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Judging the Justices: A Critical Analysis of Citizens United v. Federal Election Commission

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CLAREMONT MCKENNA COLLEGE

**JUDGING THE JUSTICES: A CRITICAL ANALYSIS OF CITIZENS UNITED V.
FEDERAL ELECTION COMMISSION**

**SUBMITTED TO
PROFESSOR WARD ELLIOTT
AND
DEAN GREGORY HESS
BY
CASSIE GURROLA**

**FOR
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Chapter 1: Introduction, Definitions and Clarifications, and Preview of Key Issues

Introduction

The United States Supreme Court's recent ruling on *Citizens United v. Federal Election Commission*, 558 US (2010) (hereafter to be referred to as "*Citizens*") has been one of the most controversial decisions in the history of the Court. This reversal of the appellate court decision, which was issued on January 21, 2010, has provoked an almost unparalleled level of unrest in both the public and political sphere. At its core, *Citizens* is essentially a case about the interpretation of the First Amendment; therefore it may not be surprising to understand the level of the public's interest in this influential decision. *Citizens* is of such noteworthy importance that President Obama directly referred to the case, albeit in a disparaging manner, in his State of the Union Address of 2010.¹ In addition to engaging with contentious issues of free speech, the *Citizens* ruling also covers a plethora of similarly controversial themes, such as the evolving status of corporations under the law, the threat of foreign companies influencing politics via United States-based subsidiary companies, and the possibility of freedom of expression and speech being restricted in other forms of communication. The potential impact that the *Citizens* decision could have on the citizens, and corporations in America is astounding. Therefore a thorough investigation of this case is well warranted. This paper will first provide a brief explanation of the basic facts and clarify a few of the important concepts that will be imperative to understanding this case; second, this analysis will examine the most critical arguments in

¹ Andrew Malcolm, "Obama's State of the Union Address: Criticism of the Supreme Court Campaign Finance Ruling," Top of the Ticket | Sunday Shows: Cantor, Plouffe, Trump, Blair, Ryan | Los Angeles Times, January 27, 2010, <http://latimesblogs.latimes.com/washington/2010/01/obamas-state-of-the-union-address-criticism-of-the-supreme-court-campaign-finance-ruling.html>.

Citizens as they are presented from both the concurring majority opinions and the dissenting opinions, in the effort to determine which side (if either) presents the more compelling case; and finally, this paper will explore a few of the potential consequences that could occur in the post-*Citizens* world. The goal of the following detailed analysis is not only to dissect and analyze the arguments from both sides of the bench, but also to determine whether the Court has aligned with precedent and its mandate in passing *Citizens*.

Ruling, Definitions and Clarifications

Before delving too deeply into the constitutionality of this fascinating case, a few basic facts about the case and clarifications of terminology would be helpful. Of primary importance is a description of the circumstances surrounding the original case that Citizens United eventually presented to the Supreme Court, to be followed by an elucidation of the changes to previous legislation that this case evoked, and a clarification of the most centrally relevant concepts. Finally, this section will conclude with a brief investigation as to whether banning a party from financially contributing to a campaign is tantamount to a violation of that party's First Amendment protections.

Citizens United is a non-profit, conservative corporation that sought to air a documentary, entitled *Hillary: The Movie*.² Citizens United used both movie theaters and “on demand” functions on television as a means of distributing this documentary, which qualified its method of dissemination as “public distribution.” This documentary was a 30-minute film that portrayed Senator Hillary Clinton in a negative manner. It should also be noted that the film was available

²Citizens United v. Federal Election Commission, 558 US ____ (2010) (Kennedy, A., opinion, 2).

“on demand” within 30 days of the primary election that Clinton was to participate in.³ *Hillary* was deemed to be an electioneering communication, which means that the film was interpreted as having no other purpose than to persuade voters to vote against Clinton. Because the film was “publicly distributed” within 30 days of a primary election and was considered to be an “electioneering communication” that was financed from the general treasury of a corporation, Citizens United was found to be in violation of § 441b of the Bi-Partisan Campaign Reform Act (BCRA).⁴ These are the main issues that the Supreme Court was considering when the *Citizens* case first appeared on the docket, and many of these fundamental concepts will be discussed in greater detail in later chapters. However, in an atypical gesture for the nine justices, the Court requested that both parties return with re-argumentation that integrated a far broader scope of arguments; 22 amicus briefs were filed after the Court requested to hear new arguments.⁵ More details will follow in Chapter 3 about judicial activism and *stare decisis*, but it is important for this initial analysis to be mindful of the fact that these were the original issues in the *Citizens* case.

Citizens United was found to be in violation of § 441b of BCRA, which sought to codify and update campaign finance reform. Also known as the McCain-Feingold Act, this piece of legislation considerably restricted the rights of corporations to contribute to political campaigns.⁶ While BCRA, and the essential Supreme Court case *Austin v. Michigan* will be described and contextualized in much greater detail later, it is useful to first understand the law for corporations

³ *Citizens United v. FEC* (Kennedy, A., opinion, 2).

⁴ *Citizens United v. FEC* (Kennedy, A., opinion, 52).

⁵ "Brennan Center Files Amicus in Citizens United Case," Brennan Center for Justice, July 31, 2009, http://www.brennancenter.org/content/resource/brennan_center_files_amicus_in_citizens_united_case/.

⁶ *Citizens United v. FEC* (syllabus, 1).

in the pre-*Citizens* status quo. As mentioned above, BCRA banned any electioneering communications that was publicly distributed within either 30 days of a primary election or 60 days of a general election.

One of the most popular criticisms of the types of limitations that BCRA necessitated cites an example where the Sierra Club, an advocacy group for environmentalism, could not air a commercial if one frame of that commercial contained an explicit message for voters to vote against a candidate that supports deforestation or a similarly destructive policy.⁷ This advertisement would be deemed an electioneering communication, and, moreover, since the Sierra Club is a corporation, the advertisement would be paid for out of the Sierra Club's general treasury fund.⁸ However, after the 1976 case *Buckley v. Valeo*, corporations were no longer able to finance electioneering communications from their general treasury funds, but instead were required to develop a Political Action Committee (PAC), and delegate the PAC to fund expenditures within the given limits.⁹ While *Buckley* strengthened the restrictions for indirect contributions by corporations, it simultaneously lifted the ban on individual expenditures. *Buckley* built upon the first legislation with regard to campaign finance reform: the Tillman Act. The Tillman Act of 1907, in which all corporate, direct contributions were banned, provided a basic, yet vague, set of restrictions on campaign financing.¹⁰

⁷ *Citizens United v. FEC* (Kennedy, A., opinion, 20).

⁸ "House of Representatives, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary," in *Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, House of Representatives, One Hundred Eleventh Congress, Second Session: First Amendment and Campaign Finance Reform After Citizens United*, Serial No. 111-71 (February 3, 2010), Sensenbrenner, F. James, 3.

⁹ *Citizens United v. FEC* (Kennedy, A., opinion, 21).

¹⁰ *Citizens United v. FEC* (Stevens, J., dissent, 42).

Accordingly, *Buckley*, and a few other key cases and acts, sought to clarify the principles that the Tillman Act laid out.¹¹ Specifically, *Buckley* defined the difference between a “contribution” (donations directly to candidates and to political committees, that are then used by the candidate or campaign as needed) and an “expenditure” (money spent not in official conjunction with a candidate or a party, but independently on the candidate’s behalf, where the person making the expenditure retains the right to spend the expenditure as he sees fit).¹² Another two terms that coincide with contributions and expenditures are “direct” and “indirect.” For the purposes of this paper, “direct” will be associated with contributions, and “indirect” will be associated with expenditures. The term “expenditure” will also be synonymous with “spending,” as the Court and literature on the subject have made no differentiation between the two terms. For example, direct contribution limits have been maintained through *Buckley*, *Austin*, and *Citizens* while independent expenditure limits have changed over time. This differentiation in terminology is key to *Citizens* because the ruling lifted the ban on expenditures, but retained the restrictions for contributions. More information on the history of legislation regarding these two concepts will follow in Chapter 2.

There are a few additional clarifications of terms and key facts that will help to crystallize the case. First, the opinion of the Court frequently refers to the conflict between “pre-*Austin*” and “post-*Austin*” delineation.¹³ This refers to the Court’s stance before the 1991 Court case *Austin v. Michigan* where the restriction on speech is forbidden based on a speaker’s identity.¹⁴

¹¹ The following definitions and clarifications use the same language that the Supreme Court has used in written opinions and dissents, specifically in *Citizens* and *Buckley*.

¹² "Questions from Senator Hatch and Responses from Professor Smith," in *Hearing before the Committee on the Judiciary United States Senate, One Hundred Eleventh Congress, Second Session*, Serial No. J-111-79 (March 10, 2010), Professor Smith, 73.

¹³ *Citizens United v. FEC* (Kennedy, A., opinion, 39).

¹⁴ *Austin v. Michigan Chamber of Commerce*, 494 US 652, (1990).

There will be a much more detailed analysis in Chapter 2, on the constitutional history of campaign finance reform, but the core issue is that the post-*Austin* ruling allowed for a consideration of the speaker's identity in determining his right to unrestricted speech. This distinction between the pre-*Austin* and post-*Austin* lines of precedent will be crucial for determining the validity of banning freedom of speech based on identity.

The differentiation between "as-applied" and "facial" challenges is also crucial in obtaining an understanding of the evolution of the arguments in this case. Traditionally, an "as-applied" challenge refers to an instance where the law may normally be constitutional, but due to a particular set of circumstances is unconstitutional in the specific case.¹⁵ A "facial" challenge contests the constitutionality of a law in every circumstance.¹⁶ The original challenge filed by Citizens United was a facial one against BCRA § 441b.¹⁷ However, as the case began to evolve (which Chapter 3 will detail), Citizens United dropped the facial challenge in favor of an as-applied one, although the decision rendered by the Court was delivered on facial grounds.¹⁸ The Court originally was expected to deliver a decision in June 2009. However, in a move that surprised many onlookers, the Court instead asked both Citizens United and the Federal Election Commission to prepare updated briefs. When these 22 briefs were delivered, the Court began deliberating as if a facial challenge, rather than an as-applied challenge, was issued.¹⁹ The switch from an as-applied challenge to a facial challenge is one of the many interesting aspects of the *Citizens* case. In this scenario, however, interesting leads to controversial, as opponents of

¹⁵ "Challenge: Legal Definition," Legal Definitions, <http://law.yourdictionary.com/challenge>.

¹⁶ *Ibid.*

¹⁷ *Citizens United v. FEC* (Stevens, J., opinion, 4).

