generate far more influence than direct campaign contributions.’”<sup>139</sup> This influence is the precise thing the *Austin*, the BCRA, and *McConnell* sought to curb through regulation of corporate independent expenditures.

Like the majority, Justice Stevens focused special attention on *Austin’s* antidistortion rationale, but he disagreed with their label of the antidistortion rationale as a discriminatory legislation aimed at silencing or favoring a viewpoint. Stevens said that the rationale is simply another anticorruption reasoning insofar as it “is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process.”<sup>140</sup> From here Stevens retraced *Austin’s* definitions of corporations in order to illuminate the need for special regulation separate from the regulation of individual independent

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<sup>137</sup> Citizens United v. FEC, 558 U.S. 340, 453 (2010)

<sup>138</sup> Citizens United v. FEC, 558 U.S. 340, 455 (2010)

<sup>139</sup> Citizens United v. FEC, 558 U.S. 340, 456 (2010)

<sup>140</sup> Citizens United v. FEC, 558 U.S. 340, 464 (2010)

expenditures. These special definitions include limited liability, perpetual life, favorable treatment in amassing wealth, the ability to be controlled by foreign interests, and a structure of employees that maximize effectiveness.<sup>141</sup> Stevens then raised the question of who speaks when a corporation uses general treasury funds to distribute ads. “Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque/e to management,” Stevens said.<sup>142</sup> If the shareholders are not speaking, and corporations are left with various outlets for speech elsewhere, what then is the majority’s claim to First Amendment protection?

Justice Stevens blasted the majority’s reliance in its decision on listener protection in the marketplace. The Court had focused “not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say.”<sup>143</sup> The majority had said that regulating the electioneering communication of a corporation deprives the marketplace of certain ideas. Stevens contended the contrary, that the corporate form allows for easier accumulation of wealth than does the individual form. The accumulation of wealth being the corporation’s main purpose, it is easy surmise that any viewpoint a corporation wished to express would be in pursuit of further capital. In elections where corporations’ speech is controlled by foreign interest, the viewpoints of the corporation would have little to know reflection on the voters’ viewpoints. Also, if corporations with large aggregations of wealth buy the majority of advertising time in the days preceding an election, it would create the view that

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<sup>141</sup> Citizens United v. FEC, 558 U.S. 340, 465 (2010)

<sup>142</sup> Citizens United v. FEC, 558 U.S. 340, 467 (2010)

<sup>143</sup> Citizens United v. FEC, 558 U.S. 340, 469 (2010)

elections were controlled by corporations.<sup>144</sup> Justice Stevens attacks, also, the majority's position that there can be no such thing as too much speech, and that silencing corporations deprives the electorate of valuable viewpoints. "In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process."<sup>145</sup>

The majority believed that the exemption for media corporations under § 203, meant that exemptions were required for other corporations. The majority saw this as an identity-based discrimination. To this the Justice replies:

Under the majority's view, the legislature is thus damned if it does and damned if it doesn't. If the legislature gives media corporations an exemption from electioneering regulations that apply to other corporations, it violates the newly minted First Amendment rule against identity-based distinctions. If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.<sup>146</sup>

The majority had also dismissed the shareholder protection rationale finding it unconvincing. While Justice Stevens found some merit in the position that some shareholders may disagree with the electioneering of a corporation in which they have interest, he agreed with the majority that this rationale was weak on its own. Rather, as in *Austin*, the Justice sees this rationale as complementary to the antidistortion rationale in two ways. First, it helps identify that when a corporation speaks it may bolster the views of some shareholders while suppressing others. Secondly, it gives more reason to the idea that corporate expenditures have little to nothing to do with the views of the electorate. "The shareholder protection rationale, in other words, bolsters

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<sup>144</sup> Citizens United v. FEC, 558 U.S. 340, 470 (2010)

<sup>145</sup> Citizens United v. FEC, 558 U.S. 340, 472 (2010)

<sup>146</sup> Citizens United v. FEC, 558 U.S. 340, 474 (2010)



the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest.”<sup>147</sup>

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<sup>147</sup> Citizens United v. FEC 558 U.S. 340, 478 (2010)

## CHAPTER THREE:

### DISCUSSION

#### Literature Review

The *Citizens United* decision has been criticized and discussed at length. Multitudes of television personalities, political theorists, and lawyers have debated the issue of corporate expenditures. The print media and the internet have been abuzz with opinions on both sides. There have been more than a few scholarly articles written on the subject. The following scholarly articles are among the most recent and the most important additions to the discussion.

