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Morgan R. Knudtsen

University at Albany, State University of New York

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Did *Citizens United* Get it Right? Campaign Finance Reform and the First Amendment – Finding
the Balancing Point

An honors thesis presented to the
Department of Political Science,
University at Albany, State University of New York
in partial fulfillment of the requirements
for graduation with honors in Political Science
and
graduation from The Honors College

Morgan R. Knudtsen

Research Advisor: Stephan Stohler, JD, PhD

May 2017

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I. Introduction

Political spending has been the subject of scrutiny since Roosevelt's State of the Union address in 1907.¹ Roosevelt, angered by the amount of money being spent in elections, called for finance reform. These reform efforts, while taking almost seventy years before implementation, have seen considerable debate and consideration among everyday individuals, legislators, and the Supreme Court throughout the course of history. Today, *Citizens United v. Federal Election Commission* (2010) remains one of the most controversial cases in recent history, with presidential elections discussing the potential to overturn the case and legislators determining how to improve campaign finance in the United States.

In recent times and with the advent of increased costs of elections, it has become generally accepted that money is a form of political speech in the United States. When examining such a principle, the First Amendment becomes central to understanding whether monetary contributions and expenditures to candidates or on campaigns are protected. Furthermore, if these protections are granted, the extent to which the law legally protects said speech must also be addressed. Over the course of this paper, *Citizens United* will be evaluated to determine a series of questions. First, the decisions leading up to the 2010 case will be evaluated to discuss relevant precedent. Following this discussion and an overview of *Citizens United*, these decisions will be looked out to determine if there was, in fact, a logical extension of precedent or if the Court irresponsibly applied the First Amendment to corporate entities. Examining these factors, this paper contends that the Court did, in fact, logically interpret past cases to decide *Citizens United*. Where I find issue with the decision

¹ Pickert, Kate. *Campaign Financing: A Brief History*, *Time Magazine*. 30 June 2008. Date Accessed February 24, 2017. <http://content.time.com/time/nation/article/0,8599,1819288,00.html>

is not in the Court overturning *Austin* or ruling with *Citizens United*, but rather, the implications and unintended consequences that occurred as a result.

The remaining portion of this paper discusses the inevitable balancing act that legislators and the Court must find to determine how reform can take shape. Examining a liberty principle, the free marketplace of ideas, and a compatibility theory, I will argue that there is, under certain circumstances, justifiable reason to restrict speech because of the potential consequences said speech has. While restrictions are, in fact allowed in certain areas, however, it is first and foremost important to protect speech. Money being a means of communication, especially in the political arena, deserves protection so long as there are no potential consequences such as corruption or distortion.

II. Background

A. The First Amendment and Campaign Finance Regulation

Prior to the nineteen seventies, most campaign finance reform laws were largely ignored by both candidates and outsiders. Consequently, the first relevant reform efforts to see enforcement were the Federal Elections Campaign Act (FECA) and the Revenue Act in 1971. These laws required disclosure of both expenses and contributions and established a system of public financing for Presidential candidates who agreed not to collect private donations or use funds received during the primary season.² These systems were dedicated to ensuring that elections were not overrun by money and led to the first constitutional challenge to campaign finance reform in the United States.

Over the last 45 years, the government has made many strides to regulate contributions and spending in elections. With consistent growth, money has played a major role each election cycle

² Pickert, Kate. *Campaign Financing: A Brief History*.

as individuals, parties, and organizations try to get their candidate elected. Through the course of this section, Supreme Court cases will be studied. Furthermore, it will examine in what ways the Supreme Court has extended the application of the First Amendment and whether the Court accurately took logical steps in deciding *Citizens United*.

B. Relevant Cases Surrounding *Citizens United*

Buckley v. Valeo

A. Background and Constitutional Challenge

Following the Watergate scandal, the United States saw reason to amend FECA in 1974. The amendments led to the establishment of a variety of reform legislation as well as an enforcement agency, the Federal Elections Commission (FEC) in an effort to control the spending that was being seen.³ The FEC was created to be “an independent body to ensure compliance,” with the newly implemented campaign finance laws. To do this job, the FEC was granted “jurisdiction in civil enforcement matters, authority to write regulations and responsibility for monitoring compliance,” with the law. Furthermore, in relation to amending campaign finance laws, the FECA amendments created a system of partial Federal funding for elections through matching funds for both Presidential primary candidates and political parties financing their national nomination conventions. Most controversial, however, was the limitations that were placed on both contributions and expenditures, which applied to all candidates for Federal office as well as Political Action Committees (PACs). Interestingly, the 1974 Amendments also allowed corporations and unions “with Federal contracts to establish and operate PACs,” for the first time.⁴

³ Geraci, Victor W, *Campaign Finance Reform, Connecticut Network*. http://www.ctn.state.ct.us/civics/campaign_finance/Support%20Materials/CTN%20CFR%20Timeline.pdf

⁴ “Appendix 4: The Federal Election Campaign Laws: A Short History.” *The Federal Election Commission*. Accessed 10 May 2017. Web. <http://www.fec.gov/info/appfour.htm>

Unfortunately, these new rules and regulations were never given the ability to do their job; the 1974 Amendments were “immediately challenged” and brought to the Supreme Court in 1976.⁵

Senator James L. Buckley from New York and presidential candidate Eugene McCarthy, among several others, filed suit in the District Court against the both the Secretary of the Senate and ex-officio member of the FEC, and the FEC itself.⁶ Buckley and McCarthy brought multiple challenges to the amendment and the public financing provision, though for the purpose of this study, only certain the limitations will be analyzed. The petitioners found fault with the FECA amendments on the grounds that “limiting the use of money for political purposes” is the same as “restricting communication itself,” thus marking the first time the Supreme Court would apply the First Amendment to political spending.⁷ The petitioners argued further that the ability to campaign and raise money is not equivalent to creating “inequality of political expression,” because everyone has the opportunity to donate at any level, meaning there is a sense of duty that candidates will be more responsive to the desires of the people instead of creating a level of “alienation and apathy,” on the part of the politician and the people.⁸ Though *Buckley* and his proponents shared a level of respect for disclosure as a means of remedying corruption, he also described the FECA amendment as creating low thresholds for disclosure that would ultimately disadvantage minor party candidates.⁹

⁵ Lioz, Adam. "Buckley v. Valeo at 40." Buckley v. Valeo at 40 | Demos. Accessed April 06, 2017. <http://www.demos.org/publication/buckley-v-valeo-40> and “Appendix 4.”

⁶ Federal Elections Commission. *FEC Litigation - Court Case Abstracts - B. FEC Litigation - Court Case Abstracts - B.* Accessed April 06, 2017. http://www.fec.gov/law/litigation_CCA_B.shtml.

⁷ "Buckley v. Valeo 424 U.S. 1 (1976)." Justia Law. Accessed April 06, 2017. <https://supreme.justia.com/cases/federal/us/424/1/case.html>

⁸ Ibid.

⁹ Ibid

B. Holding

On the charge that the FECA Amendments reduced the level of political expression that individuals were granted, the Supreme Court concurred in part. They reasoned that contribution limitations did, in part, “reduce the quantity of expression,” with regard to the number of issues, depth of discussion, and the size of the audience.¹⁰ While the Court did reach a level of concurrence, they also argued that restrictions on speech are justified by a compelling interest. In this case, the Court held that the FECA contribution limitations were justified because the integrity of the election was an overriding concern when money could create a level of dependence by candidates on large donors. The Court and the Government believed that, any factor that could cause corruption or the appearance of corruption was an inherent threat to the integrity of our elections. Through this concern, the Court held that campaign contributions to candidates themselves could have the inherent ability of persuading candidates to do favors for those that contribute the most money. This in and of itself does not guarantee corruption but the threat was prevalent enough that the government and court saw a compelling reason to restrict such expenditures. Doing so, all groups and individuals are held to the same contribution limits during elections to ensure no single individual, PAC, or group has greater influence in an election.¹¹

Expenditures, however, are considerably different than contributions and were treated as such by the Supreme Court. When an individual or a group makes a contribution, that money is sent directly to a candidate, party, or PAC. According to the Court, these contributions are not independent. Contributions, the Court argued, have the ability to impact the way a candidate or party acts in response, thereby justifying limitations on these contributions. Expenditures, on the other hand, were deemed to be wholly independent of elections. The Court reasoned that because