¹⁸ *Ibid.*

¹⁹ "Brennan Center Files Amicus in Citizens United Case."

the majority opinion question the legitimacy of the Court's ability to ask for updated briefs and change the discussed material to include a re-evaluation of the prominent *Austin* case.

In order to simplify points of reference later, the following is a breakdown of how each Justice voted on this case to achieve the 5-4 decision. Siding with the majority opinion: Chief Justice John Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, Justice Clarence Thomas, and Justice Samuel Alito. For the dissenting opinion: Justice Ruth Bader Ginsberg, Justice Stephen Breyer, Justice John Paul Stevens, and Justice Sonia Sotomayor.²⁰ Justice Kennedy authored the majority opinion while Justice Stevens wrote the most thorough dissenting opinion. The majority and dissenting opinions closely aligned with traditional party lines, where the majority Justices are Republicans and the dissenting Justices are Democrats. Justice Sandra Day O'Connor retired immediately before this case was heard; scholars, such as Rick Hasen, question if the vote would have been the same had O'Connor had not been replaced with Justice Alito. Although O'Connor was a Republican, she was considered to be a moderate, and may have voted against *Citizens*.²¹

Preview of Key Issues

Citizens presupposes the connection that barring an entity, be it a physical person or an artificially created corporation, from spending money in the political process constitutes a violation of free speech. There is such a focus on the controversy of the decision of the Court that this assumption is often taken for granted. However, before further engaging with this

²⁰ *Citizens United v. FEC*

²¹ Rick Hasen, "Beyond *Citizens United*: Campaign Finance Law and the Roberts Court" (lecture, Athenaeum, Claremont, April 1, 2011).

fascinating moment in Constitutional history, it would be prudent to first examine whether spending money represents an expression of freedom of speech.

Perhaps the main reason that the official decision from the Court includes the missing link between expenditures and freedom of speech may be that the *Buckley* Court of 1976 already made this link. As was discussed above, recall that the *Buckley* Court created the initial legislation on the differentiation between expenditures and contributions, where expenditures are the focus of the *Citizens* case. *Buckley* determined that expenditures are considered speech and contributions are merely considered associations, therefore it is unconstitutional to set limitations on expenditures.²²

Based on the precedent of the Supreme Court, spending money on campaigns is considered to be a form of free speech. With that crucial link established, this analysis can continue to examine the validity of the individual issues that surfaced during the *Citizens* case. The following chapters are crafted with the intent of either providing appropriate context or analysis that will ultimately help in achieving this paper's main goal: to determine if the Court made the correct ruling in *Citizens*. Through this analysis, this paper eventually comes to the conclusions that, when factoring in the relative weight of technical court concepts (*stare decisis*, judicial activism and judicial restraint), key issues in the present, and threats for the future, the Supreme Court was incorrect in its decision to overrule the appellate court decision on *Citizens*. While this paper is quite reluctant to rely on statistical data, one statistic may be relevant for framing the reader's mind before this discussion continues. A recent Washington Post-ABC News poll reported that 80% of Americans disagree with the Supreme Court's decision to lift the ban on corporate spending, with 85% of Democrats, 76% of Republicans, and 81% of

²² Daniel Polsby, "Buckley v. Valeo: The Special Nature of Political Speech," *The Supreme Court Review* 1976 (1976): 21.

Independents voicing disapproving opinions of the Court.²³ Additionally, in President Obama's most recent State of the Union Address, he elucidated his disagreement with the decision when he said that the Supreme Court had, "Reversed a century of law to open the floodgates – including foreign corporations – to spend without limit in our elections."²⁴

Before beginning the actual analysis of this case, it is important to establish the significance of what follows. In addition to the dissent's fear of threats to democracy and the potential banning of books, there is something more fundamental at stake with this decision: freedom of speech and all that it entails. As the official Court syllabus mentions, there must be First Amendment rights because, "Speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people—political speech must prevail against laws that would suppress it by design or inadvertence."²⁵ Without those fundamental protections that are laid out in the Bill of Rights, people would lose the most fundamental freedom that the First Amendment protects—the freedom of political speech and association. Without protections for freedom of speech, political discourse would be disrupted, and democracy in America would be threatened. *Citizens* engages with these delicate themes, and it is imperative to understand what *Citizens* means for the future of freedom of speech.

²³ Dan Eggen, "Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing - Washingtonpost.com," The Washington Post: National, World & D.C. Area News and Headlines - Washingtonpost.com, February 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

²⁴ Malcolm, "Obama's State of the Union Address: Criticism of the Supreme Court Campaign Finance Ruling."

²⁵ *Citizens United v. FEC* (Syllabus, 3).

Chapter 2: The History of Campaign Finance Reform: Past, Present, and Future

A Brief History

Citizens is far from the first important decision regarding campaign finance reform to be rendered. In fact, the history of campaign finance reform can be traced back to the early twentieth century. This section will outline the major cases that were instrumental in shaping campaign finance reform law. This is crucial to an understanding of where the latest edition to campaign finance reform law (*Citizens*) fits in with the previously established precedent. An understanding of many of the controversies that are central to campaign finance regulation can be established by investigating the history of legislation in this area.

Although there is disagreement as to when legislation regulating the amount of money that could be donated to political endeavors began, most scholars agree that an early, if not the earliest, instance of campaign finance reform was the Tillman Act of 1907. This early law laid the groundwork that would be greatly expanded upon in later cases. As mentioned in Chapter 1, the Tillman Act banned corporations from contributing to campaigns in any manner.²⁶ This is the reason that most consider it to be the beginning of campaign finance reform.

However, Senator Jeff Sessions from Alabama claims that the Tillman Act “did not bar independent political speech funded by labor unions or corporations” so it should not be considered the beginning of finance reform history.²⁷ This paper responds by noting that the link between monetary donations and political speech has been well established in the law.

²⁶ Adam Winkler, "The Corporation in Election Law," *The Loyola Law Review*, 1998, 1246.

²⁷ Sessions, Jeff. "Opening Statement of Hon. Patrick Leahy, A US Senator from the State of Vermont." In *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*. Serial No. J-111-79. March 10, 2010. 4.

Campaign financing is tantamount to political speech for two reasons. The first is that there is an inherent symbolic value in contributing to a campaign.²⁸ Regardless of the amount of money that is being donated, the act of contributing to a campaign is representative of an individual's interest in supporting that candidate. If the contribution was \$20 or \$2,000, the symbolic value is still the same: spending money demonstrates support. The second is that money is integral to running a successful campaign. With President Obama spending \$750 million on his campaign, and rumored estimates predict he will spend \$1 billion on a reelection bid, the actual monetary aspect of campaigns cannot be ignored.

With the sharply increasing amount of money being spent in elections recently, the stakes for a post-*Citizens* world are large. The further regulation of direct campaign contributions, as was the case from *Buckley* through BCRA, support the incumbent candidate.²⁹ In essence, members of Congress pass legislation that will support their future re-election bids. By limiting the size of campaign contributions, challengers are required to collect multiple smaller contributions, which may be more difficult without the previously established public support and recognition that incumbents have. With this advantage, average incumbent direct spending as compared to challenger spending, for races for the House, has increased from 1.5-to-1 to 4-to-1.³⁰ However, "most studies do not find that incumbents' expenditures have a significant effect on the number of votes incumbents receive."³¹ Note that this is for independent expenditures by the incumbent, not contributions or expenditures by third parties. However, if campaign

²⁸ Rick Hasen, "Beyond Citizens United: Campaign Finance Law and the Roberts Court."

²⁹ Bradley A. Smith, "The Myth of Campaign Finance Reform," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79 (National Affairs, 2009), 192.

³⁰ Smith, 192

³¹ Stratmann, Thomas. "What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes." *Southern Economic Journal* 57, no. 3 (January 1991): 606.

expenditures had an effect on the outcome of a campaign, the potential exists for politicians to endorse the preferred policy of the person (or corporation, for *Citizens*) who made the expenditure.³² As the data indicate, “campaign finance regulations essentially require that candidates fill their coffers in small increments, the law clearly advantages incumbents.”³³ In summary, regulation on contributions benefits incumbents while independent expenditures have proven to not have a statistically significant effect upon election for incumbents or challengers. Therefore, since *Citizens* upheld previous contribution limits but changed expenditure limits, and in accordance with the above data, this paper finds that there will be little to no effect on candidate elections. However, there has not been a general federal election since *Citizens* was passed; corporations could drastically change their expenditure behavior.

While there is a minimal degree of controversy over the validity of the Tillman Act as campaign finance reform’s basis, this paper is satisfied with the evidence that supports the legitimacy of Tillman. The next important event was the development of the Federal Corrupt Practices Act of 1925.³⁴ This Act was meant to tighten loopholes that were being exploited in Tillman. Next was the Smith-Connally Act (1943), which specifically addressed the issue of the potential influence of labor unions.³⁵ *Citizens* was not the first case to recognize the importance that unions can have in elections. Smith-Connally forbade labor unions from directly contributing to candidates; at this point, labor unions and corporations had essentially the same restrictions placed on them.³⁶

³² Stratmann, 606.

³³ Smith, 192

³⁴ Smith, 190.

³⁵ Gerard D. Reilly, "The Legislative History of the Taft-Hartley Act," *George Washington Law Review* 285 (1960): 285.

³⁶ *Ibid.*

Up until this point, the accepted understanding is that these acts were enforced weakly, and were consequently limited in efficacy. In addition to these claims, and partially due to Watergate, Congress passed the Federal Election Campaign Act (FECA). FECA was amended in 1974, and set limits for PAC contributions to candidates at \$5,000 per candidate per election cycle.³⁷ As FECA has been amended several times, the current limit that individuals have for campaign contributions is \$2400 per candidate per election. In reality, the \$2400 limit can be extended to \$4800, as an individual can sponsor a candidate in both the primary and the general election. FECA was critical in codifying the laws that govern campaign finance reform.

Buckley v. Valeo and Expenditure Limits

Buckley v. Valeo is perhaps the most important Supreme Court case to consider in this analysis. Much of the majority opinion's rationale for overturning the lower district courts' rulings on *Citizens* is on the basis that *Buckley* was unconstitutional. The difference between contributions and expenditures was key in *Buckley*. To review, direct campaign contributions are those that go to the candidate, for later use as the candidate sees fit. Expenditures are independent of the party or the candidate, and reflect the viewpoints of the individual (or corporation, as *Citizens* later decided) that are responsible for them. *Buckley* determined that expenditures are considered to be speech while contributions are considered only to be associations.³⁸ For this reason, the *Buckley* Court determined that it was unconstitutional to set limitations on expenditures, which were considered to be legitimate forms of speech. Since

³⁷ Daniel Polsby, "Buckley v. Valeo: The Special Nature of Political Speech," *The Supreme Court Review* 1976 (1976): 3.

