When Good Courts Go Bad:
Why the Supreme Court Got It Wrong in Citizens United

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I: Introduction

In January 2010, the Supreme Court handed down one of its most infamous decisions since *Roe v. Wade*. With the opinion in *Citizens United v. Federal Election Commission* came a flurry of concern about the future of campaign finance reform in America. The case, which held any limit on independent expenditures by a corporation to be unconstitutional, carries great consequences on the role of money in politics and the future of free speech. Since this year has seen the nation's first presidential election since the now-infamous decision, the debate over *Citizens United* is still quite relevant. Furthermore, the Supreme Court may very well re-consider its two-year-old decision in a future term, with a court in the 8th Circuit of Appeals upholding *Citizens United* as applied to a Minnesota law.[1] In Part II, this paper examines a brief timeline of campaign finance reform in the United States, discussing important Supreme Court cases whose holdings contributed to the decision in *Citizens United*. In Parts III through VII is a discussion of various reasons as to why *Citizens United* was decided wrongly, including: that corporations do not deserve the same level of rights as natural people, that there now exists some incoherency for future legislation, that antidistortion was wrongfully disregarded by the Court, that the Court takes an improper view of free speech, and that the regulations struck down by *Citizens United* were nothing more than time, place, or manner restrictions. Part VIII addresses a few other arguments in favor of *Citizens United* not encompassed by the preceding parts. The paper concludes that the Supreme Court was wrong in its *Citizens United* opinion and that should it fail to overturn itself in a pending case, legislative action must be taken to ensure that the negative ramifications of the decision are contained and alleviated as much as possible.

1 Baynes, Terry. "Appeals Court Blocks Minnesota Law on Corporate Political Spending." *Chicago Tribune*, 9/5/12 2012.

II: A Timeline of Campaign Finance Reform

A. 1976: *Buckley v. Valeo*

One of the most important cases regarding campaign finance jurisprudence[2], *Buckley* answered numerous questions regarding the 1971 Federal Election Campaign Act (FECA) and its bans on independent expenditures and direct contributions.[3] The Court held that FECA's limits on direct, individual, contributions were constitutional, as the possibility of *quid pro quo* corruption was very likely, and a great threat to the country's democratic process.[4] Though the *Buckley* Court upheld some FECA limits regarding direct contributions, it took an opposing view regarding independent expenditures. The Court ruled that the FECA "expenditure ceilings [imposed] direct and substantial restraints on the quantity of political speech" and were therefore a violation of the First Amendment.[5] What is interesting about this part of the opinion, other than the fact that this is exceedingly similar to the language used by the *Citizens United* majority, is that here the Court explicitly equates spending with speech. The limits on independent expenditures did not just limit the amount of money one could spend, then, but also the amount of speech one could speak.

B. 1990: *Austin v. Michigan Chamber of Commerce*

Buckley is indeed an influential decision on U.S. campaign finance, but it is by no means the end of the debate. If it were, after all, this paper would be moot. Fourteen years after *Buckley*, the Court again addressed campaign finance in *Austin v. Michigan Chamber of Commerce*. Whereas *Buckley* regarded expenditures in general, *Austin* addressed the rights corporations have regarding campaign finance. The *Austin* Court held that a Michigan statute banning corporate use of general treasury funds for independent expenditures, and justified this ban by reasoning that there was a compelling government interest in "preventing the corrosive and distorting effects" that corporate money can have.[6] This interest, then, was sufficiently compelling, and the Michigan law was narrow enough, so as not to be a violation of either the First or Fourteenth

2 Hasen, Richard L. "*Citizens United* and the Illusion of Coherence." *Michigan Law Review* 109 (2010): 581-624.
3 *Citizens United V. Federal Election Commission*, 558 U.S. 310 (2010).
4 *Buckley V. Valeo*, 424 U.S. 1 (1976). ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.")
5 *Id.*
6 *Citizens United v. Federal Election Commission*, quoting *Austin*

Amendments. *Austin*, with its antidistortion reasoning, then trumps *Buckley* by espousing and codifying an egalitarian rationale, the same one that the *Buckley* Court had rejected.[7]