Before considering critiques of *Citizens United*, it is important to understand the doctrine of *stare decisis* which was discussed at length in the decision and dissent. The doctrine of *stare decisis*, Latin for let past decisions stand, from its inception in British law has been the basis for judicial precedent. The court's reliance on judicial precedent is a main protection that citizens have against arbitrariness and bias in judicial decisions. According to Berland (2011) in the U.S. *stare decisis* "helps ensure that the law develops 'in a principled and intelligible fashion'" (p. 699). While admittedly, "not an inexorable command," *stare decisis* "promotes the even handed predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (Berland, 2011, p. 699). Berland (2011) suggests that *stare decisis* is needed precisely because "what is 'right' is often not strictly a legal question but instead in part a political question determined by the make

up and disposition of the Supreme Court Justices" (p. 699). This position seems to fall squarely within the discussion of what happened in Citizen's United where a majority conservative five justices overturned precedent established in 1990 by a much larger majority. That a small majority in the Supreme Court could in one fell swoop override an existing precedential decision is troubling for the judicial system and the people's right to justice.

Richard Briffault (2011) discusses the *Citizens United* case focusing attention on the disclosure rules contained therein and the effects of the case on political nonprofit entities. Briffault (2011) explains that the "principal focus of both legislative and litigation efforts since *Citizens United* has been disclosure, that is the publicizing of the names and affiliations of the individuals and firms financing campaign activity" (p. 2). The move in this direction has been a result of the "current public controversy over the electoral role of nonprofits" and "the lack of disclosure of the identities of the donors to these nonprofits" (Briffault, 2011, p. 2). The article explores the history of campaign finance law at some length. It is important to note that special attention is given to *Austin v. Michigan Chamber of Commerce*<sup>148</sup> and *McConnell v. FEC*<sup>149</sup> in this article. These two cases are of particular importance because they reflect the Supreme Court's opposing view of corporate independent expenditures in elections.

The fact that the author spends significant space on these cases is an early indication of opinion. After the extensive discussion of case history, Briffault (2011) identifies the possible problems within the disclosure requirements in *Citizens United*. "There is considerable evidence that business corporations prefer not to spend in their own names but, instead, to act through nonprofit intermediaries, such as (c)(4) advocacy organizations or (c)(6) trade associations or

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<sup>148</sup> 494 U.S. 652 (1990)

<sup>149</sup> 540 U.S. 93 (2003)

chambers of commerce. This can facilitate the pooling of funds from many like-minded corporate donors and the hiring of political strategists to determine where those funds can be used to the greatest political effect. Under current law, it may also make it possible for the corporations actually funding the nonprofit...to avoid disclosure” (Briffault, 2011, pp. 9-10). The author then takes time to explain every nuance of the disclosure dilemma. This includes defining what the disclosures contain, when disclosures take place, differences between individual and corporate donor disclosures, and the differences between donations for campaign finance and communication. In conclusion, Briffault calls for Congress to create more stringent and straight-forward disclosure laws. This, he believes can be achieved by following some examples being set by State legislators, including Florida, right now (Briffault, 2011, p. 24).

It is important now to refer back to Meiklejohn’s theory of self governance which highlights the role in a democracy of the people. If the system of government is to operate at its fullest capacity, the public must be informed (Meiklejohn, 1967). The disclosure subtleties and shadowy functions of Political Action Committees (PAC) make it difficult for the public to be truly informed about the stakeholders in elections (Raskin 2012).

Nancy J. Whitmore’s (2012) article *Facing the Fear: A Free Market Approach for Economic Expression* deals with the realities of “deceptive economic activities” that face the country in the form of uninhibited corporate political speech (p. 1). The author’s approach to the subject from a First Amendment theoretical background examines the effect of the decision on the understanding the meaning of free speech. The theory most often in Supreme Court freedom of expression decisions has been the Marketplace of Ideas theory discussed above. This article tracks how the court’s reading of the First Amendment and the Marketplace theory have changed

over the years. Whitmore (2012) remarks that, in the beginning, around 1791, courts viewed the marketplace model as the epitome of free speech.