³⁸ *Ibid*, 21.

contributions are only associations, and not actual speech, the Court left those in place.

Although modifications have occurred over time, the same principle has remained intact.

One defense of the *Buckley* decision says, “There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate’s message to the electorate...not the government but the people...who must retain control over the quantity and range of debate on public issues in a political campaign.”³⁹ This quote highlights the reason that the Court banned expenditure limits, but retained contribution limits. In addition to emphasizing this point, this defense of *Buckley* also brings up the issue that individual citizens are integral in the decision-making process for democracies. According to this argument, and to the majority opinion in *Citizens*, it is unacceptable to limit expenditures, which are tantamount to political speech. Furthermore, the term expenditure was now applied only to a form of express advocacy, or electioneering communications, as was the terminology used in *Citizens*.⁴⁰

Questions as to the function of corruption once expenditure limits were lifted arose during the *Buckley* era. However, the Court found that there was no direct evidence that money spent in politics was a causal factor for corruption.⁴¹ This claim will be discussed in detail later in this section with reference to the recent case *Caperton v. Massey*.

The biggest impact of *Buckley* was that the Court invalidated limitations for candidates’ expenditures of personal funds for their own campaigns.⁴² This holding was meant to validate the fundamental right of removing any barriers for the individual to participate in politics, but over

³⁹ Polsby, 20.

⁴⁰ “We the People”? Letter to Senator Jeff Sessions and Senator Patrik Leahy from Hayward, Gora, Munger, Pilon, La Raja, BeVier, Primo, Smith, Milyo. 96.

⁴¹ *Citizens United v. FEC* (Syllabus, 5).

⁴² Polsby, 26.

time, this holding was expanded.⁴³ In the *status quo*, expenditures from third party individuals, and now corporations, that wish to spend on campaigns are protected. To some observers, the original interpretation of *Buckley*, which allows for unlimited personal spending, may be of more contemporary relevance. The amount of money that has infiltrated politics has been steadily rising for some time. For example, the total cost of presidential races in 2000 was \$650 million, in 2004 it was \$1 billion, and in 2008 it was \$1.8 billion.⁴⁴ Moreover, in federal races overall, there has been about a 75% increase in the amount of money spent recently.⁴⁵ Campaigns are becoming more expensive, and unlimited opportunity for corporations to spend may only add to this problem.

It is also helpful to consider the breakdown of where this massive amount of money is coming from. As data from the 2008 election reveals, \$799 million, or 56% of the total receipts were contributions from individuals. \$380 million, or 26.8% of the total receipts was from expenditures from PACs. Candidates provided \$36 million, or 2.5%, and the rest of the money was from the respective political parties.⁴⁶ The data comes as a surprise when reflecting upon *Buckley*. *Buckley* invalidated expenditure limits and upheld contribution limits, yet individual contributions make up the majority of campaign financing. This influential case created the policy that has been debated for thirty years, yet it seems as if the behavior of individual American citizens has not been as troubled by the standards that were set in *Buckley*.

⁴³ Ibid.

⁴⁴ Thomas Stratmann, "Campaign Contributions and Spending: What Is Being Purchased and By Whom?" (lecture, Roberts North 15, Claremont, April 1, 2011).

⁴⁵ Ibid.

⁴⁶ Ibid.

Austin v. Michigan Chamber of Commerce (1990)

Austin built upon the foundation of campaign finance reform that was established in *Tillman* and *Buckley*, and proved to be an extension of these policies with a few key modifications. This case sought to determine whether the Michigan Campaign Finance Act, which banned corporations from using general treasury funds in campaigns for elections, was constitutional or not.⁴⁷ The issue of constitutionality was rooted in the First and Fourteenth Amendments. Ultimately, the Supreme Court decided that banning the use of corporate general treasury funds does not represent a violation of either freedom of speech arguments from the First Amendment or the equal protection clause of the Fourteenth Amendment. Justice Stevens, who wrote for the majority, noted that *Austin* was perfectly aligned with *Buckley*'s separation and distinction between expenditure and campaign limits. He said, "In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley v. Valeo*, 424 U. S. 1, 45-47 (1976), should have little, if any, weight in reviewing corporate participation in candidate elections."⁴⁸ According to the decision, *Austin* aligns with *Buckley*, and the ban on expenditure limits remains constitutional. In fact, Justice Stevens seems to be pointing out that the issue is not actually one of constitutionality; Stevens highlights the importance of determining a unified stance on corporate personhood over individual types of donations.

Secondly, *Austin* is remembered for citing an attempt to protect from the distorting effects that enormous wealth can have on politics. The Court, in its often quoted opinion, said, "Michigan's regulation... aims at a different type of corruption in the political arena: the

⁴⁷ *Austin v. Michigan Chamber of Commerce*, U.S. 110 S. Ct. 1391 (1990)

⁴⁸ *Austin v. Michigan Chamber of Commerce*, U.S. 110 S. Ct. 1391 (1990) (Stevens, J., section 678).

corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”⁴⁹ With this decision, the Court recognized that it is acceptable to place limits on campaign financing in order to prevent either actual corruption or the appearance of corruption. *Austin* recognizes the potentially distorting power of money in politics. It is crucial to keep this fact in mind when this chapter later discusses the *Caperton v. Massey* case.

Finally, *Austin* is noted for declaring, “Political speech may be banned based on the speaker’s corporate identity.”⁵⁰ As this quote reflects, the identity of the speaker is a key issue in determining the validity of the *Citizens* decision. Identity politics is a complex discipline in its own right; this paper will not attempt to conduct a complete analysis of identity politics in order to signify the importance of *Austin*. However, the identity issues that were raised in *Austin* transcend the boundaries of solely this case. While identity issues remain relevant in *Citizens* and further decisions on campaign finance reform, *Austin* was effectively overruled in *Citizens*. A leveling of the playing field, as *Austin* attempted to achieve, in order to facilitate equality of political speech for all, was considered to be unconstitutional by the Roberts Court.⁵¹

Citizens overruled the precedent set in *Austin*. The opinion of the Court claimed that the *Austin* was “hotly contested” and decided in a manner that was unbecoming for the Court.⁵² The arguments that surround the “anti-distortion rationale” in *Austin* will be discussed in Chapter 5; nevertheless, *Austin* is a crucial case in the history of campaign finance reform.

⁴⁹ *Austin v. Michigan*, 648

⁵⁰ *Citizens United v. FEC* (Kennedy, A., opinion, 1).

⁵¹ Jeffrey Toobin, "Money Talks," *The New Yorker*, April 11, 2011, http://www.newyorker.com/talk/comment/2011/04/11/110411taco_talk_toobin.

⁵² *Citizens United v. FEC* (Roberts, J., concurring, 5).

McCain-Feingold Act and Beyond

Since the *Austin* decision, a series of cases have been adjudicated on the subject of campaign finance reform. Chronologically, the next important topic of discussion is the McCain-Feingold Act of 2002, which is also known as the Bi-Partisan Campaign Reform Act (BCRA). BCRA cut out much of the “soft money” in politics that *Buckley* allowed for, and also closed several of the other loopholes that were exploited since *Buckley*’s inception.⁵³ Fundamentally, BCRA was responsible for creating the specific set of parameters that led to the prohibition of Citizens United’s *Hillary: The Movie*. To review, *Citizens* came about because it aired a documentary that violated several components of BCRA. The movie was publicly distributed (it was available to viewers “on demand” on cable television), it aired within 30 days of the primary election, and it was considered to be an electioneering communication (the film could not be interpreted by a reasonable person in any other way but as a message to vote against Hillary Clinton). Rick Hasen has suggested that the (mostly) non-profit organization Citizens United specifically designed the circumstances surrounding the release of *Hillary* to present a challenge to the Supreme Court, with the eventual goal of changing legislation in mind.⁵⁴

⁵³ "House of Representatives, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary," in *Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, House of Representatives, One Hundred Eleventh Congress, Second Session: First Amendment and Campaign Finance Reform After Citizens United*, Serial No. 111-71 (February 3, 2010), 93.

"House of Representatives, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary," in *Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, House of Representatives, One Hundred Eleventh Congress, Second Session: First Amendment and Campaign Finance Reform After Citizens United*, Serial No. 111-71 (February 3, 2010), 3.

⁵⁴ Rick Hasen, "Beyond Citizens United: Campaign Finance Law and the Roberts Court" (lecture, Athenaeum, Claremont, April 1, 2011).

McConnell v. Federal Election Commission (2003) is notable for upholding key aspects of BCRA.⁵⁵ Aspects of BCRA were controversial and questionable to some, therefore *McConnell* emerged as a chance to reaffirm the principles that were established in BCRA. Additionally, *McConnell* relied heavily on the precedent that was established in *Austin*. Because the majority in *Citizens* claimed that *Austin* was “hotly contested” any precedent that was established in *Austin* was effectively erased.⁵⁶ Since *McConnell* primarily was based on the precedent that was set in *Austin*, and *Austin* was deemed to be unconstitutional, *McConnell* lost a significant degree of legitimacy.

In 2006, the case *Wisconsin Right to Life, Inc. (WRTL) v. Federal Election Commission* reached the Supreme Court as an as-applied challenge to a particular section of BCRA. The substance of the challenge is minor and irrelevant to the bigger picture. However, this as-applied challenge represents an earlier version of the type of challenge that *Citizens United* raised. *WRTL* began to chip away at fundamental aspects of BCRA, and laid the groundwork for the legislative overhaul that was soon to occur.

There has also been controversy regarding the recent finance-related case, *Caperton v. Massey*. In another 5-4 decision in 2009, the Supreme Court ruled that Judge Benjamin Brent must recuse himself from a case in which he had a conflict of interests.⁵⁷ The opinion was:

⁵⁵ "House of Representatives, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary," in *Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, House of Representatives, One Hundred Eleventh Congress, Second Session: First Amendment and Campaign Finance Reform After Citizens United*, Serial No. 111-71 (February 3, 2010), 2.

⁵⁶ *Citizens United v. FEC* (Kennedy, A., opinion, 1).

⁵⁷ "Caperton v. Massey." Brennan Center for Justice. August 6, 2009. http://www.brennancenter.org/content/resource/caperton_v_massey/.