¹⁰ *Ibid.*

¹¹ *Ibid.*

this money is spent by an individual or group to promote or oppose a given candidate and that money is not directly given, those funds do not have the ability to corrupt an election. Due to this basic difference in the level of independence, the Court found expenditure caps to be unconstitutional. The Court ruled that expenditure limitations impose “direct and substantial restraints on the quantity of political speech.”¹² They argued further that rather than creating a cap on the total amount spent in an election, total expenditures can and should vary over time, depending on the level of contention in a race and the level of support for given candidates. Furthermore, though the Court recognized an ever-growing cost of elections, they deemed it unconstitutional for the government to determine what an acceptable level of spending is.¹³

Thus, on the subject of independent expenditures, the Supreme Court ruled with the petitioners, holding that restricting an individual’s ability to spend during an election was unconstitutional.¹⁴ Though the respondents argued that the government had a compelling interest in limiting the level of spending by individual donors, the Supreme Court disagreed. The Court maintained that the Government’s interest in reducing corruption was narrowly tailored; only when corruption was evident or apparent can the State regulate speech. Expenditures, they argued, did not give rise to corruption or its appearance and, consequently, did not fall under the Court’s narrowly tailored argument. Furthermore, they relied on reasoning that expenditures were wholly independent of candidates and did not threaten the integrity of elections. Political discussion and expression therefore protected independent expenditures under the First Amendment.¹⁵ The Court also found it unconstitutional for the government to limit a candidate from using his or her own,

¹² FEC Litigation - Court Case Abstracts - B. Federal Elections Commission. Accessed April 06, 2017. http://www.fec.gov/law/litigation_CCA_B.shtml and *Buckley v. Valeo* 424 U.S. 1 (1976).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *FEC Litigation - Court Case Abstracts - B. Federal Elections Commission*

personal funds in an election. They held that in limiting an individual from spending his or her own funds, the government was preventing that individual from exercising his or her right “to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.”^{16 17}

First National Bank of Boston v. Bellotti

A. Background and Constitutional Challenge

In the 1970s, the National Bank of Boston hoped to spend its money to publicize initiatives on the Massachusetts ballot that would allow the state to implement a graduated income tax. Under Massachusetts law, however, organizations were not allowed to spend money that could be used to influence the outcome of an election or vote even if that that vote did not “materially affect their assets and holdings.”¹⁸ Consequently, in this case, the Court directly reacted to money being spent on behalf of banks and corporations to publicize their political preferences for the upcoming election. In this case, the Court was tasked with determining whether corporations have “First Amendment rights coextensive with those of natural persons or associations of natural persons,” perhaps the most central issue in *Citizens United*.

Differing from typical campaign finance cases, *Bellotti* also brought forth questions on the constitutionality of the Massachusetts law prohibiting appellants from both making contributions or expenditures and from questioning the voters on taxes related to income, property, or transactions that affect property, business, or assets of a corporation under the Fourteenth Amendment. In determining if corporations are afforded the same constitutional rights as natural

¹⁶ *Ibid.*

¹⁷ *Buckley v. Valeo* 424 U.S. 1 (1976).

¹⁸ *First National Bank of Boston v. Bellotti*. Oyez. Accessed April 06, 2017. <https://www.oyez.org/cases/1977/76-1172>.

persons, the Court found its answer in the Fourteenth Amendment. The Court argued that the main challenge surrounding the case should not be whether corporations have First Amendment Rights but rather should center on whether the Massachusetts law burdens expression under the First Amendment.¹⁹ Thereby, the Court did not seek to determine whether a corporation was afforded the same natural rights as an individual voter.

B. Holding

Under the Fourteenth Amendment, the Government is unable to take any action that would “deprive a person of life, liberty, or property, without due process of law.”²⁰ To ensure that neither the Federal nor state governments could infringe upon these rights, the Court began a process called “selective incorporation,” which gradually applied “selected provisions of the Bill of Rights to the states through the Fourteenth Amendment Due Process clause.” This process consequently holds states to the same standards as the Federal Government. The First Amendment right to free speech became incorporated to all states in 1925 after the Court heard and decided *Gitlow v New York*, and therefore was a driving force in *Bellotti* and the Court’s understanding of Free Speech cases before them.²¹ Through incorporation of the First Amendment, the *Bellotti* Court granted corporations protection under the First Amendment. Furthermore, because protections under the First Amendment have “always been viewed as fundamental components of liberty,” a corporation

¹⁹ *Ibid.*

²⁰ Staff, LII. "14th Amendment." LII / Legal Information Institute. November 12, 2009. Accessed 06 April 2017. <https://www.law.cornell.edu/constitution/amendmentxiv>.

²¹ "Incorporation Doctrine." *Legal Information Institute, Cornell University Law School*. Accessed 10 May 2017. Web. https://www.law.cornell.edu/wex/incorporation_doctrine

can legally “claim First Amendment protection for its speech or other activities,” when a “general political issue materially affects” its “business, property or assets.”²²

Furthermore, “speech that otherwise would be within the protection of the First Amendment,” should not, under *Bellotti*, lose “that protection simply because its source is a corporation,” especially under the conditions put forth in this case.²³ The Court did not find “a material effect on ... business or property,” of the corporations and banks trying to spend money to influence the election, and as a result, the legislature could not prohibit speech “based on the identity of the interests that spokesmen may represent,” when those groups can provide education to the public on general issues²⁴. Thus, the First Amendment was extended in such a way that corporations are legally capable of petitioning their legislative and administrative leaders to provide “facts and opinions to the public,” and the Court affirmed the necessity of this decision.²⁵

Austin v Michigan Chamber of Commerce

A. Background and Constitutional Challenge

In 1990, the Supreme Court was again asked to evaluate the merits of campaign finance reform under both the First and Fourteen Amendment when Michigan passed a law prohibiting corporations from using their general treasury funds to make independent expenditures.²⁶ The Michigan Chamber of Commerce, henceforth referred to as the Chamber, hoped to support a candidate running for office by using its general treasury funds to create a newspaper

²² *First Nat'l Bank of Boston v. Bellotti* 435 U.S. 765 (1978). Justia Law. Accessed April 06, 2017. <https://supreme.justia.com/cases/federal/us/435/765/case.html>. *First National Bank of Boston v. Bellotti*. Oyez.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Austin v. Mich. Chamber of Comm.* 494 U.S. 652 (1990), Justia. <https://supreme.justia.com/cases/federal/us/494/652/case.html>

advertisement that would sponsor a candidate for the Michigan House of Representatives.²⁷ Under the Michigan law, the Chamber was unable to do so and, consequently, the Chamber filed suit under the First and Fourteenth Amendment.²⁸

In its deliberations, the Court was tasked with determining whether Michigan was constitutionally restricting corporate expenditures by evaluating both if a burden was being placed on political expression and if that burden was created under a compelling state interest. Amongst the prevalent issues in this case, a large consideration was that the Chamber was funded by the collection of annual dues from its members, three-quarters of which were for-profit corporations. These corporate interests were heavily considered, such that among the first references in Marshall's opinion is of *Bellotti*, stating that at the very core, speech must not be restricted on the basis of corporate identity.²⁹ Thus, from the onset of the case the Court was tasked with ultimately determining at what point *Bellotti* is not longer applicable to corporate speech or if the decision should be overturned in full.

B. Holding

In its decision, the Court held that Michigan's law was not in violation of the First Amendment. While the Supreme Court recognized the burden the law put on political expression, they found Michigan to have a compelling state interest in enacting it. The law, deemed to be "narrowly tailored to achieve its goal," to "eliminate... distortion caused by corporate spending," also allowed corporations to freely participate in the market of political ideas through a separate store of funds and thus, the Chamber's right to freely express itself was not violated.³⁰ This rationale, however, marks the first time the Supreme Court took another rationale into

²⁷ *Austin v. Michigan Chamber of Commerce*. Oyez

²⁸ *Austin v. Mich. Chamber of Comm.* 494 U.S. 652 (1990)

²⁹ *Ibid.*

³⁰ *Ibid.*

consideration, no longer focusing on corruption or its appearance. This new rationale, was formed out of fear of distortion in elections resulting from individuals or groups having greater resources to spend. The *Austin* Court held that because some individuals or organizations maintain a larger amount of money or other such resources, they would have a larger voice on the national stage, potentially distorting public perception and the overall outcome of an election

The Court found in *MCFL* that if a nonprofit ideological corporation maintains the above characteristics and are restricted under BCRA, said restrictions are unconstitutional. The Court which decided this case three years prior to *Austin* found that associations which do not receive corporate contributions and are made up of individual members that do not act in a manner similar to shareholders have a right to contribute funds from their general treasury because they agree with the express political purposes of the organization.³¹ Through this test, the Court applied strict scrutiny in *Austin* and found that the Chamber did not maintain the necessary qualifications for exemption. The use of this test in relation to *Citizens United* will be examined later in this paper.