In First Amendment jurisprudence, public discussion and debate have become deep-rooted and fundamental value that is uniquely tied to an unfettered marketplace. To properly function, public discussion must exist in an open, self-regulating marketplace. A marketplace in which coerced or forced silence is allowed to exist will not reap the benefits sound reasoning and thoughtful deliberation are said to produce. On the contrary, a heavily regulated marketplace will eventually lead to repression, hate and instability. (p. 26)

Whitmore (2012) also discusses decisions over the years in which the Court considered individual fulfillment and self-governance theories, but notes that both have been overshadowed by the marketplace approach to free speech. The author stresses that the Court in *Citizen's United* said that limiting independent expenditures by corporate entities would discriminate against speech based solely on the speaker's economic status (Whitmore 2012). But Whitmore (2012) concludes that, in post-*Citizens United* years, government will face a "regulatory dilemma" when trying to incorporate economic expression into the marketplace of ideas (p. 61). The Court has set a precedent that no speech should be stopped or banned, but has also been tasked with applying regulations to deter the dissemination of false, misleading or distorted information from groups with immense wealth (p. 62). Rather than greater restriction, Whitmore (2012) notes the need for greater regulation.

Wilst (2011) looks at the Court's decision from the health industry's perspective. The author expresses a fear that corporate funds spent on advertising for or against policy issues or on campaigns for office could negatively affect the health industry (Wilst, 2011). As an example of the type of risk, the author uses "[c]orporate campaign contributions related to the health insurance reform debate of 2009 to 2010" (Wilst, 2011, p. 1174). In that race, "[c]orporate

campaign contributions targeted members of congress who had direct influence over health care legislation” (Wilst, 2011, p. 1174). Wilst (2011) thus opposes the *Citizens United* decision. Much of the article is focused on the negative effect of corporate power, and especially the spending power of insurance companies, on the health care industry and the health of the population at large (Wilst 2011). Though not the first author to do so, Wilst notes the ever rising cost of running a campaign for federal office. “In the 2008 federal election cycle, the average cost to win a US Senate seat was more than \$8.5 million and to win a House campaign, \$1.4 million” (Wilst, 2011, p. 1175). That meant that the Senate candidate would have to “raise more than \$23,000 every day for a year,” and a House candidate would need to raise “almost \$4,000 each day for a year” (Wilst, 2011, p. 1175). Thus, Wilst (2011) notes that in the wake of *Citizens United* no campaign for political office can be run without corporate funding.

Richard L. Hasen (2011) also criticizes the decision in *Citizens United* because he says it will cause confusion for lawmakers in the future. Hasen (2011) argues that the Court will have trouble now in facing campaign finance laws that question the scope of the ruling. One major issue discussed in Hasen’s (2011) article is the possibility of foreign monies being used to influence American politics.

Though these seem to be reasonable arguments in favor of a ban on foreign campaign spending, they run counter to many of the key assertions and suppositions of the *Citizens United* majority. As the dissent noted, a foreigner spending limitation would be an identity-based restriction, which under the majority’s view would interfere with the free speech rights of those who would want to hear what might be said in an election about a candidate. If more speech is always better, and if ‘[t]he First Amendment protects speech and speaker, and the ideas that flow from each,’ then it is hard to see the basis for limiting speech simply by the identity of the speaker. In addition, the majority has declared that independent spending simply cannot corrupt, and that in any case ingratiation and access are not corruption. (p. 603)

The author notes that, to avoid this effect, the US government may need to impose limitations or bans on foreign campaign contributions but could not do so without some “doctrinal incoherence” with the *Citizens United* case (Hasen, 2011, p. 604). Hasen (2011) also brings up the possibility of corruption in determining a criminal case as a result of corporate spending in a judicial race (p. 613). The Court struck down this possibility, but Hasen asserts that limiting expenditures in one instance for the appearance of corruption but not in another case seems inconsistent (Hansen, 2011).

The impact of the *Citizens United* decision has been examined in several different areas. Indeed, every day more authors publish opinions on the issues at stake. Behrens (2012) has looked at the impact this decision may have in the tax world, others have studied the impact of the decision in political knowledge gap (Nadeau et al 2008). The author of greatest interest to this study is Lawrence Lessig, a professor of law at Harvard Law School. Lessig has written two particularly poignant critiques of the decision in *Citizens United*, one of which was delivered before the Senate. Lessig’s testimony was given on July 24<sup>th</sup> 2012 and later published in *Progressive* (Lessig 2012).