We conclude that there is a serious risk of actual bias - based on objective and reasonable perceptions - when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election⁵⁸

This “risk of actual bias” is in reference to the \$3 million dollars that a CEO of a coal company spent upon the re-election bid of Judge Benjamin Brent to the West Virginia Supreme Court. Essentially, the Court ruled that money in politics has the potential to corrupt.⁵⁹

While this statement would be completely aligned with decisions such as *Austin* and BCRA, *Caperton* stands out in direct contrast to *Citizens*. The majority in *Citizens* lifted the ban on corporate expenditures with the rationale that no evidence has been found as to the corruptive powers of money. In *Caperton*, the same Court decided that money does have the power to corrupt, or else the judge would not have been required to recuse himself.⁶⁰

When analyzing the history of campaign finance reform within the Supreme Court, there appears to be a fundamental inconsistency regarding the necessary burden of proof for contributions and expenditures. For contributions, it seems as though the Court needs almost no evidence of corruptive powers to maintain limits on contributions; the Court is protective and has

⁵⁸ "Caperton v. Massey," Brennan Center for Justice, August 6, 2009, http://www.brennancenter.org/content/resource/caperton_v_massey/.

⁵⁹ *Ibid.*

⁶⁰ House of Representatives Subcommittee, 16.

a broadly applied principle in this case.⁶¹ However, for expenditure limits, the Court has even ruled once before (*Caperton*) that expenditures can have the ability to corrupt politicians, yet the Court allowed for, potentially, billions of dollars to enter into the upcoming campaigns. These two standards are at odds with each other. This brief history of campaign finance reform legislation was meant to provide a clear context with which to understand *Citizens* on a deeper level. However, after examining the most important cases in this area, a cogent position on the trajectory of campaign finance reform has still not been developed.

⁶¹ Rick Hasen, "Beyond Citizens United: Campaign Finance Law and the Roberts Court."

Chapter 3: Stare Decisis, Judicial Review, and Judicial Activism

Introduction

Based on all of the controversy that *Citizens* has caused, it may seem preposterous to consider that there is a strong consideration that this case should never have been presented to the Supreme Court in the fashion that it was. This Chapter seeks to examine the ways in which *Citizens* was argued to change its focus from an as-applied challenge to a facial challenge. Moreover, this Chapter will also include an analysis of several of the Justices' opinions. Finally, this chapter will briefly examine the disclosure agreement of the ruling, which was only opposed by Justice Thomas. This Chapter primarily aims to decide whether the *Citizens* case should have ever been heard. This is an extremely important consideration, because if the case should never have been reviewed by the Supreme Court in the sweeping manner that it was, then this ruling should have no validity. However, it is crucial that, occasionally, action must be taken outside of the normative framework to create necessary change. Cases such as *Brown v. Board of Education*, *Roe v. Wade*, and *Baker v. Carr* represent rulings that differed significantly from the previously established precedent. For example, *Brown* did not solely rely on judicial precedent, but instead integrated additional, relevant factors to create a decision that changed the course of American history.⁶²

One of the central concepts upon which the American legal system rests is that of *stare decisis*. This phrase comes from the Latin and means, "To stand by that which has been

⁶² Charles Aikin, "Stare Decisis, Precedent, and the Constitution," *Political Research Quarterly* 9, no. 1 (March 01, 1956): 87.

decided.”⁶³ When applied in the courtroom, *stare decisis* dictates that judges should use the precedent of preceding legal cases as a detailed guideline for how to decide current cases. Logically, for a successful legal tradition to follow from this principle, sound judgment is required for all preceding cases. This issue is crucial in the *Citizens* case, because both the majority opinion and the dissenting opinion argue that previous Supreme Court decisions have been incorrect for a few relevant cases.

The majority opinion argues that *Austin* was not well reasoned and should be overruled.⁶⁴ Chief Justice Roberts remarked on the issue, “When the precedent’s validity is so hotly contested that it cannot reliably function as a basis for decision in future cases...the simple fact that one of our decisions remains controversial does undermine the precedent’s ability to contribute to the stable and orderly development of the law.”⁶⁵

The Chief Justice was referring to the *Austin* case in this quote, and he highlights the inability of the Supreme Court to rely on decisions that the Roberts Court considers to be misaligned with the Constitution. Justice Roberts cites the level of controversy that surrounded the *Austin* decision to be a valid reason to disregard its holding. However, the same rationale could easily be applied to Justice Roberts’ ruling on *Citizens*. *Citizens* is a controversial decision too—arguably creating more controversy than the *Austin* decision did. If we believe the logic behind Justice Roberts’ argument that invalidates *Austin*, then *Citizens* must also be invalidated due to its high level of controversy. The majority’s attempt to ignore *stare decisis* with regard to *Austin* is too hypocritical to be valid.

⁶³ "Stare Decisis," Free Legal Dictionary, <http://legal-dictionary.thefreedictionary.com/stare+decisis>.

⁶⁴ *Citizens United v. FEC* (Syllabus, 6).

⁶⁵ *Citizens United v. FEC* (Roberts, concurring, 7).

Another criticism of the majority's sweeping decision in *Citizens* is that manifold other alternatives exist that would have corrected the violation that brought Citizens United to trial in the first place. Essentially, the level of unconstitutionality that Citizens United was responsible for could have been easily fixed without a legislative overhaul.⁶⁶ According to the dissent, there were some changes that Citizens United could have made to fix its violations of the Constitution at a minimal cost. For example, Citizens United could have restructured the funding of the movie so that only its PAC was using its funds to finance *Hillary*, not the funds of the general treasury. Another option would have been for Citizens United to distribute privately the film, instead of making it publicly available with the "on demand" function for television.⁶⁷ There are other hypothetical scenarios where Citizens United could have made simple alterations to avoid breaking the law, but these other options are not necessary to explain. This analysis finds that there were easily applicable changes that Citizens United could have chosen to apply to *Hillary* to make the documentary constitutional. However, *Citizens*, did, indeed, make it to the Supreme Court, so it is worthwhile to examine the balance of judicial activism, judicial restraint, and *stare decisis* that were involved in this divisive case.

The terms "judicial activism" and "judicial restraint" are both frequently used when trying to decipher the motive behind a justice's decision. While one can find several differing definitions for judicial activism, a fairly moderate one may read that judicial activism occurs when a judge lets personal biases or other extraneous factors take precedence over precedent in trials. For this reason, assignment of the term judicial activism must be taken seriously.

⁶⁶ Jeffrey Rosen, "Statement of Jeffrey Rosen, Professor of Law, George Washington University, and Legal Affairs Editor, the New Republic, Washington, DC," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79, 7.

⁶⁷ *Ibid.*

Opponents of the decision, however, appear to have no problem with categorizing the majority justices as guilty of judicial activism. For instance, one claim reports that, “The justices answered a question they weren’t asked in order to overturn a century of precedent which they had reaffirmed only recently. The only real change has been one of Court membership.”⁶⁸ An interesting part of this remark is the final sentence, where Chairman of the Subcommittee Jerrod asserts that the only reasons that the *Citizens* ruling turned out the way it did is because of the Bush-era appointments to the Court.⁶⁹ It is difficult to validate or invalidate this biting accusation in tangible proof; Chapter 4 will include an in-depth examination of the recent history of the Court, which will be helpful to determine if personal bias was the cause of any degree of judicial activism.

Nevertheless, in the literature surveying the *Citizens* case, the claim that the justices who voted for the majority opinion unnecessarily overturned decades of law frequently appears. Although, as mentioned previously, relying on extra-precedent factors may be acceptable in certain circumstances, the century of precedent that has been overturned, as discussed in Chapter 2, refers to the earliest beginning of campaign finance reform with the Tillman Act of 1907.⁷⁰ The debate as to whether campaign finance reform began at this moment in history is less relevant than the debate over whether the Court should have heard the case at all. Justice Stevens authored the most thorough dissenting opinion, and his criticism that several of the

⁶⁸ Nadler, Jerrod. "House of Representatives, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary," in *Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, House of Representatives, One Hundred Eleventh Congress, Second Session: First Amendment and Campaign Finance Reform After Citizens United*, Serial No. 111-71 (February 3, 2010), 1.

⁶⁹ Jerrod, 1.

⁷⁰ Aikin, 88.

Justices practiced judicial activism, especially when juxtaposed with remarks from judicial confirmation hearings, is necessary to discuss.

Based on their comments during previous cases and their confirmation hearings, most of the Justices who voted on this case were considered to be minimalists. This means that the Justices are following “a distinctive form of judicial decision-making by which a court settles the case before it, but leaves many things undecided.”⁷¹ Further, judicial minimalism advocates a policy where justices do not seek to change drastically the law when there is not ample precedent to do so. This policy emphasizes judicial restraint, as opposed to the contrasting policy of judicial activism.

While the terms “activism” and “restraint” (“minimalism”) may appear to be of a neutral connotation, in practicality one term frequently has negative undertones. If a justice is accused of being an activist, this is normally viewed as an accusation or an insult.⁷² Scholars point to historical tradition as a possible origination for the current perception that classification as an activist judge is received negatively. The power of judicial review, as accorded to the Supreme Court in *Marbury v. Madison*, was originally intended to give the weak judiciary branch a relative degree of power. In fact, in Alexander Hamilton’s *Federalist No. 78*, he labels the Supreme Court and the judiciary as “the least dangerous branch.”⁷³ Therefore, at the time of the founding of the United States of America, the judiciary was accorded powers to make it as relevant as the legislature and the executive branches. However, as time has progressed, judicial review proved to be a powerful policy that had far-reaching impacts.

⁷¹ Christopher J. Peters, "Assessing the New Judicial Minimalism," *Columbia Law Review* 100, no. 6 (October 2010): 1455.

⁷² Thomas Mann, "The Politics of Campaign Finance Reform" (lecture, Athenaeum, Claremont, March 29, 2011).

⁷³ Peters, 1455.

Understanding how the Supreme Court interprets the Constitution to apply to law is essential to gaining an accurate perspective on the merits of judicial activism and restraint. There are two different schools of thought when it comes to interpretation of the law: one that determines cases individually and one that utilizes a principled, general approach. Sunstein is a scholar that believes in the case-by-case basis approach. His main argument is that a generalized approach is not specific enough to engage with the multiple and varied circumstances of each case.⁷⁴ For example, Sunstein remarks that broadly based rules can often lead to ambiguities, over-inclusiveness, and under-inclusiveness.⁷⁵ Interestingly, both sides of the *Citizens* opinion base the legitimacy of their opinions on principles similar, if not identical, to the ones discussed immediately above. Sunstein makes the argument that analyzing each case with regards to its own circumstances is the best way to ensure fairness and sustainability of a legitimate judiciary.⁷⁶

Conversely, Justice Scalia espouses that the decisions for cases should rely on well-established generalized principles, not decided on a case-by-case basis. In his article for the University of Chicago Law Review, Scalia points to ease and predictability as two crucial reasons why the judiciary must support a policy of adhering to generalized rules.⁷⁷ On ease, perhaps facility for members of the public and the judiciary is not the critical component that should be upheld over most others. Ease would be appreciated, but Scalia's argument that a government must use well-established general principles to ensure the legitimacy of the state is more convincing. He argues:

⁷⁴ Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999), 44.