Furthermore, the Court found that the law did not violate the Equal Protection Clause of the Constitution. The Court found that the “State’s decision to regulate corporations and not unincorporated associations is precisely tailored to serve its compelling interest.” It also held that the fact media corporations were exempt did not make the law unconstitutional and the Chamber’s challenge did not provide sufficient evidence under law that Michigan’s restrictions were not justified.³² Thus, under the Equal Protection Clause, the Chamber’s arguments failed. The Court did not agree that the exemptions applied to certain groups meant that the law was invalid due to

³¹ *FEC v. Massachusetts Citizens for Life, Inc* (1986). Find Law. <http://caselaw.findlaw.com/us-supreme-court/479/238.html>

³² *Austin v. Mich. Chamber of Comm.* 494 U.S. 652 (1990),

the necessity of allowing media groups, for example, to freely promote the “collection and dissemination of information to the public,” in order to inform the electorate.³³

McConnell v. Federal Elections Commission

A. Background and Constitutional Challenge

Under newfound regulations established by BCRA to eliminate soft money from elections and to control the type of electioneering communication put forth before an election, the Court found itself again challenging BCRA. The petitioners brought the multiple questions to the Court, two of which were picked up and answered by the majority. First asking whether the so called soft money ban was constitutional and then questioning whether regulations of political advertising were allowed under the First Amendment. The Court majority, on both accounts, upheld the BCRA restrictions.³⁴

Interestingly, the Court offered a three-part opinion, penned by three members on the bench. Justice Stevens, Chief Justice Rehnquist, and Justice Breyer, evaluated BCRA Titles I-IV and while Stevens and Breyer sided with the majority, the Chief Justice voted to strip BCRA restrictions put forth by Senators McCain and Feingold. Justice Stevens wrote on the core of the constitutional challenge, Title I and II of BCRA, which relate to soft money, electioneering communications, and coordination.

B. Holding

Soft Money

The term soft money refers to the ways in which individuals, corporations, and unions who had already made maximum contributions to candidates under FECA could donate to political parties in less accountable ways by funding activities such as get out the vote drives. Though this

³³ *ibid*

³⁴ *McConnell v. Federal Elections Commission*, Oyez. <https://www.oyez.org/cases/2003/02-1674>

gave rise to questions following *Buckley*, the literal translation of contributions coupled with the FECs conclusion left soft money a legally permissible activity for individuals and groups to participate in, representing 42% of total party spending by 2000.³⁵

Title I of BCRA was the first attempt to close the loopholes surrounding soft money. Under BCRA, many measures aimed to eliminate soft money in elections and were upheld by the Supreme Court. One of the most important, however, was that national party committees were prohibited “from soliciting, receiving, directing, or spending any soft money,” in an election. Furthermore, political parties were prohibited from soliciting and donating funds to tax-exempt organizations that would use the funds for electioneering purposes. Another important measure under BCRA was to prevent circumvention on all levels by prohibiting state and local candidates from both raising and spending soft money for electioneering that would “promote or attack federal candidates.”³⁶

Issue Advertising/Electioneering Communication

Under *Buckley*, the Court “construed FECA’s disclosure and reporting requirements,” to “reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”³⁷ Through this interpretation, advertisements financed by soft money could legally be aired prior to an election without disclosure so long as “magic words” such as “elect” or “vote against” were not present in their work.³⁸ Because of this, corporations and unions would push millions of dollars into the political atmosphere that, like soft-money, was completely unregulated by FECA.

³⁵ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*, 558 U.S. ___ (2010).

³⁶ Stevens, John Paul. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*, 558 U.S. ___ (2010).

³⁷ *Ibid.*

³⁸ *ibid.*

The major challenge before the Court, however, related to *Buckley*'s interpretation of electioneering communication and its distinction between issue advocacy and express advocacy. The petitioners in *McConnell* led their charge under the *Buckley* rationale, arguing the Government “cannot constitutionally require disclosure of, or regulate expenditures for, “electioneering communications” without making an exception for those “communications” that do not meet *Buckley*'s definition of express advocacy.”³⁹ The Court, however, held that the petitioners held an incorrect reading of the *Buckley* decision. Arguing that the decisions regarding express advocacy in *Buckley* were statutory interpretations and not a constitutional provision, *Buckley* looked to the relative vagueness and ambiguity of phrases in FECA and the Court argued “nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line,” in *Buckley*.⁴⁰ Furthermore, the Court maintained that the “presence or absence of magic words,” in an advertisement “cannot meaningfully distinguish electioneering speech from a true issue ad,” and though the advertisements may not expressly advocate for or against a candidate, “they are no less clearly intended to influence the election.”

Disclosure Requirements

Another issue prominent in *McConnell* that made its way to *Citizens United* was the BCRA disclosure requirements. In *McConnell*, the Court validated the District Court ruling that the state has a justifiable interest in upholding disclosure requirements. By providing the electorate with valuable information and increased access to data that helps to “enforce more substantive electioneering restrictions,” and to avoid corruption, whether real or apparent, the Court ruled disclosure requirements were entirely constitutional.⁴¹

³⁹ *McConnell v. Federal Election Comm'n* 540 U.S. 93 (2003)

⁴⁰ *ibid.*

⁴¹ *ibid.*

Furthermore, under BCRA disclosure was required for people who gave greater than or equal to \$1,000 to a segregated fund or who spent greater than or equal to \$10,000 on electioneering communications in any given year. The Court in *McConnell* recognized the *Buckley* beliefs that “compelled disclosures may impose an unconstitutional burden on the freedom to associate in support,” of a given candidate or issue, but found no “‘reasonable probability’ of harm to any plaintiff group or its members,” consequently upholding the BCRA requirement. What the Court did do, however, was claim that this “does not foreclose possible future challenges to particular applications of that requirement,” meaning that the decision was not all encompassing and, depending on the given circumstances, may not be applied.⁴² The rationale here indicates that under certain circumstances, the Court may find justifiable reason to strike down disclosure requirements if there are situations that would inhibit individuals or groups from spending during a campaign. As we will see under *Citizens United*, the Court did not find the petitioner’s argument to be sufficient to strike down disclosure requirements.

Disclosure requirements, as I will argue in greater detail later, play a central role in understanding *Citizens United* and determining how future reform measures should be tailored and interpreted. Under the Court’s ruling in this case, disclosure was found to be constitutional because disclosure requirements provide the electorate with important information to make informed decisions. In an election, it is imperative to have an informed electorate that can reasonably discern what voices they are hearing on a daily basis so that they can accurately choose the candidate that best suits their needs in a given election year. Disclosure consequently plays a major role in an election, and is immensely important to ensure the integrity of elections. Rather than allowing

⁴² *McConnell v. Federal Election Comm'n* 540 U.S. 93 (2003)

individuals and groups to hide behind a cloak of anonymity, the electorate deserves and benefits from knowing who is spending in support or opposition and how much money is being spent.

Citizens United v. Federal Elections Commission

A. Background and Constitutional Challenge

Citizens United is a nonprofit corporation that sought an injunction in 2008 to allow for the release of a documentary that was critical of Hillary Clinton during her bid for the presidency. The organization was determined to make the film available on television in an On Demand format. This film, however, would be available 30 days prior to the primary elections and thus, would have violated the BCRA provision stating that any electioneering communication may not be “publically distributed,” 30 days prior to any election. On an as-applied basis, Citizens United sought an injunction on BCRA sections 441b, 201 and 311 because the communication of *Hillary* was constitutional.⁴³

The organization argued that *Hillary* was not “electioneering communication” because it was not actually distributed publically; as an on demand feature, they argued it had a “lower risk of distorting the political process,” than a television ad would.⁴⁴ Furthermore, the group argued that they were not expressly advocating or opposing a specific candidate and thus, the law would have to be unconstitutional as applied to their documentary. Lastly, they argued that there should be an exception to bans “for nonprofit corporate speech funded overwhelmingly by individuals,” in order to justify its level of expenditure on the documentary.⁴⁵

⁴³ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*.