C. 2002: McCain-Feingold Bipartisan Campaign Reform Act

Campaign finance reform has not just been an action of the courts, however. In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), which attempted to define succinct laws and regulations regarding campaign finance while abiding by controlling precedent of the time, including *Buckley* and *Austin*. BCRA set limitations on when a corporation could use its general treasury funds for independent expenditures, declaring that any electioneering communications—defined to be "any broadcast, cable, or satellite communication that refers to a clearly identified candidate"—made within 30 days of a primary election or 60 days of a general election were unlawful.[8] BCRA also banned soft-money donations from corporations, unions, and individuals, eliminating the unregulated flow of money between candidate and donor. BCRA, like most pieces of unpopular legislation, faced challenge in court. The Supreme Court, in *McConnell v. Federal Election Commission*, upheld parts of BCRA and also reaffirmed the holding of *Austin*.[9] Thus, *Austin* and BCRA stood as controlling precedent and good law, until January 2010.

D. 2010: *Citizens United v. Federal Election Commission*

In *Citizens United*, the Court was initially asked to determine whether a film, *Hillary: The Movie*, produced by the nonprofit Citizens United violated BCRA as an electioneering communication.[10] In a surprising move of overreach—that is, addressing more than the "case or controversy" before it—the Court expanded this narrow question to a debate about the constitutionality of BCRA and the validity of *Austin*. In its holding, the Court overturned *Austin* as well as the relevant parts of *McConnell*—the parts reaffirming *Austin*—and held that corporations could use their general treasury funds for independent expenditures, and the limitations imposed by BCRA (i.e. 30 days before primary/60 days before general election) were unconstitutional prohibitions on free speech. In the wake of this decision, corporations are now

7 Hasen, Richard L. see footnote 1, *supra*. p.588 ("the Court in fact was espousing an equality rationale, which it had rejected with respect to individuals in *Buckley*.")
8 *Citizens United v. Federal Election Commission,* quoting BCRA
9 Hasen, Richard L. see note 1, *supra*. p.589 ("Reaffirming *Austin*, the *McConnell* Court upheld the rules...")
10 *Citizens United v. Federal Election Commission*

free to spend as much money as they want from their general funds (that is, without the use of a PAC) as close to elections as they want. While there is a case working its way through the court system, *Western Tradition Partnership v. Attorney General of Montana*, *Citizens United* still remains a controlling precedent, and thus remains a problem.

III: A Lesser Degree of Citizenship Implies Lesser Constitutional Protection

Citizens United is based on a flawed premise that corporations deserve the same protections and rights as natural people (humans). While it is not contended that corporations deserve *no* First Amendment protection, it seems more appropriate that since corporations differ greatly from humans, and since corporations are held to a lesser degree of citizenship, they thus merit less protection. As Justice Stevens notes in his dissent, "unlike natural persons, corporations have…perpetual life," may amass unlimited wealth, and do not comprise the "We the People by whom and for whom [the] Constitution was established."[11] Because corporations have perpetual life, it is off-putting to classify them as "people." Natural people have limited lifespans; and though not all that is mortal is human, certainly all that is human is mortal, and will die eventually. If a corporation wishes to be a person, it seems fitting that it must meet all criteria of personhood, including the unfortunate consequence of mortality. Since the corporation, however, does not die—it may continue on for ages and amass unlimited wealth. The ability of a corporation to amass unlimited wealth is troubling as it makes that corporation a "formidable political presence."[12] With unlimited wealth, a corporation may, in theory, spend unlimitedly on electioneering communications. Realistically, a corporation cannot spend truly unlimited amounts on electioneering, as a corporation has its share of expenses that go along with running a business, but a corporation's general fund nonetheless gives it more disposable funds than most individuals possess. For this reason, the corporation can outspend most natural persons. Justice Stevens distinguishes corporations from natural people in an interesting way in claiming that corporations are not a part of the famous "We the People." To reach these conclusions, he relies on the previously mentioned differences, as well as the fact that corporations have "no consciences, no feelings, no thoughts, [and] no desires" of their own.[13] That is, while the individuals who comprise the corporation may have all of these things, the

11 *Citizens United v. Federal Election Commission*; (Stevens, J. Dissenting) p. 75-76
12 *Id.*
13 *Id.*

corporate entity itself does not. A corporation must abide by its duty to its shareholders—the duty to maximize profits. The corporation is an entity with one purpose: to make money. A conscience, however, requires more than a single driving purpose; it involves so much more, including morality, compassion, and empathy. But the drive, the obligation, to make money has none of these things, and cannot constitute a conscience. Therefore, the corporate entity is not part of "We the People."