⁷⁵ *Ibid.*, 10.

⁷⁶ *Ibid.*

⁷⁷ Scalia, Anotin. "The Rule of Law as a Law of Rules." *University of Chicago Law Review* 56 (1989): 1175.

As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, "reckonability," is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.⁷⁸

Regardless of whether the Justices endorse an individualistic or a generalized approach, the president appoints these individuals for the purpose of interpreting the Constitution. If a Justice is accused of being an activist judge, it is normally indicative of a Justice acting upon his or her own inclinations as opposed to serving strictly as a custodian of the Constitution. Many opinions consider the Justices who sided with the majority to be activists because the *Citizens* ruling created new and important additions to the legal framework. Since the decision reversed preexisting law in order to align with the Constitution, there was a necessary change to the law. Moreover, the dubious circumstances surrounding the manner in which the case was ultimately presented to the Supreme Court has been the source of these activist accusations.

The activism with regard to bringing the case before the Supreme Court may be the most important argument in deciding if the *Citizens* decision was correct. If such a high level of activism, one which is not within the scope of duties or power of the Supreme Court, was necessary to even hear *Citizens*, then it is possible that the case should never have been discussed at all.⁷⁹ If the Court would never have heard the case without an extreme "bending of the rules" by a few justices, then any substantive ruling that emerged from the case would be irrelevant and

⁷⁸ Scalia, 1177.

⁷⁹ Mann

non-binding. However, freedom for political discourse is so fundamentally important to the successful functioning of a democracy that perhaps the Court's request for re-argumentation, and subsequent sweeping reform was warranted to protect this freedom.

Moreover, there are questions as to whether Chief Justice Roberts' decision in hearing *Citizens* is consistent with his remarks at his confirmation hearing. During this confirmation hearing, Roberts endorsed a minimalist and non-activist policy, where he even said that he had "no agenda" and would keep an "open mind."⁸⁰ In accordance with questioning Roberts' ideological cohesion, there are also intimations that Justices serving on the Roberts Court may be showing bias in favor of big business. For example, the Supreme Court takes on less than two percent of the petitions that it receives per year. Yet 26% of the Chamber of Commerce's petitions were accepted.⁸¹ The Roberts Court has heard 46 business cases in which the Chamber of Commerce has been a party, and 75% of these cases were decided in favor of the Chamber of Commerce.⁸² These figures seem to represent a significant departure for the averages of the Court. While this is not enough evidence to prove corruption in the current Supreme Court, these statistics raise important questions. The most important of which may be: will this apparent slant toward favoring big business, especially in light of the *Citizens* case, ultimately mar the reputation of the Roberts Court enough to undermine the legitimacy of the decisions that the Roberts Court has made or will make in the future? While we can only make predictions as to how future scholars and the public will view the set of decisions, specifically those regarding

⁸⁰ "I Come with 'No Agenda,' Roberts Tells Hearing." CNN. September 13, 2005. http://articles.cnn.com/2005-09-12/politics/roberts.hearings_1_roberts-nomination-day-of-confirmation-hearings-chief-justice?_s=PM:POLITICS.

⁸¹ Rosen, 35.

⁸² Ibid.

campaign finance reform, that emerge from the Court, the risk of judicial illegitimacy is a cause for concern.

Chapter 4: Corporations

A Brief History

As John Marshall, the longest serving Chief Justice in the history of the United States Supreme Court, said, “A corporation is an artificial being...the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”⁸³ This statement, made in 1819, incorporates much of the precedent that the Marshall Court created. This precedent is often considered to be the foundation of American law, although, as the following analysis will show, there have been substantial changes since the beginning of the nineteenth century. Since the unique nature of the corporation is at the heart of the *Citizens* case, this chapter will first provide a brief legal history of corporations in the United States and then will engage with three crucial arguments about aspects of corporations. After this chapter, a more detailed understanding of the position of the majority and the dissenting opinion regarding corporations will be obtained.

One significant case to discuss is *Santa Clara v. Southern Pacific Railroad Company* 118 U.S. 394 (1886). This case is interesting, in that the precedent that it (unintentionally) created has been far more influential and important than the decision of the actual case. Basically, the state of California was attempting to add on taxation of areas in between the fence and the railroad tracks. The Southern Pacific Railroad Company cited a previous contract that would make this new agreement contradictory. Ultimately, the Supreme Court unanimously decided

⁸³ Leahy, Patrick. "Opening Statement of Hon. Patrick Leahy, A US Senator from the State of Vermont." In *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*. Serial No. J-111-79. March 10, 2010. 1.

that the fenced area was not legally taxable.⁸⁴ However, the important point, for the purposes of this paper, is evident in the headnote of the case (a short summary of the crucial issues in the case). Official Court Reporter J.C. Bancroft Davis reported that Chief Justice Waite said, “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”⁸⁵ This acknowledgment that the Court accords the equal protection clause of the Fourteenth Amendment to corporations was not of notable significance in 1886, but has since become important. *Santa Clara v. Southern Pacific Railroad Company* represents the first written legal classification that corporations have equal protection under the law under the Constitution.⁸⁶

This case created the basis for, and oftentimes the confusion with, corporations being accorded the same constitutional rights as individuals. This paper seeks to answer a few of these crucial questions. For instance, understanding the exact definition and rights of corporations in the pre-*Citizens* world and the post-*Citizens* world is essential in grasping an understanding of the direction that campaign finance reform is progressing.

Shareholders in a Corporation

The first issue of contention between the majority and the dissent, with regard to corporations, engages with the delicate issue of the rights of shareholders in a corporation. As

⁸⁴ *Santa Clara County v. Southern Pacific Railroad Company*, " US Supreme Court Cases, May 10, 1886, Syllabus, <http://supreme.justia.com/us/118/394/case.html>.

⁸⁵ *Santa Clara County v. Southern Pacific Railroad Company*, " US Supreme Court Cases, May 10, 1886, Syllabus, <http://supreme.justia.com/us/118/394/case.html>.

⁸⁶ *Ibid.*

was noted above from the *Santa Clara* case, corporations have been recognized, by legal definition, as an artificial creation. This classification, however, has come into conflict with precedent set by cases such as *Santa Clara*. An argument that members of the majority opinion make is that it is unfair for the shareholders of a corporation to be barred from using their money as a form of political expression. This statement relies upon two assumptions. First, that giving, or earmarking, money for a political campaign is considered an expression of political speech and, second, that an individual person's rights transfer through his business relationships. To reiterate, as was discussed previously, the Supreme Court has found that independent expenditures for campaigns are considered to be a form of political speech; therefore it is established that independent expenditures are a form of political speech.

The second question is more intriguing, because there is evidence to support both sides of the argument. A scholar noted that corporations "have long been recognized as able to assert constitutional rights where doing so is necessary to preserve the rights of the corporate members or shareholders."⁸⁷ Therefore, when corporations speak (as speech has already been determined as equivalent to indirect expenditures), it is the individual members of the corporation expressing their right to associate and claiming their constitutional rights. Corporations have been legally recognized as a viable amalgamation of its shareholders' rights and must be allowed to protect those rights, yet, the controversy over this issue stems from the point at which corporations are allowed to carry out its shareholders' will.⁸⁸

The official Court syllabus, however, finds that, "It is irrelevant for First Amendment purposes that corporate funds may 'have little or no correlation to the public support for the

⁸⁷ Bradley Smith, *Before the United States Senate Committee on the Judiciary "We the People? Corporate Spending in American Elections after Citizens United*, report (March 10, 2010), 10.

⁸⁸ *Ibid.*

corporation's political ideas.”⁸⁹ Following this logic, even if the political views supported by the corporation are not shared by all of its shareholders, the corporation still has the right to express its political ideals. According to the majority, even if the views of shareholders are not completely aligned with the view that the corporation has espoused, which would represent the toughest challenge to this “shareholder argument,” the corporation may function much like a wealthy individual would and choose to spend its money as an exercise in political speech. Dissenting opinion on this topic points out that a wealthy individual spending his or her own money differs from a corporation spending its shareholders money in elections in that the individual is one person with one ideology, whereas the corporation represents the amalgamation of thousands of viewpoints.

Another argument involving shareholders focuses less on the money that shareholders are contributing to political campaigns and more on the role that shareholders serve in a corporation. The majority opinion logic for respecting the rights of shareholders to express freedom of speech and expression relies primarily upon the assumption that shareholders control the behavior of the corporations. This is true, to an extent—shareholders can buy and sell stock, which is an implicit approval or disapproval of the actions that a company is taking. If a shareholder does not approve of business decisions that his or her corporation is making, he or she will sell any owned stock.⁹⁰ According to this rationale, if political speech for corporations were to be censored or banned, as it was in the pre-*Citizens* world, this would directly translate to a restriction on the rights of individual shareholders.⁹¹ Individuals control the corporation, so limiting campaign

⁸⁹ *Citizens United v. Federal Election Commission*, 558 US ____ (2010) (Syllabus, 5).

⁹⁰ *Citizens United v. FEC* (Kennedy, A., opinion, 88).

⁹¹ *Ibid.*

contributions from the corporation would, in fact, be limiting campaign contributions from the individual.

The dissenting opinion could have a distinct response to this critique. The answer, which was prominent in the written dissenting opinion of the Court, asks in what scenario shareholders actually have a say in the everyday business of multi-million or multi-billion dollar corporations?⁹² It is naïve to think that an average American who may own a few shares of stock in a multi-billion dollar corporation can affect the political viewpoint of that corporation. If Average Joe sells his handful of stock in disapproval that the corporation has recently donated to a candidate that Joe does not agree with, will Joe's stock sale make the corporation revoke its financial support for that candidate? With almost absolute certainty, it will not. Notably, if this effect were to happen millions of times over, then perhaps the corporation would take notice, but there is a lack of evidence to go any further into this hypothetical scenario. There are additional questions as to if it is Congress' role to dictate the day-to-day interactions between a shareholder and the corporation.

Is a corporation a person? This is a fundamental question to determine the appropriate distribution of rights. Perpetuity of life and limited liability are also aspects that are unique to corporations.⁹³ It seems that the majority is aligning with the *Santa Clara* ruling, which states that corporations and people are accorded the same rights under the equal protection clause of the Fourteenth Amendment. The dissent has issued this probing question against claims by the majority that corporations are equal enough to people to have full constitutional rights: Should corporations be allowed to vote? Since corporations have so many rights that are similar to

⁹² Citizens United v. FEC (Kennedy, A., opinion, 46).