⁴⁴ *Ibid.*

⁴⁵ *ibid.*

B. Holding

The Supreme Court, in another narrow decision, reevaluated the *Austin* decision through *Citizens United*'s claim that section 441b did not apply to them. Following review by the Court, *Austin* was overruled on the grounds that it “provides no basis for allowing Government to limit corporate independent expenditures,” indicating that section 441b was invalid as applied to *Hillary*. By extension, this also invalidated the *McConnell* decision that upheld restrictions on independent corporate expenditures.⁴⁶

In the majority opinion, Justice Kennedy argued that “laws enacted to control or suppress speech” may occur at many stages in the speech process. In this instance, however, the law was “an outright ban,” for any corporation to expressly advocate 30 days before a primary and 60 days before a general election. Kennedy argues these types of bans would traditionally be seen as censorship under any other circumstance and thus, would never be allowed under the First Amendment. Whereas the dissenting parties had argued the creation of PACs serves as an outlet for corporations to speak, Kennedy argues this is not the case and even if it had been, it would not justify the problems of 441b under the First Amendment.⁴⁷

The extensive regulations on PACs, according to Kennedy, place an undue burden on corporations if they wish to speak during an election. This rationalizes his view that section 441b places a ban on speech of any given corporation. What is different about his interpretation, however, is his transformation of the issue. He questioned not whether corporations deserved equal protection under the law but whether the Court could restrict speech in that area. He quotes *Buckley* to imply that limitations on spending constitute limitations on the number of issues discussed in a

⁴⁶ *ibid*

⁴⁷ *ibid*

way that deliberately silences “certain voices at any of the various points in the speech process.”⁴⁸

⁴⁹ As decided in *Bellotti*, it is unconstitutional to prohibit the speech of some but not others and it is therefore, the ban imposed by BCRA on corporate speech was found to be in violation of *state decisis*, regardless of the *Austin* decision.^{50 51} Had the Court decided in favor of reform, Kennedy argued, the judgment would have deliberately favored the speech of individuals over that of corporations in the attainment of political information “from diverse sources,” prior to a determination of who to vote for.⁵²

The Court maintained in a vast array of decisions that First Amendment rights do apply to corporations. Political speech, under the Court, is not something that can or should be treated differently because of the mouth it is coming from unless there is a compelling, justifiable reason to do so.⁵³ Citing the dissent from *United States v. Automobile Workers*, Kennedy argued that a group cannot be deemed “too powerful” and have its First Amendment rights easily slipped away, even if that group is a corporation.⁵⁴

One of the largest issues the Court was faced with in this decision were cases that both prohibited and allowed restrictions based on corporate identity. Kennedy notes that in *Buckley* and *Bellotti*, restrictions on speech based on a corporate identity were forbidden but after *Austin*, they were permitted.⁵⁵ Thus, *Austin* needed to be considered to determine whether it was actually valid in order to determine *Citizens United*. The contradictions within the cases created a dilemma for

⁴⁸ *Buckley v. Valeo* 424 U.S. 1 (1976).

⁴⁹ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*

⁵⁰ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*

⁵¹ *First Nat’l Bank of Boston v. Bellotti* 435 U.S. 765 (1978).

⁵² Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*

multiple reasons. First, Kennedy argues that *Austin* “sought to defend the anti-distortion rationale to prevent corporations from obtaining “an unfair advantage in the political marketplace,” by using “resources amassed in the economic marketplace.” On the other side, however, he contends that *Buckley* reasoned the government does not have a justifiable interest in equalizing the political sphere in terms of individuals and groups trying “to influence the outcome of elections,” in the United States.⁵⁶ Thus, the inherent contradictions required the Court to pick a side to either justify or turn *Citizens United* down on the grounds it brought forth. Of further issue was the exemption that certain corporations, such as the media, were given in relation to this law.⁵⁷ If the law is to apply to all corporations in much the same way it is not justified to allow media outlets to spend money to “advance its overall business interest,” when other corporations are not allowed to. This view is inconsistent with the First Amendment, according to Kennedy, and as such, no corporations should be subject to restrictions under BCRA.⁵⁸

For the reasons listed above, the Supreme Court overruled central *Austin* provisions in favor of the First Amendment right to freedom of speech. The Court held that our ability to speak has found so many different dimensions that “informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights,” and the knowledge held by corporations should be easily transferred to the public when they have the expertise to share⁵⁹. Overruling *Austin* eliminated all justification for allowing limitations of independent expenditures on corporations, thereby allowing them to contribute vast sums of money in the political realm.

⁵⁶ *Ibid.*

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ *Ibid.*

In relation to *Citizens United*'s claims that the disclaimer and disclosure requirements did not apply to *Hillary*, the Court disagreed. Kennedy's opinion argues that despite the burden that might impact corporations to disclose information, they "impose no ceiling on campaign related activities," and thus, do not harm free speech.⁶⁰ ⁶¹ Furthermore, because disclosure helps individuals to make knowledgeable political decisions, the Government has a right to regulate them.⁶² Lastly, as it relates to the actual broadcasting of *Hillary*, the Court again held in favor of restrictions. The Court agreed that BCRA's definition of electioneering communication did encompass the film *Citizens United* had attempted to put forth.⁶³ Thus, the more relevant portion of the *Citizens United* decision was that it struck down limitations on expenditure, which has caused dramatic controversy over almost a decade.

C. Dissent

In part, Justice Stevens agreed with the majority on the basis of this case. He did not, however, agree with each principle and consequently penned an opinion that Justices Ginsburg, Breyer, and Sotomayor joined. The main concern following the opinion was the belief that an unprecedented amount of money would pour into elections. Further, they were concerned with the application of personhood to corporations, arguing that inanimate objects should not be granted the same rights as human beings.⁶⁴

To Stevens and the dissenting judges, the Court had begun to "stray from precedent," believing previous opinions were overturned based on faulty conclusions drawn by the *Citizens United* majority. Stevens goes so far as to say that, "the only relevant thing that has changed,"

⁶⁰ *Buckley v. Valeo* 424 U.S. 1 (1976).

⁶¹ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM'N*

⁶² *ibid*

⁶³ *ibid*

⁶⁴ McElroy, Lisa. *Citizens United v. FEC in plain English*. SCOTUSblog, 22 January 2010. <http://www.scotusblog.com/2010/01/citizens-united-v-fec-in-plain-english/>

since past court cases has been the “composition of this Court,” and, thus, under both *Austin* and *McConnell*, the *Citizens United* decision does not hold. The two cases had demonstrated that the exemptions given for separate funds to be distributed through PACs justified the legislature’s action in regulating independent expenditures.⁶⁵ Ultimately, under this rationale, *Citizens United* could have been resolved on much narrower grounds, provided restrictions were found legally permissible under past case law.

Furthermore, Stevens argued in his dissent that the Court opened the door to unlimited corporate spending, which could, at face value, be detrimental to society. The overarching concern of the dissent was the political corruption that could result from unlimited corporate expenditures to political campaigns.⁶⁶ Stevens argues that the government has a vested interest in “preventing corruption and the undue influence of corporations,” and should be able to exercise their judgment when regulating finance reform.⁶⁷

Though corporations “make enormous contributions to our society,” Stevens argued, they “are not actually members of it,” concluding that the First Amendment protection of free speech does not validate unlimited expenditures.⁶⁸ Stevens dissent, in a way, echoed the dissent put forth by Justice Rehnquist in *Bellotti*, where he argued that though “in granting the institution of a corporation, the government does not also implicitly endow the corporation with all those constitutional freedoms enjoyed by natural persons.”⁶⁹ In *Citizens United*, the dissent thus argues that the First Amendment is a right protected solely by individuals and other entities do not apply,

⁶⁵ Martindale, Nathan R. *Constitutional Law*, 632.