Lessig in his article, *The Founders Versus the Funders* argues that the last decades have seen a dramatic shift of influence in politics. This shift of influence is, as his titles suggests, from the people served in elections to those who fund elections (Lessig 2012). This, move Lessig suggests, is the result of corruption. The democracy now depends mainly on the funders of elections and is not, as the Federalist papers suggest it was intended to be, ‘dependent on the People alone’ (Lessig 2012). In the past few decades, he writes, we have “evolved a government that is not dependent on the people alone, but that is also dependent on the Funders. That different and conflicting dependence is a corruption of our Framers’ design, now made radically

worse by the errors of *Citizens United*' (Lessig, 2012, p. 21). Lessig goes on to explain the different corporate forms that were involved in political influence before the *Citizens United* decision. Previous to the unlimited corporate independent expenditures allowed by *Citizens United*, there were two main ways corporations could engage in politics.

First was the 501c(4). These nonprofit entities could engage in political spending as long as political influence was not its primary purpose. "Thus, c(4)s had to spend 50 percent or more of their funds on activities other than 'political influence.' In this way, the influence of c(4) contributions was effectively taxed at a 50 percent rate" (Lessig, 2012, p. 21).

The other way a corporate body could engage in political speech was by contributing "to independent political committees organized under section 527 of the Internal Revenue Code" (Lessig, 2012, p. 21). These committees could spend 100% of their funds on political activity so long as they did not engage in 'express advocacy.' Corporations could make unlimited contributions to these PACs as long as their political communications were not deemed express advocacy. In this way, corporations were free of the 50% tax of c(4)s but were constrained under fear of retribution by the FEC if their indirect advocacy were to be seen as direct (Lessig 2012, p. 21). After *Citizens United*, the limit on contributions to 527s engaging in direct advocacy was removed. The unlimited size of these wholly political entities gave rise to the name 'SuperPACs.' These SuperPACs are responsible for the majority of political spending in the country now. Lessig cites statistics from the Sunlight Foundation that report "in the 2011-12 cycle [by October 2012] more than a quarter of a billion dollars ha[d] been raised by Super PACs" (Lessig 2012, p. 20). The SuperPACs obtain contribution from very few donors who donate in unlimited amounts. "In the current [2012] presidential election cycle, 0.000063 percent of America—that's 196 citizens—have funded 80 percent of individual Super PAC contributions



up to now. Only twenty-two Americans— that’s seven-onemillionths of 1 percent—account for 50 percent of that funding” (Lessig 2012, p. 20). Lessig (2012) closes this discussion with a call to action. He prescribes a shift back, back to the Framers’ idea of a representative democracy not dependent on campaign contribution by the wealthy, but dependent on the people alone (Lessig 2012).

In a 2010, Lawrence Lessig defines the type of corruption he sees in the post-*Citizens United* world. Lessig defines this new age as one of institutional corruption. In the article, *Democracy After Citizens United*, Lessig defines institutional corruption as “an influence, financial or otherwise, within an economy of influence, that weakens the effectiveness of an institution, especially by weakening public trust of that institution” (Lessig 2010, p. 11). The institution that Lessig (2010) deals with in this article is that of election to public office which he writes is weakened by this institutional corruption because campaigns are run by large contributions. These “contributions are (1) an influence, (2) within an economy of influence that has (3)...weakened the ability of Congress to do its work by (4)...weakening public trust in Congress” (Lessig 2010, p. 11). The idea here is not that Congress is entirely run by corrupt individuals with bad motives. It is that the entire system that Congress uses to enter into office, regardless of the individual morals of each candidate, breeds corruption by influence. This is an evolutionary fact, Lessig (2010) argues, as Congress depends on large monetary contributions to enter into a political race. It is this dependence that causes the corruption. “We all reward those whom we depend upon, whether or not such reward is consistent with our ideals or objectives” (Lessig 2010, p. 12). This type of corruption, though not as blatant an affront to our political morality, still carries a damaging stigma. As noted in *Buckley v. Valeo*, the court has an “interest in alleviating the corrupting influence of large contributions” because of the “danger of candidate

dependence on large contributions.”<sup>150</sup> Even before the *Citizens United* decision, in the original decisions where the Court opposed limiting independent expenditures, the court still noted the issue of political/monetary dependence. This system continues today. As Lessig (2010) points out “whether you get votes depends upon whether you can outspend your opponent; whether you can outspend your opponent in turn depends upon whether you can raise enough money or inspire others to spend money on your behalf” (p. 12). It is important to note the last line of that reasoning: inspire others to raise money on your behalf. This is how the democratic system in the U.S. works today, alive today in the form of SuperPACs, that endangers democracy with, at the very least, the appearance of corruption through dependence on funders rather than voters.