⁹³ Doug Kendall, "Will the Supreme Court Prevent Citizens United From Being Fixed?," The Huffington Post, March 25, 2011, http://www.huffingtonpost.com/doug-kendall/will-the-supreme-court-pr_b_840794.html.

humans, it seems that the next cogent step would be to allow corporations to run for elected office and the right to vote. Defenders of the majority have responded by saying that corporations do not necessarily require the right to vote, but due to their enormous potential for influence in American society corporations do deserve protection of political speech.⁹⁴

Corporations are inherently included in the political process because of the amount of money that they contribute to the government (taxes) and, therefore, society. Discriminating against this protection would entail the government actively giving preference to certain viewpoints over others. This is antithetical to the values that the Bill of Rights and the First Amendment was based upon.

The majority opinion also emphasizes that there are numerous corporations that are not the stereotyped, multi-million or multi-billion enterprises. There are a significant amount of small and non-profit corporations that do not have the appropriate financial support to maintain a PAC.⁹⁵ As discussed earlier, the PAC is the mechanism that corporations use for donating to political campaigns. Therefore, it is extremely important that the protection of political speech be extended and protected for smaller PACs. The majority argues that in the pre-*Citizens* world, there was a *de facto* ban on political speech for the smaller corporations that could not afford the maintenance of a PAC.⁹⁶ According corporations the necessary protection of political speech, but not going as far as to make corporations eligible to vote or run for office, was a necessary measure to protect freedom of speech for all.

This paper finds a contradiction in the logic of the majority regarding the necessity for all corporations to have protected political speech. As mentioned above, the reason that

⁹⁴ Smith, Bradley. *Before the United States Senate Committee on the Judiciary "We the People? Corporate Spending in American Elections after Citizens United*. Report. March 10, 2010.

⁹⁵ *Citizens United v. FEC* (Kennedy, A., opinion, 21).

⁹⁶ *Ibid.*

corporations require the ability to engage in public dialogue is because of the enormous amount of money that they contribute to society. However, the majority claims that smaller corporations also deserve the same level of freedom of expression. If a corporation is unable to even pay the salaries of a small staff for a PAC, then it seems unlikely that that particular corporation would be contributing enough money to society to necessitate voicing its opinion in the public atmosphere. Unless the majority wishes to change its rationale for why there exists a right for corporations to have protection of political speech, this protection necessarily cannot extend to all corporations. Since the reasoning could not protect small corporations without enough funding to form a PAC, then there would be no added protection for small PACs; that advantage is lost.

What About Unions?

The *Citizens* decision does not exclusively apply to corporations, as was mentioned in the introductory chapter. Unions are also included as bodies that are exempt from the normal restriction on campaign contributions, and they also preclude people from obtaining certain jobs if they refuse to be a part of the union. This paper has chosen to exclude unions from its discussion for a specific reason. This chapter has been focusing on the subtleties and details of corporations, and has been attempting to sift through arguments, through the framework of corporations, that either support or reject the decision. As this next section seeks to prove, unions are substantially different from corporations, and thus are not included in this analysis, because of one important reason: unions already possess a unique protection mechanism for their members.

Typically, a union is composed of many individuals that band and act together. Contrastingly, shareholders in corporations, for the most part, do not interact with each other. There is also a notable difference in the accountability and transparency structures between corporations and unions, where corporations are notorious for acting with little to no transparency.⁹⁷ Not only are the purpose and structure of unions fundamentally different from those of corporations, but the law also has precedent for treating these two groups differently. In *Aboud v. Detroit Board of Education* (1977), protection for unions and public-sector workers against using their dues to finance “political or ideological spending” that the member disagrees with was present, but there was not this same protection for shareholders in a corporation before *Citizens* emerged.⁹⁸

At this point, it would make be logical to conclude that unions are insignificant actors for the purpose of this paper. However, there is evidence to support that labor unions are, or at least before the *Citizens* decision, more actively involved in political campaigns than corporations are. California has no restrictions on the amount of corporate political advertisements that are allowed, yet not a single corporation was one of the top ten independent contributors in California political campaigns from 2001 to 2006.⁹⁹ Who, or what, was filling those ten spots in the absence of corporations? Five labor unions, two Indian tribes, two individual people, and the trial lawyers’ association. This information suggests that labor unions are a more powerful force to be dealt with than corporations are. Even though corporations may have more money to spend, if corporate desire to spend on campaigns does not exist then unions could have far more

⁹⁷ Patrick Leahy, "Questions from Doug Kendall to Senator Patrick Leahy," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79, 41.

⁹⁸ *Ibid.*

⁹⁹ Leahy, 47.

impact. Regardless, since union members have been accorded different rights and since their structures are fundamentally different to corporations, this paper will be focusing on the *Citizens* decision with respect to corporations. Even though unions have demonstrated more activity in political campaign contributions, perhaps the *Citizens* decision will spur corporations to become more involved. Implications for the future of campaign finance will be discussed in detail in Chapter 6, but for now we continue with a focus on corporations.

Foreign Ownership of Corporations

One worry that has emerged among both scholars and the public has been concern over *Citizens* opening up American politics and influence to foreigners. Since corporations are able to unlimitedly contribute to campaigns, there exists the worry that foreign-owned corporations (or, perhaps, corporations that are technically owned by Americans and based in American soil, but that are heavily influenced by foreigners) will be able to participate in politics by funding candidates that support these corporations' agendas. To allay one worry, the law, which has remained unchanged since *Citizens*, explicitly states that foreign nationals cannot contribute money in any US election.¹⁰⁰ Supporters of the decision point out that *Citizens* did not amend any part of this law.¹⁰¹ Further, the overall ways in which foreigners are allowed to participate in American politics in any way was not changed. As the official FEC regulations state, foreigners cannot "direct, dictate, control, or directly or indirectly participate in the decision making process of any person, such as a corporation, labor organization, political committee, or political

¹⁰⁰ Smith, 6

¹⁰¹ Ibid.

organization with regard to such person's Federal or non-Federal election-related activities.”¹⁰²

The conclusion for the majority is that foreign-owned corporations will not be legally able to influence American politics.¹⁰³

Opponents to the majority claim that a subsidiary company could easily be formed to allow foreign influence. All that would be needed to accomplish this goal would be to find a US citizen as a legally appointed person in charge of the corporation. However, there is evidence that suggests US-based companies are familiar with creating subsidiaries and setting strict boundaries for any foreigners involved.¹⁰⁴ This supposed reassurance, however, neglects the specific worry about foreign, not US, based companies creating subsidiaries. The inferred link is that if US companies have historically had few problems, then foreign companies are likely to follow the same pattern. Speculation on expected behavior may not be enough to assuage concerns in this arena. Further, US subsidiaries of foreign owned corporations were already allowed to have expenditures in 28 states before *Citizens* was enacted. California had no regulation for corporate influence, but New York did; this emphasizes the lack of sudden doom that the opposition claims will immediately occur once foreign influence enters politics.¹⁰⁵

The dissenting opinion could respond by noting that state elections, even those of New York and California, are on a thoroughly different scale than a general election would be. The potential for corruption would be greatly amplified with a general election, and the temptation for undue corporate influence may be too great to resist. Moreover, regarding the overall attempt

¹⁰² Bradley Smith, "Questions from Senator Jeff Sessions Answered by Professor Smith," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79, 66.

¹⁰³ Leahy, 42.

¹⁰⁴ Smith, "Questions from Senator Jeff Sessions Answered by Professor Smith," 67.

¹⁰⁵ *Ibid.*

of the majority to placate fears about foreign influence in American politics, challengers to *Citizens* express concern over First Amendment protection being extended to foreign nationals. Because the Court has decided that the First Amendment provides protections of freedom speech for all, regardless of the identity of the speaker, this would necessarily include foreign nationals. Perhaps, even, this may include multi-national corporations.¹⁰⁶

Additionally, the Court has changed the previous standard for corruption with *Citizens*. Before the decision, an activity that was creating either the appearance of corruption or actual corruption was banned. Therefore, if a multi-national corporation were thought to be conducting shady business and using enormous sums of money to influence politicians, then this corporation could be viewed as creating the appearance of corruption and would then be completely barred from financially contributing to campaigns. However, with the changes made in *Citizens* require actual, tangible evidence that corruption has occurred in order for a change to be made.¹⁰⁷ This change may make it considerably more difficult to prove that foreign-owned corporations are unfairly influencing elections.

In recent years, there has been an increase in the awareness of China as a rising global power. In accordance with this increased awareness, Americans also wonder about the economic future of America with such a competitive China in existence. A popular fear that has emerged hypothesizes what the future of American politics would be like if China were able to own and operate a US-based corporation.¹⁰⁸ If this scenario were to occur, the worry is that such a corporation would be able to sponsor whichever candidate will support their policy agenda. And

¹⁰⁶ Leahy, 42.

¹⁰⁷ Leahy, 42.

¹⁰⁸ Patrick Leahy, "Opening Statement of Hon. Patrick Leahy, A US Senator from the State of Vermont," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79 (March 10, 2010), 1.

with the wealth of multi-national corporations, the possibility of outcomes is daunting. Scholars and the public worry about the future of democracy and the democratic tradition if foreign-owned corporations are allowed to spend as much as they wish.

A final concern with foreign-ownership of corporations is more technical than anything else. The response of supporters of the majority opinion to fears about US-based, but foreign-owned corporations, is that a US citizen must be in charge, and that a US citizen must own a controlling share of the corporation. But, what exactly constitutes a controlling share? This seemingly simple question can have powerful impacts. As it were, the definition for a controlling ownership share of a corporation is decided on a state-by-state basis. For example, 32 states define a controlling interest with a specific percentage, where 31 of those states clarify that 20% ownership or more is needed to qualify as a controlling share.¹⁰⁹ This lack of a codified definition of a controlling share could lead to corporations seeking out bases in US states that have the loosest restrictions. While it is impossible to determine the exact consequences of potential foreign-ownership of corporations on the American political process, the ambiguity in definition of a controlling ownership is most certainly a cause for concern.

¹⁰⁹ Smith, testimony, 6.

Chapter 5: Additional Considerations in *Citizens United*

Introduction

This chapter provides an overview of the remaining issues of contention for the *Citizens* decision. The opinion, concurrence, and dissent, as discussed thus far, have focused on the nature of corporations and freedom of speech. This chapter seeks to integrate two key additional issues that are fundamental to *Citizens*, such as the possibility of banning other forms of communication, and the validity of the anti-distortion (equality) rationale present in *Austin v. Michigan Chamber of Commerce*. These issues represent crucial factors in determining the validity of the *Citizens* decision.