Put another way, we may consider humans as "normative citizens," those whom society holds to the utmost degree of citizenship.[14] Normative citizens, are, by virtue of their level of participation in society, deserving of full rights and protections. Corporations, as the most basic corporate entity, fall into a separate category: the "legal citizen."[15] The normative citizen owes certain duties—has certain obligations—to his country, and as a result of these obligations, he is rewarded with full protection of the Constitution.[16] The normative citizen engages with his country through three basic obligations: voting, jury duty, and military service if conscripted.15 The legal citizen, however, exists only artificially as "contemplation of law."[17] A corporation itself is really an idea and not a tangible object. The corporate entity exists via law, and while the building in which the corporation operates, the people who comprise the corporation, and corporate resources are in fact tangible, the corporate entity itself remains, for all intents and purposes, an artificial thing. A corporation, as the corporation in it of itself, cannot vote in elections. The individuals who are part of the corporation can vote, yes, but in doing so they espouse not the views of the corporation but of themselves.[18] Thus, the vote cast represents the desire of that individual, and not necessarily of the corporation. In doing so, the individual acts as the normative citizen, while the corporation, which does not vote itself, is again the legal citizen. Similarly, a corporation—or any "legal citizen"—cannot serve as a juror. Although the individuals, the normative citizens, who make up the corporation may serve jury duty, once

14 Sepinwall, Amy J. "*Citizens United* and the Ineluctable Question of Corporate Citizenship." *University of Pennsylvania, Selected Works of Amy J. Sepinwall* (2011). ("More specifically, I advance an account of normative citizenship…a formal citizen who is subject to a set of obligations that sustain the nation-state's joint project.")

15 *Id.*

16 This is not to say that a person who fails to meet these obligations, such as a person who does not vote, is less deserving of full protection and rights, but rather that a human *can* perform these duties while a corporation cannot. A normative citizen has the ability to engage with these obligations, while the legal citizen does not.

17 Clermont, Woody R. "Business Associations Reign Supreme: The Corporatist Underpinnings of *Citizens United V. Federal Election Commission*." *Thomas M. Cooley Law Review* 27 (2010): 477-508. p.491 ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.")

18 While one might say that the views of the individuals who make up the corporation are in fact the views of that corporation, this is illogical to assume. An individual might have certain opinions that translate to his or her work in a corporation, but working in the corporate entity, a person must frame his or her decisions in a way that makes sense for the corporation's end goal. A for-profit, for example, is designed to make money, and its decisions would, or should, be framed for what's best for that end goal.

again it is not the corporate entity itself engaging with the nation. As with the vote being cast, the decision as a juror made by the normative citizen reflects the view of the individual and not that of the corporation. While there indeed may be overlap between the view of the individual and of the corporation, it is important to note that only the individual may create the opinion; a corporation, being an artificial entity existing only on paper (its charter), is not capable in itself of forming opinions. Lastly, the normative citizen is expected, and for the most part able to, serve conscripted military service (assuming that the nation has invoked draft laws, etc.). As of yet, a corporation has never been drafted into the U.S. military, though numerous normative citizens have. These three basic ways by which normative citizens serve and engage with the nation are further examples—and indeed more persuasive examples—of how a corporation yet again differs from a natural person. With these numerous differences, it follows, then, that because the corporation does not engage with the nation on these three important, basic, levels, the corporation does not deserve the same extent of rights afforded to it as do normative citizens. Of course, that is not to say that corporations deserve no rights. Rather, corporations, much like non-suspect classes in equal protection jurisprudence receive lesser levels of scrutiny, deserve less absolute protection. Restrictions on the First Amendment rights of corporations, therefore, should perhaps be subjected to intermediate scrutiny or rational basis, instead of strict scrutiny, which is then reserved for the protection of the rights of normative citizens.