## **Conclusion**

*Citizens United* was decided primarily along party lines, with the majority being the five justices who had been appointed by Republican presidents, and the minority being the Democratic justices. This stark political division may well have been facilitated by the change in the guard on the Supreme Court bench. Certainly there is evidence that Rehnquist, based on his earlier posturings in the Court in cases such as *Bellotti* where he dissented on the bases that corporations were not natural persons and so should not be allowed to influence elections, may not have concurred with the conservative majority.

Essentially, the message from this decision appears to be that the Supreme Court justices are becoming more partisan in their decision making. This may also be true of the media as in the weeks following the decision, Brown (2011) found that cable stations were also divided in

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<sup>150</sup> 424 U.S. 1 (1976)

their coverage of the decision along partisan lines, with MSNBC being very critical of the decision, Fox swinging between defensiveness and neutrality and CNN, though attempting to remain unbiased, largely critical (Brown, 2011).

*Citizens United* flew in the face of more than a century of U.S. legislative and judicial practice and it drew tremendous criticism.

One of the major traditional arguments against corporate political speech was the effects on corruption of the political process, the very anti-distortion discussion that figured so heavily in the majority and minority opinions—the one denying their existence and the other affirming it.

In the 2012 presidential election, the first major election since *Citizens United*, some \$565,959,956 was spent by the now unshackled corporations toward the campaigns (Outside Spending 2012). While the majority of this, \$ 292,420,046 went to oppose President Obama (Outside Spending 2012). Notwithstanding the large amount of funds given toward the Republican campaign, Obama won convincingly, though not as convincingly as in 2008. It could be argued that this victory debunked the argument about corruption, however, it is the view of the researcher that this Election was an anomaly—in future elections corporate spending could have a greater impact on the outcome.

It is, therefore, troubling that, as it appears, in a whimsical moment, this slim majority on the Supreme Court led to reverse and specifically invalidate a direction in the law which has been in the making over one hundred years. Any analysis of this decision must address the rationale for the existing limits on corporate political speech before *Citizens United*.

The starting place should be *Buckley* and *Bellotti*, the two cases cited by the majority in communications. Neither case can be argued to be a bulwark for the relaxation of limits to corporate political speech.

The 1976 case, *Buckley*, while removing restrictions on expenditures, upheld restrictions on contributions by corporations to political campaigns, the former being pure speech that enjoyed full protection. Nonetheless, far from being remembered as a champion of freedom of corporate political communications, this case was the authority for imposing limits on political speech. *Bellotti*, on the other hand, has been distinguished because, as Stevens said in his dissent, the case involved a referenda question rather than actual involvement in election campaigns.

On the other hand, the majority's decision in *Citizens United* to overturn *Austin* has been criticized as unnecessary, highhanded, and self-serving by Stevens. As argued by Stevens it was also outside the Court's authority.

The summary above identifies many flaws in the majority's opinion in this case. It has been revealed, in the view of this research, that the decision in *Citizens United* was poorly reasoned. Furthermore, the principals espoused by the majority do not align with the free speech theories above. Certainly the Court had some theoretical ground with the Marketplace of Ideas, citing that more speech is always better than less. This does not necessarily mean that unlimited corporate independent expenditures will lead to a more robust political discourse. Indeed, the opposite may be true.

*Citizens United* destroyed a piece of the Bipartisan Campaign Reform Act which forbade corporate expenditure of electioneering broadcasts within 90 days of a federal election.<sup>151</sup> With this freedom to dominate airwaves, corporate interests and media gatekeepers have the ability to limit, restrict, or otherwise silence opinions that oppose corporate interests or high finance. The marketplace's theory that truth shall overcome falsity rests on the assumption that all opinions are aired and weighed against each other before a final decision is made on the validity of ideas (Mill, p.34 2003). Claims made within 90 days of the electoral process, especially claims made without the benefit of exposure to dissenting opinions, will not receive the benefit of being legitimized or refuted by collision with those silenced or marginalized ideas.

With no other way to be heard, many take to the streets. "The failures of existing media are revealed in the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to the inadequacy of old media as instruments to afford full and effective hearing for all points of view" (Barron, 1967 p. 1647). The sit-ins of the Occupy Movement are one indication of the failure of old media in the age of the internet. The rule of television has not ended and has furthered the inequality of information reception. This example of the Occupy movement can be used again in conjunction with Barron's observations: "It is a measure of the jaded and warped standards of the media that ideas which normally would never be granted a forum are given serious network coverage if they become sufficiently enmeshed in mass destruction and violence" (Barron, 1967 p. 1650).