Book Banning?

Once a person mentions the phrase “banning books,” the general public becomes worried quite quickly. Indeed, this was exactly what happened with *Citizens*. The then-Solicitor General Kagan caused more controversy in this issue when she endorsed the authority of the recently developed statute in *Citizens* to regulate the publishing of books.¹¹⁰ With the newly revised law, a publishing house could be banned from publishing a book if there was a single sentence in the entire book that could be deemed as an electioneering communication. While many people might brush actual book banning off as a distant possibility and an event that is highly unlikely to occur, Kagan included, the possibility of the government banning publishing of books may become a reality in the *status quo*.

¹¹⁰ Bradley Smith, "Questions from Senator Jeff Sessions Answered by Professor Smith," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79, 60.

It is plausible to imagine the extension of policies that apply to a movie like *Hillary* or another film that was banned from being shown, *The Rights of the People*, into the realm of the written word. While the possibility of book-banning in America is rather worrisome for most Americans, Kagan noted, regarding potential opportunity for banning books as a result of *Citizens*, that “there has never been an enforcement action for books,” yet, in acknowledging the possibility of literature censorship, there could be “a good as-applied challenge.”¹¹¹ In this statement, Kagan recognizes the potential for government authority to ban other kinds of media communication. Her remark about the “as-applied challenge” refers to the recourse that individuals who have their material censored could take up. As was mentioned in the first chapter, an as-applied challenge is only brought up on an individual, case-by-case basis. This contrasts with the facial challenge, which challenges a law on the grounds that it would never be constitutional to follow that law. While Kagan notes that there is the potential for as applied challenges, this inherently recognizes that individuals will have their material censored before it either allowed to be published or made unavailable if it were to be published. This could lead to a significant increase in the amount of material that would make the banned list.

While the above may convince the public of the imminent future of an Orwellian world, there are some practical considerations that temper this fate. First, it important to consider that even after *Citizens*, electioneering communications, in a documentary, a pamphlet, or a book, can only be banned within 30 days of a primary election and 60 days of a general election. In reality, this is a fairly small window, and individuals who want to express their political opinions may be well advised to ensure that publications are produced outside of these windows. It is interesting to consider the scope of the limitation on individuals producing electioneering communications.

¹¹¹ Smith, “Questions,” 60.

While a 30 or 60-day ban may appear easy enough to work around, at what point would the limit be too great? This paper does not attempt to answer this question, but instead poses it as a thought experiment. Finally, the entire expenditure ban that *Citizens* lifted only applies to corporations and unions, so individuals are still welcome to produce material with politically-based content even within a few days of an election. Therefore, the amount of material that *Citizens* may ban is reasonably minimal.

The dissent has elucidated some serious and potential harm that may emerge as a result of *Citizens*. The public should be concerned if even if a minimal chance exists that books may be banned in America. The dissent has pointed out extreme potential consequences of *Citizens*, and the majority has countered by stating that the cases where censorship may occur would be reasonably infrequent. In concluding, if the potential for harm is great, and the opportunity for enforcement is very small, then this paper claims that the risk that *Citizens* creates far outweighs the potential rewards.

Anti-Distortion and Equality Rationales from Austin v. Michigan

One of the most frequently cited cases in reference to *Citizens* is the landmark campaign finance reform case of the 1990s *Austin v. Michigan Chamber of Commerce*. As was discussed in Chapter 2, *Austin* “upheld a direct restriction on the independent expenditure of funds for political speech for the first time in history.”¹¹² Notably, this is the majority opinion of the Court, which ruled such expenditure limits to be unconstitutional and not founded in precedent. Regardless, the *Austin* decision relied upon what it called an “anti-distortion rationale” in order

¹¹² *Citizens United v. Federal Election Commission*, 558 US ____ (2010) (Kennedy, A., opinion, 31).

to justify such a limitation on expenditure limits. According to the decision, these limits were essential not in order to prevent corruption, but in order to ensure equality for all. Throughout this discussion it is important to keep in mind that equality and freedom are two separate, and different, objectives. Here, the decision relies upon an understanding of the First Amendment that the identity of the speaker is relevant to protecting his free speech. More succinctly, as Justice Kennedy writes for the Court, “The Court is thus confronted with conflicting lines of precedent. A pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”¹¹³ Chapter 2 covered the implications for campaign finance reform history that emerged as a result of *Austin*, but this section seeks to explore the validity of the anti-distortion rationale with respect to equality of freedom of speech.

The Court has defined its anti-distortion rationale as preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”¹¹⁴ Is it within the realm of the Court to make policy to prevent distortion of wealth? The majority opinion has a twofold answer to this question. First, that it is unacceptable to compromise the values elucidated in the First Amendment to make policy in an attempt to correct for distortion of wealth. This is compounded when the majority sees the First Amendment as providing equal protection for freedom of speech, regardless of the identity of the speaker.¹¹⁵ A second concern is if the Court should be activist in attempts to prevent the distortion of wealth. Perhaps it is not within the mandate of the Supreme Court to be actively creating distinctly new policy; it is a Court of review to assess the constitutionality of pre-

¹¹³ *Citizens United v. FEC* (Kennedy, A., opinion, 32).

¹¹⁴ *Citizens United v. FEC* (Kennedy, A., opinion, 31, quoting from *Austin* section 660).

¹¹⁵ *Ibid*, 30.

existing laws. The branch of law that would be responsible for the redistribution of wealth is Congress.

The majority believed that implications for banning other forms of media forced the Court to overturn *Austin*. If the public was to follow the law as prescribed in *Austin*, then a newspaper that was owned by a corporation may be censored. If the newspaper were to publish any article that contained an electioneering communication, which seems almost inevitable for a source of news, and a corporation owned the paper, then this act would violate *Austin*. In theory, the paper would have to be temporarily suspended or remove any offending articles. It is difficult to imagine entering into an election season without consulting some form of media for news about campaigns. The Internet, news delivered on the television, and talk radio all provide excellent coverage of critical issues for millions of Americans. Additionally, the Constitution makes no differentiation between different kinds of media communications, so Internet blogs, printed newspaper articles, and pamphlets could all be at risk of censorship.¹¹⁶ Even e-books, such as Amazon's Kindle, could be threatened. Access to create political speech, and its concurrent availability to be heard, are necessary to the maintenance of democracy; therefore, as the majority asserts in the Court opinion, it would be unconstitutional to have a robust media and remain consistent with the *Austin* decision.¹¹⁷ In response to this critique by the majority, the defense has responded that society and law have made special exceptions for media corporations in the past. It is assumed that an extension and continuation of such policies could exist in the post-*Citizens* world. Interestingly, the majority is relying on the precedent that has previously

¹¹⁶ Bradley A. Smith, "The Myth of Campaign Finance Reform," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79 (National Affairs, 2009), 75.

¹¹⁷ *Citizens United v. FEC* (syllabus, 5).

been set, both by the Court and by social norms, that allows special exemptions for media, but will not trust *Austin*'s precedent regarding the anti-distortion rationale.

Chapter 6: Looking to the Future and Final Thoughts

Introduction to the Conclusion

One of the main goals of this paper has been to utilize precedent and application of cogency in order to determine the validity of *Citizens*. Although this is a fascinating topic of inquiry, for which the results will be discussed later in this chapter, the legitimacy of the decision has little to do with the real world consequences that will occur. This final chapter will first determine what effect *Citizens* will have on corporations, politicians, and campaign finance in general. Second, there will be a synthesis of the consequences for political speech, as the majority frequently cited First Amendment grounds as a reason for lifting the ban. Third, this section will look to the legislative consequences for the 24 states that have laws that limit corporate spending and contemplate the potential ways for a reversal of the decision. Finally, this chapter will consider the conclusions from the above consequences and return to answering the original question: did the Court make the correct decision in *Citizens*?

Corporations, Politicians, and Elections: Who Gains and Who Loses

There are three major groups who could be affected by the *Citizens* decision: corporations, politicians, and the general population who is involved in the election cycle. Corporations are perhaps the most interesting of the three to consider. The dominantly proposed theory is that enormous corporate wealth will now enter into campaigns and have the potential to corrupt individuals. The Court made clear, however, that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”¹¹⁸

¹¹⁸ *Citizens United v. FEC* (syllabus, 5).

Perhaps, then, the public should not be overly worried about the influence of money in politics. It is difficult to gather empirical evidence regarding the legitimacy of claims of corruption, or the appearance of corruption in politics. However, this lack of evidence should not translate to apathy in the public sector. Will corporations enthusiastically spend in upcoming elections now that the previously established ban has been lifted, or will the expenditure levels of corporations be unaffected by new opportunity? By using the case study of California that was presented in Chapter 4, we may be able to predict that corporate behavior will not overwhelmingly change. California, as a state that did not have restrictions on independent expenditures for corporations before *Citizens*, witnessed the majority of the money in politics as dominated by unions.¹¹⁹

There has only been one election since *Citizens* was enacted, which was the mid-term election of 2010. Therefore, the data available to determine if corporations have greatly increased expenditures is limited in availability. One figure reports that almost \$4 billion was spent in the 2010 midterm election. If accurate, this represents an increase of more than 30% from the amount spent in the last federal midterm election.¹²⁰ Reliable data, complete with a breakdown of where specific sources of money are coming from, are difficult to find. Therefore, this increase in spending may have been caused by a number of different factors. However, this paper finds the circumstances surrounding legislation changes with *Citizens* and a 30% increase in amount of money spent in campaigns to be related, and not purely coincidental. Yet, perhaps

¹¹⁹ Patrick Leahy, "Questions from Doug Kendall to Senator Patrick Leahy," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79, 47.

¹²⁰ Brian Montopoli, "Target Boycott Movement Grows Following Donation to Support 'Antigay' Candidate - Political Hotsheet - CBS News," *Breaking News Headlines: Business, Entertainment & World News - CBS News*, July 28, 2010, http://www.cbsnews.com/8301-503544_162-20011983-503544.html.

this 30% increase is not too extreme; the cost of presidential races increased by 55% from 2004 to 2008.¹²¹

The lack of reliable data also points to another issue of consideration for the future: disclosure agreements. The *Citizens* decision ruled that disclosure was mandatory by the corporation that was producing electioneering communications (in this case Citizens United was legally required have a few frames of the documentary that notified the public that it was responsible for the project). Interestingly, all 4 of the dissenting justices even agreed with this part of the majority opinion. Clarence Thomas wrote a dissenting opinion exclusively on the topic of disclosure. Justice Thomas' main argument was that the right to anonymity of speech must be preserved, at any cost.¹²² His argument, that anonymity is fundamental to protecting the essential right of free speech, will be addressed below. All of the justices, save Thomas, recognized that the benefits associated with disclosure far outweigh any potential harm.