⁶⁶ Martindale, Nathan R. *Constitutional Law*, 627

⁶⁷ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*

⁶⁸ *ibid*

⁶⁹ Osterlind, Alex. *Giving a Voice to the Inanimate: The Right of a Corporation to Political Dree Speech*. *Missouri Law Review*, 2011. 277.

<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3917&context=mlr>

especially when focusing on rights that may or may not have been “bought” with large sums of money. The question that must be asked is whether a corporation can “say” anything it pleases so long as it does not contribute large amounts to political campaigns.

In aggregate, *Citizens United* led many to question what is justifiable under the First Amendment, whether it solely be individual speech or group speech, and further, whether money is an applicable form of expression. Through a lens examining what occurred as a result of *Citizens United*, the remainder of this paper will argue how the Supreme Court correctly applied Freedom of Speech to corporations.

III. Analysis

A. Citizens United as an Extension of Supreme Court Cases

Extension of Buckley

In the aggregate, the Burger Court held that the First Amendment protects political speech even in the form of monetary donations regardless of the source of that speech. In relation to *Citizens United*, examining what constitutes political speech and how disclosure and limitations have played a role in the case are essential to understand how the Roberts Court reached its decision. When the Roberts Court made its decision in *Citizens United*, it turned towards *Buckley* to examine how the First Amendment applies its protections. The *Buckley* Court, having recognized capping independent expenditures “fails to serve any substantial governmental interest in stemming the reality or appearance of corruption,” and such caps burdened an individual’s right to freely express oneself, created the very base of the *Citizens United* decision.⁷⁰ In a very broad sense, it would appear that the Roberts Court did adequately extend the interpretations of *Buckley* and *Bellotti* provided to them in precedent.

⁷⁰ *Citizens United v. FEC* 558 U.S. __ (2010).

The *Buckley* Court put an immense level of emphasis on whether there were anticorruption justifications for limiting the level of “speech” allowed in an election. In their decision, they looked towards a type of equalization rationale, which held that the government may have an interest in “equalizing the relative ability of all voters to affect electoral outcomes” referencing the cap on independent expenditures. The Appellees argued that these limits were justifiable because they would “mute the voices of affluent persons and groups,” and that the ceilings implemented could “act as a brake on the skyrocketing cost of political campaigns,” thereby opening “the political system more widely to candidates without access to sources of large amounts of money.”⁷¹ The Appellant, however, argued that these limitations “must be invalidated because bribery laws and narrowly drawn disclosure requirements” are a significantly less restrictive way to fight “proven and suspected quid pro quo” corruption. The *Buckley* Court held that FECA focused “precisely on the problem of large campaign contributions... where the actuality and potential for corruption have been identified – while leaving persons free to engage in independent political expression.” Furthermore, they held that the ceiling did not “undermine to any material degree” the ability for individuals and groups to freely express or discuss their concerns with candidates or campaigns and for that reason, upheld the contribution ceiling.⁷²

Under this rationale, the *Citizens United* decision strayed away, at least in part, from the *Buckley* decision. *Citizens United*, much like *Buckley*, focused on the implicit ability for campaign contributions to act as political speech. If the *Buckley* Court recognized that political speech is accepted and protected by the First Amendment with some exceptions, the question herein lies as to why the Roberts Court turned to this decision for its full rationale. If ceilings “protect against

⁷¹ *Buckley v. Valeo* 424 U.S. 1 (1976).

⁷² *Buckley v. Valeo* 424 U.S. 1 (1976).

the appearance of improper influence of large campaign contributions and safeguard the electoral process without violating the rights of citizens,” by extension, the Roberts Court should have considered the possibility of limiting expenditures on behalf of large corporations.⁷³ Where things get complicated, however, is that *Buckley* held that the interest in regulating contributions only mattered if the contributions were going directly to individual candidates.⁷⁴ Consequently, there are no compelling interests stated in *Buckley* that directly refer to expenditures on behalf of candidates. If and only if *Citizens United* focused on direct contributions to individual candidates would an exact extension of *Buckley* be easily seen.

Furthermore, Stevens dissent in *Citizens United* makes larger claims that the passages selected from *Buckley* are not wholly applicable. For example, Stevens brings forth the use of the claim in *Buckley* that the “concept that government may restrict the speech of some elements of out society to enhance the relative voice of others is wholly foreign to the First Amendment,” in order to justify the majority decision. He notes that, unfortunately, this does not hold because the Court has previously found reason to restrict speech in certain circumstances.⁷⁵ Stevens challenged the majority’s extension of *Buckley* by maintaining that the provisions put forth in *Buckley* and *Citizens United* are completely different and, therefore, to assume the Court meant corporate entities would fall under this ruling would be a mistake.⁷⁶ As Stevens notes, the two provisions are

⁷³ Martindale, Nathan R. *Constitutional Law – Elections: Citizens Divided: Balancing the First Amendment Right to Free Speech and the Role of Private Corporations in our Nation’s Elections*. North Dakota Law Review, 2010.

https://law.und.edu/_files/docs/ndlr/pdf/issues/86/3/86ndlr619.pdf

⁷⁴ Ibid.

⁷⁵ Stevens, John Paul. *Citizens United v. Federal Election Commission* (No. 08-205).

<https://www.law.cornell.edu/supct/html/08-205.ZX.html>

⁷⁶ Ibid.

different at their very core, and subsequently, it would be invalid to justify a full extension of this provision to *Citizens United*.

Further, in *Buckley*, the appellants argued that the limits on PACs constitute a burden on free association. *Buckley* provided for the establishment of these groups “for the purpose of influencing the nomination for election, or election, of any person to Federal Office,” valuing their importance in relation to elections.⁷⁷ This, however, did not stop the Court from finding the appellant claims to be “without merit,” because the “provision enhances the opportunity of bona fide groups to participate in the election process,” through registering and contributing in a manner that would prevent “individuals from evading the applicable contribution limitations by labeling themselves committees.”⁷⁸ Restrictions on PACs were therefore found to be valid and justifiable.⁷⁹ Insofar as this is concerned, the Court did not fully address the issue of PACs though it did argue that PACs did impart a burden on those hoping to form them.⁸⁰ While this did not eliminate PACs from existence or change any existing structure surrounding PAC contributions, it does play an important role in understanding the rationale in *Citizens United*. The Court in *Citizens United* maintained the burden of actually forming a PAC was enough to justify finding BCRA’s prohibition on corporate expenditures to be a ban on free speech. Thus, while *Citizens United* did not result in changes to PACs themselves, the application is fuzzy when compared to *Citizens United*. Had the Court maintained that these restrictions were valid and justifiable, we should have seen little increase in the rights of corporations. Unfortunately, forever, the Court does not provide

⁷⁷ *Buckley v. Valeo* 424 U.S. 1 (1976).

⁷⁸ *ibid*

⁷⁹ *Buckley v. Valeo* 424 U.S. 1 (1976).

⁸⁰ *Citizens United v. Federal Election Commission* (No. 08-205).

<https://www.law.cornell.edu/supct/html/08-205.ZX.html>

this and we are inclined to believe the Court took a step in the direction of favoring corporate rights and called it “protecting speech.”

In the realm of disclosure, the *Buckley* Court argued that they “have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” The Court also recognized, however, that disclosure requirements in general, “directly serve substantial governmental interests,” but whether that interest was sufficient to regulate disclosure by groups and other associations was dependent on the extent to which individuals were burdened by such disclosure⁸¹. In their examination of the claims and arguments made, the Court upheld the disclosure requirements for both contributions and spending led to questionable decisions on behalf of the Roberts Court.⁸² In *Citizens United* the Court found disclosure requirements as the related to *Hillary* were constitutional because the government has a significant interest in providing the “electorate with information.” Ironically, post *Citizens United* resulted in significantly less disclosure as large amounts of dark money came to the forefront of the 2012 election.⁸³

In sum, the Court found ways to stray from the *Buckley* language. The overall decision of the Court in *Buckley* was to uphold disclosure and spending limits while simultaneously striking down expenditure limits on individual candidates. If *Citizens United* adequately extended *Buckley* in its decision, there would have been some sort of limitation on corporate spending. Without considering *Bellotti* and *Austin*, the Court could have found limits to be constitutional to some degree. The *Citizens United* decision, though it can be argued strayed in some overarching sense

⁸¹ *Buckley v. Valeo* 424 U.S. 1 (1976).