If access were granted through peaceful means prior to demonstration, violence of all sorts could be avoided. This access should be allocated to those who have grievances with their government. Certainly no law should impede free speech, but some should protect it. "Is it too

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<sup>151</sup> 116 Stat. 81-116

bold a suggestion that it is necessary to ensure access to the media for unorthodox ideas in order to make effective the guarantee against repression?” (Barron, 1967 p. 1649).

The use of corporate funds further marginalizes ideas that afford no financial gain. Certainly ideas that oppose the institutions of high finance will never have the means to be heard. Access will be limited to the highest bidder and the finite resource that is ‘air-time’ will disappear behind a wall of conglomerated interests. Corporate monies have the power to flood the marketplace so that no citizen can be secure in his or her electoral decisions. Without proper information from all points of view, as Meiklejohn would argue, the electorate has less power to effectively run its representative democracy. Indeed, as some critics have said, the current democracy is not one that is run by the people. This is the corruption, or even appearance of corruption that so many political speech and campaign finance cases seek to alleviate. As many claim, the *Citizens United* case is a further retreat into a system of corruption.

These fears have been realized at the State level recently. In Florida, to battle the effects of corporate spending and shadowy disclosure, the State House and Senate passed two laws. These laws were a response to the overwhelming evidence of corruption in Florida’s politics. According to Department of Justice data, Florida was number one in total federal public corruption convictions between 2000 to 2010 (Wilcox & Krassner 2012). These corruption charges are said to stem from the use of political committees. Florida’s current campaign finance laws permit political committees called Committees of Continuous Existence (CCE). These committees “can collect unlimited campaign checks but may not expressly advocate for candidates” (Klas 2013a). As such, these committees, critics say, are used as giant checkbooks by political candidates. The CCEs are referred to often as “slush funds” because of their unlimited size and relatively shadowy disclosure requirements (Klas 2013b). House Bill 569

would eliminate some of these issues. The entire bill is related to the restructuring of the law to effectively eliminate CCEs and to encourage greater transparency through disclosure.

While Florida is attempting to defend against large aggregations of wealth, the Supreme Court is considering an opposite tract. Currently in litigation in the Supreme Court is the case of *McCutcheon v. FEC*. This case involves Shaun McCutcheon and the Republican National Committee (RNC) who brought action against the FEC to challenge the individual campaign contribution limits (Martin 2012). The case could eliminate the little restrictions left on big money. If the limits are lifted, not only will corporations be able to spend unlimited money on electioneering communications, but individual donors will be able to fund elections without restriction. This would lead to a democracy dependent on the richest donors with the best corporate sponsorship. The influence, as Lessig (2012) described, would belong to the few rather than the many.

Though the case is now three years old, the impact of *Citizens United* is still being felt. Without this case, the face of politics would be vastly different. Without *Citizens United*, the BCRA and *Austin* would still limit corporate expenditures, and cases like *McCutcheons* would have little legal ground to argue before the Court. Because *Citizens United* introduced the idea that regulating election spending is tantamount to a ban on speech, the way elections are decided may be changed forever. These changes, though thought by some to be an expansion of political discourse, will mean the marginalization of ideas which are incongruous with the wealthiest few. The scarcity of time, space, and attention will be wholly dominated by an increasingly smaller number of views. This, in the opinion of this research, is incongruous with the First Amendment. As Barron and Baumbaur noted above, access to the press limits the Marketplace of Ideas. While television remains the dominant medium for political discourse, there will be a natural scarcity of

time, space, and attention. When corporations have unchecked spending power in the days before an election, these scarce resources will undoubtedly be overrun by corporate electioneering communications. This domination will deprive the voting public of minority opinions. If these opinions are removed from the Marketplace of Ideas, then all possible truths suffer, for they will lack collision with falsities, and all possible falsehoods will be left unchecked by a lack of available truth. Further, the voting public will be lacking a well-rounded information landscape from which to derive political ideas. When the populous is deprived of a robust and diverse political landscape, democracy suffers. As Meiklejohn suggests, only an informed electorate can rule a representative democracy efficiently. In the wake of *Citizens United*, a truly informed electorate seems unlikely, as does a true representative democracy, ruled at large by 'We the People' and not 'We the Few.'



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