IV: *Citizens United* Creates Incoherency and May Lead to an Unworkable Standard

Citizens United also manifests itself as a poor decision by the Supreme Court in that it creates incoherency in the Court's campaign finance jurisprudence. As discussed above in Part II, *Citizens United* is a departure from decisions such as *Buckley*, *Austin*, and *McConnell*, the last two of which were ultimately overturned by *Citizens United*. The legal doctrine *stare decisis* is an important one that calls for the respect of precedent and for the Court to overturn itself only when most dire. While *stare decisis* is by no means a binding policy on the Court, there is a certain legitimacy that comes from the Court remaining consistent with its previous decisions, so long as those previous decisions are not blatantly wrong.[19] When the Court overturned *Austin*, then, it drew question to its legitimacy. A court that overturns itself frequently is a court that becomes perceived as ineffective and unimportant. It is indeed surprising that the Court would

19 That is, cases such as *Plessy v. Ferguson* were rightly overturned, as they were clearly discriminatory and wrongly decided.

weaken its perceived legitimacy by overturning a case that quite frankly did not merit overturning. However, the greater incoherency comes not from what *Citizens United* did, but what it failed to do. The opinion stated explicitly that the Court "need not address whether the government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."[20] This is a troubling and careless statement for the Court to make. It seems logical to want to keep foreign influence (by means of a foreign-owned corporation operating partially within the United States) out of American elections, yet any such legislative attempt to ban or limit foreign influence would, under *Citizens United*, be seen in the eyes of the law as an identity-based restriction, and therefore impermissible.[21] Therefore, this legislative solution to limit foreign influence, though necessary (as a foreign-based corporation might have more shareholders abroad than in the U.S., thus eliminating the shareholder backlash that might suffice for some domestic corporations) is impossible. *Citizens United* fails to address this concern, and may therefore lead to an unworkable guideline for lower courts and for legislatures who might eventually tackle this question of foreign-based corporate influence.

V: *Citizens United* Fails to Give Due Weight to Anticorruption and Antidistortion

In both *Austin* and *Buckley*, the Court upheld limitations on corporate speech under the compelling interest of preventing *quid pro quo* corruption and distortion. Unfortunately, in *Citizens United*, the government abandoned the antidistortion rationale of *Austin*; as such, the Court was unable to give the argument due consideration. In fact, the majority dismissed such concerns, holding that any attempt to combat "undue influence" was impermissible, as it was not "a form of corruption that [justified] regulation."[22] In this statement, which limits the Court's understanding of corruption to explicit *quid pro quo*, the Court completely ignores any and all effects of distortion, and dismisses distortion as unimportant, when, in fact, it truly is an important concern. The amount of money in the political arena is certainly an important thing to consider. Independent expenditures are just as important in this consideration as direct contributions, yet only the latter is subject to limitations, as only the Court assumes only the latter lead to *quid pro quo*. But consider the following scenario: Corporation X favors a candidate challenging an incumbent, who is unfavorable to corporation X's business. With its

20 *Citizens United v. Federal Election Commission* p. 46-47
21 *Citizens United v. Federal Election Commission*; (Stevens, J. Dissenting)
22 Issacharoff, Samuel. "On Political Corruption." In *Money, Politics, and the Constitution: Beyond Citizens United*, edited by Monica Youn. 119-34. New York: Century Foundation, 2011.

general treasury, corporation X makes a series of independent expenditures favoring this challenger, ultimately dominates the airtime with ads against the incumbent, and undeniably helps the challenger oust the incumbent. It would follow, then, that the challenger would feel some gratitude and sense of debt to corporation X for its help in him winning the election. This then creates air of distortion, where the newly elected official now feels indebted to corporation X and pursues legislation that lopsidedly favors that company. Certainly this is distortive in nature, and thus it proves the majority was wrong to conclude that distortion has no effect on the political process. Furthermore, the Court has rejected the premise of preventing the appearance of corruption as a compelling governmental interest. Again, the Court's logic is flawed in doing so. The perception of corruption can be as destructive as actual corruption, as if the public perceives its government to be corrupt, the public becomes disillusioned with that government. This would create a society where enthusiasm and participation in our democracy is replaced by "cynicism and disenchantment" with the American political system.[23] Certainly this is an unfavorable outcome, yet the majority has deemed this insufficient to warrant any legislative prevention. In adopting such a limited view of "corruption," the *Citizens United* Court neglects very real concerns of antidistortion interests, and lays the groundwork for distortive effects of money to permeate our politics even more so than they already do.