⁸² Lioz, Adam. *Buckley v. Valeo* at 40.

⁸³ *Dark Money Basics*, Open Secrets: Center for Responsive Politics.
<https://www.opensecrets.org/dark-money/basics>

from what occurred in *Buckley*, cannot wholly be determined as incorrectly applying precedent to *Citizens United*. In many ways, *Citizens United* did uphold certain provisions of *Buckley*. While a decent portion of *Citizens United* came from interpreting *Buckley*, a larger share came in the Court's study of *Bellotti*'s implications for corporate expenditures.

Extension of *Bellotti*

Though the Court found ways to perhaps broaden the interpretation of *Buckley*, when paired with *Bellotti*, the Court found the ability to justify the lack of regulation of corporate expenditures. Because this rationale existed, the *Citizens United* Court struck down the as-applied challenge and sought to determine whether *Austin* and *McConnell* were rightly decided. In doing so, the Roberts Court found its largest justification for overturning the two through the use of *Bellotti*.

Kennedy, writing for the *Citizens United* majority, quotes *Bellotti*, arguing that “political speech is “indispensable to decision making in a democracy,” upholding the importance of all speech, regardless of where it is coming from, so long as there are is no interest in controlling such speech.^{84 85} Our very society has rested on the idea of democracy and it's necessity in protecting our rights. Political speech, at the very core of democracy, was thus seen to be an integral part of *Bellotti* and, by extension, *Citizens United* such that it should not be limited by the government solely because of the voice of the speaker. Kennedy, in *Citizens United*, holds “*Bellotti* did not rest on the existence of a viewpoint-discriminatory statute,” and instead focused on the “principle that the Government lacks the power to ban corporations from speaking.”⁸⁶ It was these very ideas intrinsic in the *Bellotti* case that the Court found itself justified in allowing corporate political

⁸⁴ *First Nat'l Bank of Boston v. Bellotti* 435 U.S. 765 (1978).

⁸⁵ *Ibid.*

⁸⁶ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM'N*

speech through the form of unlimited contributions. Taken at face value, with no other case law, *Citizens United* can be seen to stem from the *Bellotti* decision.

Extending *Bellotti* to *Citizens United* in this regard brings forth some questions, however, about whether *Bellotti* was more restrained in its decision. Kennedy notes, in relation to *Bellotti*, that a footnote in the decision left the door open to determine whether independent expenditures could cause corruption. Despite the possible implications this could have had on *Citizens United*, Kennedy maintains that the footnote, which argues that a corporation's right to speak on public issues does not equate to participation in the campaigns, was based on an incorrect interpretation of *Buckley*.⁸⁷

Breanne Gilpatrick, writing for the *Harvard Journal of Law and Public Policy*, argued that Kennedy's argument is not a strong one because the Court ignored the important distinction put forth in *Bellotti* and the footnote.⁸⁸ In such important cases, it is these minor distinctions that play a major role in determining what is accurate and what is not. Yet another one of these important distinctions occurred in Justice Rehnquist's dissenting opinion where he argued that the Court found, in previous cases, that "the liberty protected by that Amendment" under the Equal Protection and Due Process clauses only extended to natural persons.⁸⁹ He held that a corporation's right to speak freely was not vital by its economic functions and could potentially interfere with speech in the political sphere. Consequently, he held that the statute was Constitutional under the First Amendment.⁹⁰ Both circumstances lead to a question about the potential validity of the cases. This rationale, though not precedent, could have perhaps guided the Court on its later

⁸⁷ Gilpatrick, Breane. *Removing Corporate Campaign Finance Restrictions*.

⁸⁸ *Ibid.*

⁸⁹ Rehnquist, William. *First Nat'l Bank of Boston v. Bellotti* 435 U.S. 765 (1978).

⁹⁰ *Austin v. Michigan Chamber of Commerce*. Oyez. <https://www.oyez.org/cases/1989/88-1569>

interpretations of *Austin*. Thus, the question becomes to what extent corporations were being protected under the guise of the First Amendment when perhaps the Court was simply protecting corporate interests.

Extension of *Austin*

The Court in *Austin* ruled in favor of campaign finance restrictions, consequently overturning certain aspects of the *Bellotti* decision for the first time. The *Austin* Court maintained that a corporation's "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" compels the State to implement some form of regulation on expenditures so that corruption, real or apparent, is avoided. The characteristics noted above provide corporations with a large inflow of resources "amassed in the economic marketplace," which the *Austin* majority believed would lead to an unfair advantage for corporations in the political marketplace for ideas.⁹¹ Thus, the Court held that "corporate wealth can unfairly influence elections," even when making independent expenditures and thus, by regulating these corporations, the Court found that Michigan was legally preventing "an unfair advantage in the political marketplace."^{92 93} Though the Chamber argued that this apparent "corporate domination," was not a sufficient reason to restrict their expenditures and the Court recognized the apparent burden the restrictions had, the ability for corporations to spend large sums of money that "have little or no correlation to the public's support for the corporate's political ideas," proved to be a justifiable reason to limit expenditures. This soon became known as the distortion rationale.⁹⁴

⁹¹ *Austin v. Mich. Chamber of Comm.* 494 U.S. 652 (1990)and *FEC v. Massachusetts Citizens for Life, Inc* (1986).

⁹² *Ibid.*

⁹³ *FEC v. Massachusetts Citizens for Life, Inc* (1986)

⁹⁴ Hansen, Richard L. *Is "Dependence Corruption Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig.* Legal Studies Research Paper Series No. 2013-94. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220851

In contrast, Scalia's dissenting opinion in *Austin* argued that the majority's decision rested on two faulty arguments. First, he argues the Court failed to see that State granted associations and the ability to amass wealth, when combined, do not mean that the right to free, political speech may be taken away.⁹⁵ Furthermore, he argues the majority is at odds with the decision reached in *Buckley*. He reasons the *Austin* Court has made no distinction between the reasoning in *Buckley* that there is no "substantial risk of corruption" associated with independent expenditures that "express the political views of individuals and associations," implying that the Court had to have come to a faulty conclusion in *Austin*. Scalia goes so far as to argue that with the Court's method of thinking, anything deemed "politically undesirable" will equate to corruption "by simply describing its effects as politically "corrosive.""⁹⁶ Thus, the dissent put forth by Scalia stands diametrically opposed to the majority. Both the majority opinion and Scalia's dissent provide significant weight when examining the case of *Citizens United*.

Considering the arguments on the anti-distortion rationale and their conceivable extension to *Citizens United*, we begin to see where the Court overturned the *Austin* decision, though the reasoning is not yet entirely clear. By definition, these expenditures are funds used, outside of a political candidate or party, to get a message across to the general public. In *Austin*, these funds were considered corrupt because corporations may amass large sums of money to use in the political arena. Where the issue arises, however, is in consideration of the *Buckley* decision, which defined corruption in terms of contributions that have an actual connection to a given candidate. *Austin*, consequently, created a new definition of corruption that was eliminated in *Citizens United*; the *quid quo pro* definition of corruption in *Buckley* was the only form of corruption that the

⁹⁵ *Austin v. Mich. Chamber of Comm.* 494 U.S. 652 (1990)

⁹⁶ *Ibid.*

government was allowed to prevent, making the *Austin* anti-distortion rationale unjustifiable in the eyes of the Court.⁹⁷

Accordingly, the question is whether the anti-distortion rationale is justifiable. Does the ability of a corporation to place large sums of money in the political arena prove to be a serious threat to the idea of fair elections or, did the *Austin* Court simply put forth new regulations in hopes of cutting back on corporate power? Looking at *Citizens United* as an extension of *Austin*, the Court may not have ruled in favor of the First Amendment. The issue, however, is the competing opinions the Court had relating to corporate expenditures. With *Buckley* and *Bellotti* at odds with *Austin*, the key to understanding corporate expenditures and determining which Court was right in its decision rests in understanding how we define political speech and corruption.