There are two potential harms to consider with disclosure. The first is disclosure in the narrow reading, as endorsed by the Court in *Citizens*, and the second is disclosure of where campaign funds are coming from in the overall election process. There is less overall controversy involved with the disclosure requirements as set in *Citizens* largely because corporations are confident that they can maneuver around actually disclosing.¹²³ There are a number of corporations that have billions of dollars and hundreds of lawyers at their disposal that could be used to find ways around this disclosure. For instance, if Citizens United did not want its name associated with an anti-Hillary Clinton message, the corporation could use a subsidiary

¹²¹ Thomas Stratmann, "Campaign Contributions and Spending: What Is Being Purchased and By Whom?" (lecture, Roberts North 15, Claremont, April 1, 2011).

¹²² *Citizens United v. FEC* (Thomas, C., opinion, 2)

¹²³ Rick Hasen, "Beyond Citizens United: Campaign Finance Law and the Roberts Court" (lecture, Athenaeum, Claremont, April 1, 2011).

corporation or fund a new one with a non-offensive name, something such as “Americans for Impartial Information,” or another name along those lines. Americans for Impartial Information would then have its name stamped on *Hillary*, and the American public would know no better. Moreover, even if the corporation disclosed, it seems highly unlikely that the public would know which individuals that make up the corporation would be the correct targets of violence, if such a path were desired. In fact, there has been no evidence that disclosure leads to violence. This paper endorses that the public should be more worried about increased attempts at disclosure for individuals that contribute to campaigns.

Opponents of disclosure argue that if names are released as to which corporation, or individual, supported which initiative, then those corporations, or people, may be targets of violence. Recently, customers have been boycotting Target and Best Buy in response to these corporations’ donations to a group that is making ads on behalf of the gubernatorial campaign of Tom Emmer of Wisconsin.¹²⁴ Target spent \$150,000 on behalf of Emmer’s campaign, and the public has responded by posting YouTube videos where people are shown returning goods to Target and cutting up Target credit cards. The main reason that so many Target customers have boycotted is because Emmer opposes same-sex marriages.¹²⁵

The experience that a corporation such as Target has gone through could have two potential impacts: it could deter corporations from becoming involved in the political process through expenditures or it could encourage corporations to become more crafty to avoid disclosure. The second option has already been discussed, but if the first were to occur there could be a completely different end scenario. Essentially, what if *Citizens* caused corporations to be even less involved in political campaigns than they currently are? This is quite the opposing

¹²⁴ Montopoli

¹²⁵ Ibid.

theory of the most frequent worry about *Citizens*, but it is an interesting concept to explore. Thomas Mann believes that the public should be more worried about politicians soliciting and harassing corporations for financial involvement in campaigns than worry about big business corrupting elected officials.¹²⁶ If corporations desired to become more involved in political campaigns, it seems that their lobbying powers would have been dedicated to that cause. However, Mann notes that corporations were not pushing for the type of legislation that emerged in *Citizens*. In fact, there is no evidence to support that corporations were unhappy with the *status quo* for expenditures and contributions.¹²⁷ As mentioned in Chapter 3, it is possible that the Roberts Court had a pro-business agenda, regardless of any tacit or explicit support from big business. Further, during the era of the Roberts Court, there has been a decline in the amount of petitions filed in every area except campaign finance.¹²⁸ In fact, the campaign finance related case *McComish v. Bennett* is slated to be decided during April 2011. *McComish* is an example of one of the several cases regarding campaign financing that have reached the Supreme Court during the Roberts era. There is no way to be certain as to what the future of the Roberts Court will look like, but scholars predict that only a constitutional amendment or retirement of a judge will change the trajectory of the Court back from de-regulation.¹²⁹

Although *Citizens* did not change legislation on disclosure of corporations for expenditures, this issue has become increasingly controversial and relevant since *Citizens*. Democrats are attempting to pass the DISCLOSE Act in the Senate in attempts to temper the enormous wealth that could be coming from corporations in the upcoming election. DISCLOSE, which passed in the House but failed in July 2010, in the Senate, would require corporations to

¹²⁶ Mann

¹²⁷ Mann

¹²⁸ Hasen

¹²⁹ Hasen

disclose to the public the expenditures that they make.¹³⁰ Specifically, DISCLOSE aims to “Amend the Federal Election Campaign Act of 1971 to prohibit foreign influence in Federal elections, to prohibit government contractors from making expenditures with respect to such elections, and to establish additional disclosure requirements with respect to spending in such elections, and for other purposes.”¹³¹ The issue remains undecided in legislation, but disclosure has the potential to impact Americans in multiple facets of their lives.

One potential consequence is exemplified by the website eightmaps.com. This site allows users to view a geographical map and see the names, occupation, and amount of money that people donated in favor of the anti-gay marriage Proposition 8 that passed in California last year.¹³² Again, although evidence has not been proffered as to a link between disclosure and violence, the possibilities for websites such as eightmaps.com and fundrace.org (every contribution to specific causes can be viewed) to cause problems is imminent.

Another consequence of *Citizens* is that public financing of candidates may be effectively extinguished. With corporations being allowed to spend unlimitedly, it is doubtful that candidates who choose public financing will be able to compete. This could have disastrous consequences for politicians, as those who would normally opt for public financing now feel as though they must solicit corporate sponsors.¹³³ Additionally, this effective extinguishing of public financing may only increase the advantage for incumbents. Although the Court has ruled that money does not have a corrupting influence, the public should still worry about desperate candidates receiving the necessary hundreds of millions of dollars to be competitive in the

¹³⁰ "H.R.5175: DISCLOSE Act - U.S. Congress - OpenCongress," OpenCongress - 112th Congress - Track Bills, Votes, Senators, and Representatives in the U.S. Congress, http://www.opencongress.org/bill/111-h5175/actions_votes.

¹³¹ Ibid.

¹³² "Prop 8 Maps: A Mashup of Google Maps and Prop 8 Donors." eightmaps.com.

¹³³ Hasen

upcoming presidential election. According to one source, post tax corporate profits from 2009 were \$1 trillion, and Fortune 100 companies have combined profits of \$605 billion. Therefore, if Fortune 100 companies were to take only 2 percent of their post tax profits and put it toward political expenditures, this would double all of the current political spending, even including that by PACs.¹³⁴ Notably, this data may have been manipulated to endorse a certain motive, but even if these numbers were grossly exaggerated the consequences could be severe. The amount of money currently in politics is enormous, and an increase is only more of a cause for concern.

Freedoms

As this analysis has highlighted, the issue of freedom of speech and expression is critical. There is hardly another freedom that is more central, or more representative, of the American tradition. Since the contribution of money to an independent political effort has been deemed by the Supreme Court to be a legitimate expression of political speech, it is essential that this freedom be upheld. However, the majority opinion that corporations must have their political speech protected on the same level as individual, living persons, is a stretch. Fundamentally, no matter how much legislation is passed that allows corporations certain protections under the law, corporations are still not persons. They have unlimited lifetime, and therefore cannot vote and cannot run for office. While the efforts of the Justices in the majority to protect First Amendment rights are well appreciated, the symbolic and tangible harms that accompany unlimited corporate expenditures far outweigh the benefits from protecting quasi-person corporations. Moreover, when considering the degree to which other forms of freedom of speech

¹³⁴ Jeffrey D. Clements, "Written Testimony of Jeffrey D. Clements," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United* (March 10, 2010), 87.

and expression will necessarily be curtailed, *Citizens* has created more problems than it has solved. Elena Kagan, as the Solicitor General at the time, claimed that book banning would occur only in extreme and rare circumstances because of *Citizens*, but the potential for such banning of fundamental expressions of thought are terrifying. The United States government has recognized that it retains the authority to ban books.¹³⁵ Admittedly, freedom of speech and expression has never been absolute in American society, (hate speech, for example, is banned) but this acknowledgment of the existing potential for censorship is alarming. Perhaps we are moving toward the Orwellian world that Scalia mentioned in his opinion on *Austin*.¹³⁶

Legislation

24 states currently have laws that restrict corporate spending in elections. How long will these states be able to retain these laws when they directly conflict with the new law as created by *Citizens*? Some of these laws date back over 100 years. As of April 2011, 17 of the 24 states that have laws in conflict with *Citizens* have introduced legislation to amend the current laws; 11 states have passed new laws already.¹³⁷ This is a critically important aspect of the *Citizens* decision that is sometimes overlooked by the more controversial corruption and book banning arguments. Money affects politics at both the federal and the state level, and forcing nearly half of the states in America to overhaul their entrenched campaign finance policies has the potential for backlash and resentment. However, attempts at amending laws to fit *Citizens* have failed in

¹³⁵ Jeffrey Rosen, "Statement of Jeffrey Rosen, Professor of Law, George Washington University, and Legal Affairs Editor, the New Republic, Washington, DC," in *Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session: "We the People"? Corporate Spending in American Elections after Citizens United*, Serial No. J-111-79, 14.

¹³⁶ *Austin v. Michigan Chamber of Commerce* (Scalia, A., section 679)

¹³⁷ "Citizens United and the States," NCSL Home, <http://www.ncsl.org/default.aspx?tabid=19607>.

13 of the 24 states.¹³⁸ While money in politics is critical at the state and federal level, this analysis finds more cause for concern over the multi-billion dollar federal campaigns rather than state elections. Regardless, the overhaul of state constitutions to remain consistent with *Citizens* is an issue to watch.

Conclusion

After analyzing the history of campaign finance reform, the specific arguments that both the majority and the dissent made, the history of legislation with regard to corporations, and the potential impacts that stem from this decision, this paper finds that the Supreme Court was erroneous in its decision for *Citizens United v. Federal Election Commission*. When *Citizens* is contextualized in the history of campaign finance reform, it is an outlier from the rest of the landmark cases. The Tillman Act, the development and refinement of FECA, *Buckley v. Valeo*, and *Austin v. Michigan* all recognized the importance of freedom of speech, but also realized the practical harms in according corporations more rights than individual, living American citizens. Overall, the dissenting opinions were more convincing in their defense of American judicial tradition of relying on precedent instead of activism to uphold the Constitution. The Court's solicitation of a re-argumentation of the case to obtain a completely different and far more broad set of issues from which to legislate is wildly unprecedented, and even worthy of considerations of disregarding the decision since it was so artificially prompted. Although it is too early to tell, the future of American politics eagerly awaits the consequences of *Citizens*.

¹³⁸ *Citizens United and the United States*

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