VI: An Egalitarian View of Free Speech is Better Than a Libertarian One

In its decision in *Citizens United*, the majority embraced a "liberty-protecting" view of the First Amendment as opposed to an "equality-enhancing" one.[24] The Court deemed the ability of all to speak to be far more important than the ability of all to be heard. But this raises the question: how effective can everyone's speech be if not everyone's speech can be heard? Surely the right to speak is important, but that importance relies upon the ability of that speech to be heard. An individual may certainly have the right to speak, but without the assurance that his voice will be heard, his right to speak is moot. There then has to be an assumption of a "baseline of minimally necessary diversity" as an "essential precondition to democratic self-government."[25] The ability of all to be heard on a level playing field must, then, take importance over the right of all to speak, if democracy is to survive. To think otherwise would lead to an

23 *Citizens United v. Federal Election Commission* (Stevens, J. Dissenting)
24 Hasen, Richard L. "*Citizens United* and the Orphaned Antidistortion Rationale." University of California, Irvine, Law School, 2011. ("The Justices in the majority…embrace a view…that is liberty-protecting rather than equality-enhancing…")
25 Sullivan, Kathleen M. "Two Concepts of Freedom of Speech." *Harvard Law Review* 124 (2010): 143-77.

"immediate drowning out of noncorporate voices"[26] by the overwhelming presence of corporations who can now speak freely, and who can afford to speak more loudly (that is, in more media and with more frequency) than noncorporate speakers. An egalitarian view of free speech, which assumes that the ability of all to be heard equally, better ensures the ability of all voices, including unpopular fringe dissenters, to be heard, while the libertarian view suggests that a speaker's worth is determined by how loudly he (or it, in the case of a corporation) can speak. All that matters to the libertarian view is that all may speak, not that all are heard. The freedom of speech must be protected in such a way that permits restrictions on political speech if they are aimed explicitly at "[reducing] some speakers' disproportionate influence"[27] in the political arena. If the purpose of the First Amendment is to foster intellectual diversity and political dissent, to ensure that all citizens may voice their opinions and have them heard, then surely the egalitarian view of free speech—the view adopted by the dissenting justices in *Citizens United*; the view that says all must have an equal chance to be heard for free speech to truly be "free"—is best equipped to embody this mission.

VII: BCRA Was Narrowly Tailored to Merit Upholding

The relevant sections of BCRA that were contested and ultimately struck down in *Citizens United* can be viewed as nothing more than "source restriction[s] or [as] time, place, and manner restriction[s]."[28] BCRA's restriction on corporate speech limited the time of the electioneering communications to 30 days before a primary or 60 days before a general election, and restricted the place and manner to broadcast, cable, or satellite. The statute is written in a viewpoint-neutral language, and applies to a very specific message: material about "clearly defined candidates" in specific time frames, as described above.[29] BCRA did not prevent corporate speech in the form of independent expenditures any time before the 30-day or 60-day window, nor did it prevent corporations from dispensing election-related material in print (via pamphlets or newspaper ads, etc.) or online. Citizens United, the corporation, very well could have made its film *Hillary* available online for free without infringing on the regulations laid out in BCRA. Some may claim that BCRA was effectively a ban because the media it encompassed are the most effective platforms from which to disseminate information, especially politically

26 *Citizens United v. Federal Election Commission* (Stevens, J. Dissenting)
27 Sullivan, Kathleen M. see footnote 24 *supra*. p.176
28 *Citizens United v. Federal Election Commission* (Stevens, J. Dissenting)
29 *Id.*

charged information. While broadcast, cable, and satellite are indeed influential, the rise of the Internet makes this argument significantly weaker. Information travels faster and reaches a wider audience via the web than on cable. It seems logical that more people would see the free film online than on television, as a Google search is far less complex than ordering an on-demand film.[30] BCRA was not a blanket ban, as the majority would like to paint it, but merely a time/place/manner restriction that applied to a specific window of time and a clearly defined and limited medium. Especially in our modern era, the Internet is more powerful than ever for disseminating opinions and political material. With the rise of blogging and social media, a film such as *Hillary* would have undoubtedly spread quickly. One need only look to the recent Kony 2012 video and its overnight popularity boom to see that the Internet is a formidable presence in the spreading of ideas.