In *Austin* the argument, the ability to freely express political speech is not necessarily an issue of who is speaking, what they are saying, or whether they have a political or financial incentive to contribute money. In addition, the majority took issue with the possibility of large donors overtaking elections through large scale expenditures.⁹⁸ The Court in *Austin* appears to argue that because corporations can amass great wealth, they can drive up the cost of elections and distort the wants and needs of individuals by having a louder “voice” in the political arena than individuals. This is, however, troublesome due to the nature of elections and the inherent ability for individuals to amass great wealth and spend it in much the same way as a corporate entity. The Court appears to argue that democracy, famous for its focus on direct and fair representation of the people, is endangered if large voices have the potential to grow louder. In this respect, the

⁹⁷ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*.

⁹⁸ *Austin v. Mich. Chamber of Comm.* 494 U.S. 652 (1990)

ability to regulate corporate expenditures would, to some degree, silence the voices that have the potential to distort elections.

If this theory is accurate, and distortion of this kind is a true factor in elections, there should have been a push by the *Citizens United* Court to eliminate such corruption. The *Citizens United* decision, however, not only overturns parts of *Austin* in favor of *Bellotti* to prohibit the restriction on political speech on the basis of corporate identity, but also argues “that *stare decisis* does not compel the continued acceptance of *Austin*.”⁹⁹ The majority “derogates the “distortion” rationale as simple equalization,” deferring to *Buckley*, which rejected the Government’s interest in equalizing the size and scope of influence of individuals and groups that result in “skyrocketing cost of political campaigns.”¹⁰⁰ The Roberts Court maintained that silencing the level of political speech of some is not justifiable in any way, shape, or form regardless of any potential distortion. Furthermore, the Court maintained that “twenty-six states do not limit independent expenditures, and the government made no argument that corruption existed in those states.”¹⁰¹ If arguments had been made by the 26 states cited that corruption had existed, perhaps, by extension, the Court perhaps would have taken greater strides in accepting the anti-distortion rationale. Without such justification or evidence of corruption, the *Citizens United* Court found no reason to believe the antidistortion rationale was a valid reason for limiting independent expenditure of groups. Siding with *Buckley* and *Bellotti*, the Court found no reason to redefine corruption in new terms and stuck to the *quid pro quo* argument, disregarding the attempt made by the *Austin* Court.

I contend that despite the *Austin* majority and the dissenting voices in *Citizens United*, the “core analytic structure” of both *Buckley* and *Bellotti* in which corruption or its appearance

⁹⁹ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*

¹⁰⁰ *Ibid.*

¹⁰¹ Martindale, Nathan R. *Constitutional Law*.

provides justifiable reason to regulate speech, are superior to the anti-distortion argument presented in *Austin*.¹⁰² As Post notes, if eliminating distortion were the ultimate aim, there would be no reason to create a “constitutional line between contributions and expenditures.”¹⁰³

The *Buckley* decision holds that contributions represent a “general expression of support for the candidate,” but does not articulate the reasoning behind such support. With each contribution, the Court maintains that there is not an increase in the amount of communication, but rather, a rough estimate of the intensity of such feelings of support. Limiting contributions “involves little direct restraint” on expression and is not an infringement on an individual’s ability to discuss important issues, thereby allowing for some sort of regulation.^{104 105} The Court maintains further that limitations act to compel spending through direct expression rather than to candidates, groups, or parties, to “reduce the total amount of money potentially available to promote political expression.”^{106 107}

Expenditures, consequently, receive a much higher degree of protection. Under *Buckley* the Court found a direct link between expenditures and speech, indicating how money is an extension of an individual, group, or party sharing their views on a candidate or issue. The Court, recognizing the need to spend money to communicate any idea in mass media, argues that restrictions on expenditures themselves “reduces the quantity of expression by restricting the

¹⁰² Youn, Monica, *Money, Politics, and the Constitution: Beyond Citizens United. Part 1, Chapter 2: Post, Robert, Campaign Finance Regulation and the First Amendment Fundamentals*. (The Century Foundation, 2011). Kindle Version.

¹⁰³ *Ibid.*

¹⁰⁴ *Buckley v. Valeo* 424 U.S. 1 (1976).

¹⁰⁵ Youn, Monica, *Money, Politics, and the Constitution: Beyond Citizens United. Part 1, Chapter 2: Stone, Geoffrey R. “Electoral Exceptionalism” and the First Amendment*. (The Century Foundation, 2011). Kindle Version.

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

number of issues discussed, the depth of their exploration, and the size of the audience reached.” Moreover, these limitations also place very real restraints on the diversity of speech, allowing only candidates, parties, and the press to use the most effective and widely accessed forms of communication.¹⁰⁸

While these two modes of political speech are inherently different as described in *Buckley*, under the reasoning put forth by the *Austin* Court, both contributions and expenditures have the ability to “distort” due to large sums of wealth that can occur on both sides. The *Austin* Court incorrectly treated corporate expenditures “in a manner more consistent with *Buckley*’s treatment of political contributions” under the First Amendment.¹⁰⁹ If expenditures maintain the same low value contributions did, this would mean that expenditures are mere symbolic representations of support, retaining little to no value during the transaction from individual to party, group, or candidate, rather than a direct expression of an individual’s intent as *Buckley* would have us believe.¹¹⁰ This variation from past language establishes the first means with which the *Citizens United* Court had grounds to take issue with the *Austin* decision in an of itself. Relative value and emphasis on that value plays an important role in understanding to what degree limitations should be allowed.

Examining the distortion rationale through a *Buckley* lens of expenditures and contributions, the *Citizens United* decision begins to come into focus. The distortion rationale, which aims to regulate expenditures on the grounds that the accumulation of wealth could cause disproportionate influence, seems at odds with core beliefs and provisions made by earlier Court decisions. Contribution limits, according to *Buckley*, were established in order to push individuals

¹⁰⁸ *Buckley v. Valeo* 424 U.S. 1 (1976).

¹⁰⁹ Stone, Geoffrey R. “Electoral Exceptionalism” and the First Amendment

¹¹⁰ *ibid.*

into greater direct participation in the political realm and expenditures allowed that type of participation in the form of an advertisement, pamphlet, or other medium. Under *Buckley* where there should be greater protection, *Austin* stepped away to create a new type of corruption that relies on mere appearance. The *Austin* Court held that political views and beliefs could be distorted through large contributions from loud voices but fails to provide justifiable reason to limit speech when, under *Bellotti*, it is not to be limited.

Furthermore, the distortion rationale – intended to promote political equality – is a difficult feat when the *Austin* Court allowed expenditures if they followed the *MCFL* decision or they were the result of separate segregated funds. Writing for the *Austin* majority, Marshall notes that committees may be formed to collect segregated funds may be used “solely for political purposes.”¹¹¹ These separate entities, in theory, do the same thing as a corporation would, but are simply subject to different rules and regulations though they may represent the same corporate interests. Realistically, the Court in agreeing with the *MCFL* decision, potentially created a path for future groups to form. For example, Gilpatrick maintains that expenditures by corporate and union PACs have increased between 1992 and the time of writing, which, when coupled with the data presented later in this paper, demonstrates that the burden is perhaps not as heavy as has been suggested.¹¹²

Despite this demonstration, years later when *Austin* was being overturned, the *Citizens United* majority argued that because PACs are separate political entities, they are “burdensome alternatives” subject to costly administration and further regulation.¹¹³ According to FEC data, between 1985 and 1992, the years immediately preceding the decision, corporate PACs increased,

¹¹¹ *Austin v. Mich. Chamber of Comm.* 494 U.S. 652 (1990)

¹¹² *ibid*

¹¹³ Gilpatrick, Breane. *Removing Corporate Campaign Finance Restrictions*, 414.

peaking at the end of 1988, and then decreased slightly through 1992. In a similar fashion, total PAC numbers followed the same trend.¹¹⁴ Thus, in some respects the *Austin* decision did not inherently eliminate or weaken corporate speech in the political arena, though the amount of PACs did decrease, the figures were only marginally different. Consequently, the *Citizens United* Court is not entirely supported by data and figures.

The lynch pin for the *Citizens United Court*, however, is the Roberts Court understanding that the First Amendment, since its formation, prohibits the suppression of speech based on the speaker's identity. Since First Amendment cases began, the Court has continuously upheld the right to freely express oneself, regardless of race, ethnicity, or creed, except under the extraordinary circumstances outlined in the beginning of this paper. By extension, this protection was granted in *Bellotti*. The anti-distortion rationale coupled with a roundabout means for corporate interests to be introduced make *Austin* an illogical extension from earlier cases. Consequently, if *Austin* is ill decided and *Citizens United* overruled the decision, favor is granted towards the Roberts Court.