VIII: Two Counterpoints: Individual Rights and the Corporate Form, and the Press

Those who support the decision in *Citizens United* might voice, among others, concerns regarding 1) the fact that individuals, by merit of their decision to incorporate, do not lose their First Amendment rights, and 2) that much of the press is incorporated, and any ban on corporate speech might ban the press. To address this first concern, it is important to realize that, as discussed in Part III, individuals may still voice their opinions as individuals. Their rights have not been infringed, as the CEO of a corporation may still espouse an opinion, as long as he or she does so as that individual. This makes sense, because it might not be fiscally prudent for the CEO to infuse his or her own political beliefs into the day-to-day operations of a corporation. It might be said that the corporate form is the only way some individuals can afford political speech—that the pooling of resources in the corporate treasury allows for minority opinions to be heard. This is troubling in that while this may be true, the answer lies not in allowing unlimited corporate speech, but in altering the system so that individuals can afford to voice their opinions. In creating a culture where the emphasis is on an equal playing field for all to be heard, the first step is for the Court to acknowledge egalitarianism as more important than libertarianism when dealing with the First Amendment. Once the Court takes this step, the legislature has room to write and rewrite laws ensuring that minority voices are heard without the necessity of a corporate form.

30 One need only look at a modern cable remote control to understand how a click of a computer mouse is far easier than navigating a cable provider's on-demand service.

In regards to the concern about the press, one need only look to the First Amendment, which specifically mentions the freedom of the press. If the Constitution is understood as a document that should be interpreted based on the text, and not necessarily the original meanings of the text, then it becomes clear that as the 1789 America meant for "freedom of the press" to refer to the press of the time (i.e. a lone publisher on a street corner), the 2010 America should infer that the press extends to our modern understanding of the term, which now includes news corporations whose primary motive is relating the news. That is, a press corporation should be understood to be an organization dedicated to reporting the news in a neutral (or as close to neutral as possible) manner and that views its mission to be the impartial sharing of current news, and not the espousal of some ideologically charged position. Overturning *Citizens United* should be accompanied by a provision (perhaps through the legislature and not the courts) specifically exempting press organizations from BCRA's regulations, as they have extra First Amendment protection. It is important to note that a press corporation is held to be "the press" first and a corporation second. The *New York Times* is a newspaper first and foremost, and not generally regarded as a politically activist corporation. In this sense, it differs from Citizens United, the nonprofit, which advertises itself and is understood to be an activist (that is, ideologically-driven) organization, and not a member of the press.

IX: Conclusion

For the reasons presented above, *Citizens United* was decided incorrectly and poses significant, mostly negative, implications for the freedom of speech in America. In this broad, overtly activist decision, the Court "re-ordered the priorities of our democracy," emphasizing the role of special interest (corporate money) over the voices of the voters.[31] The First Amendment is indeed important, and political speech is indeed the most protected form of speech,[32] but we must ask ourselves whose political speech is most protected? Surely it is the individual's right to speak and right to be heard that takes precedence over the corporation's right to speak. *Citizens United* was an unfortunate and erroneous decision that the Court should seek to overturn in *Western Tradition Partnership*. The consequences of *Citizens United* are numerous and grave, and warrant concern. If the Court will not acknowledge its mistake, then the legislature must step

31 Youn, Monica, before the Committee on the Judiciary. *Testimony of Monica Youn, Counsel at the Brennan Center for Justice at NYU School of Law before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, One Hundred Eleventh Congress, 3 February 2012.
32 Abrams, Floyd. "*Citizens United* and Its Critics." *Yale Law Journal Online* 120 (2010): 77-88.

up. Legislative remedy should be taken to ensure that the true freedom of speech is not forgotten in a sea of corporate influence. Under a guise of First Amendment reasoning, *Citizens United* undermines, rather than protects, the freedom of speech and makes the American political process increasingly less democratic.