Extension of *McConnell*

The overarching themes in the Court's ruling on soft money stem from an anticorruption rationale, a desire to "protect the integrity of the electoral process," and a literal reading of both definitions and the law. The *Buckley* anticorruption rationale is highly visible throughout the Court's decision to ban soft money expenditures. As the *Buckley* Court decided years earlier, the government has "strong interests in preventing corruption, and particularly its appearance."¹¹⁵ By extension, looking at how soft money is used and the lack of disclosure to a certain extent could

¹¹⁴ *PAC Count – 1974 to Present*. Federal Elections Commission.
<http://www.fec.gov/press/resources/paccount.shtml>

¹¹⁵ *Buckley v. Valeo* 424 U.S. 1 (1976).

fall under this definition in *Buckley*. If individuals and groups are in fact donating sums of money to parties that are used for “party-building activities,” that do not expressly advocate for or against a candidate, the question lies in whether this is a justifiable source of funds. Ultimately, these so called party building activities include, but are not limited to get out the vote drives and promoting the passage of laws.¹¹⁶

Mutch also notes that the Court majority cited multiple cases decided since 1996 that extended the government interest to regulate the “undue influence” of soft money donors. These regulations took the same form as the *Austin* Court’s anti-distortion rationale to prevent any degree of corruption in the electoral process.¹¹⁷ Kennedy in his dissent, argued that the government did not actually have such interest because “favoritism and influence, are not... avoidable in representative politics,” such that banning soft money would have little to no impact on the level of favoritism present.^{118 119} Soft money itself, because it was so lightly regulated, could potentially cause some sense of favoritism only if each and every donor was disclosed to the public considering soft money spending occurred at the party level. Naturally, candidates are already inclined to favor their party and, consequently, soft money does not necessarily play into such favoritism. Furthermore, even without soft money, individuals, groups and parties can legally donate sums of money to campaigns and were able to spend using segregated funds. At each of these levels, there is likely to be some form of favoritism either based in monetary contributions or ideological preferences. Kennedy, evidently, continued to chip away at the anti-distortion

¹¹⁶ MacEachern, Ayton. *What is the Difference between “hard money” and “soft money”?* Investopedia. <http://www.investopedia.com/ask/answers/08/hard-money-soft-money.asp>

¹¹⁷ Mutch, Robert E. *Buying the Vote: A History of Campaign Finance Reform*. (Oxford University Press, 2014).

¹¹⁸ *ibid*

¹¹⁹ Kennedy, Anthony. *CITIZENS UNITED v. FEDERAL ELECTION COMM’N*

rationale he was adamantly opposed to in *Austin*. While this argument is important to an overall understanding of *Citizens United* as an extension of the above cases, the soft money limits are addressed later in discussion on *WRTL*. Moving on, we will examine the Court interpretation of issue advertising as it relates to *Citizens United*.

In reference to disclosure requirements, in 2008, *Citizens United* challenged BCRA under an “as applied” approach for Hillary and its subsequent advertisements. Under both the *Buckley* and *McConnell* decisions, the Roberts Court was tasked with first determining the level of harm that would be done to the petitioners and whether the Court had the constitutional means to uphold actions of the legislature. It is possible that disclosure would result in lack of participation and consequently harm an individual’s right to freely associate. Looking at the facts of *Citizens United* and *Hillary*, there was an interest in showing and advertising a film within the restricted window without disclosing where the funding came from. To be a logical extension of the *Buckley* and *McConnell* decisions, therefore, the Court would have needed to find an undue burden on the association of the members of Citizen United if it were to strike down the disclosure requirement. The Court, however, chose to uphold the disclosure requirements by following the logic proposed in *Buckley*. Quoting the decisions, Kennedy notes that the requirements “do not prevent anyone from speaking,” as argued in *McConnell* and that there was no “substantial relation between the disclosure requirement and a “sufficiently important” governmental interest,” as argued in *Buckley*. For this reason, the *Citizens United* Court remained consistent in its reasoning.

B. The Numbers: Campaign Finance in the Wake of the *Citizens United* Decision An Overview of Disclosure

Disclosure in the United States is an important topic in consideration of campaign finance rules and regulations. The Federal Government, having its own rules and regulations, is joined by

state governments who also mandate a form of both disclosure and reporting of their finances.¹²⁰ Disclosure, in and of itself, meant to ensure transparency for the public, is a prominent factor in campaign finance reform and has been subject to much debate.

501(c) Organizations

Organizations in the United States have been fortunate to receive tax exemptions since the late 1800s, with the earliest reference in the Tariff Act of 1894. With the creation of the modern United States tax code in 1954, 501(c), tax-exempt organizations came to fruition, with limitations placed on their political activities.¹²¹ These organizations, formed for “charitable and other “voluntary” associations,” formed without “Governmental framework,” and have flourished since. To this day, 501(c) organizations in the United States can operate and do not incur any tax liability for their operations.

Alongside exemption from tax liability, these groups can collect donations from a variety of donors and are not obligated to disclose these donors to the general public, making individuals feel more comfortable and incentivizing future endowments. To help check these groups, however, the Center for Responsive Politics notes that they must file 990 tax forms, which are publically disclosed and “detail a group’s revenue, primary activities, major vendors, grant recipients, and members of its board of directors.”¹²² Further, according to the Center for Responsive Politics, one of the issues with this lack of disclosure has been evidence they have found that some groups

¹²⁰ Disclosure and Reporting Requirements, National Conference of State Legislatures. 17 July 2015. Web. <http://www.ncsl.org/research/elections-and-campaigns/disclosure-and-reporting-requirements.aspx>

¹²¹ Arnsberger, Paul; Ludlum, Melissa; Riley, Margaret & Stanton, Mark. A History of the Tax-Exempt Sector: An SOI Perspective, Internal Revenue Service. Winter 2008. Web. <https://www.irs.gov/pub/irs-soi/tehistory.pdf>

¹²² Frequently Asked Questions About 501(c)(4) Groups, Center for Responsive Politics. <https://www.opensecrets.org/outsidespending/faq.php>

appear to be funded by one wealthy individual rather than multiple individuals as was intended.¹²³ Thus, one individual has the ability to donate large amounts to a group and hide behind nondisclosure requirements. The Center for Responsive Politics has also found that corporate entities could donate to groups that take controversial stands on issues while hiding their identity, posing yet another issue.¹²⁴ Perhaps more positively, while these groups are not disclosing their donors, they are still subject to certain other rules and regulations. If a group wishes to be politically active, for example, they are only able to spend, at most, 49.9 percent of their resources on political activities.¹²⁵ These groups only have so much power to be politically active.

Prior to *Citizens United*, 501(c) organizations did exist and there were some groups that were politically active. In their early days of activity, however, these groups were more limited in their expenditures; rather than being directly involved, these organizations had to “hire lobbyists or spend money to make general ads about topics important to their cause,” meaning they were much more removed than they would later become.¹²⁶

As a result of *Citizens United*, two different 501(c) tax-exempt groups grew exponentially in the United States, 501(c)(4)s and 501(c)(6)s. First, 501(c)(4) organizations, which represent social welfare organizations, began to strengthen. These groups are organized for the sole purpose of promoting social welfare of the community. Social welfare activities that these groups may engage in include “seeking legislation germane to the organization’s programs,” and lobbying.¹²⁷ Furthermore, these organizations are allowed to spend money on political activities so long as they

¹²³ *Ibid*

¹²⁴ *Ibid*

¹²⁵ *Ibid*

¹²⁶ *ibid*

¹²⁷ Business Leagues, Internal Revenue Service. Web. <https://www.irs.gov/charities-non-profits/other-non-profits/business-leagues>

spend less than half in the process of doing so and spend more than half on so called “social welfare” activities.¹²⁸ For reference, two popular 501(c)(4) organizations that have continued to dominate on the national stage are the National Rifle Association and the Sierra Club.¹²⁹

501(c)(6) organizations, which also increased in number following *Citizens United*, are, according to the Internal Revenue Service, “business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues.”¹³⁰ These groups form under a “common business interest,” to promote said interest and to benefit the industry as a whole instead of “performing particular services for individual persons.”¹³¹

Post *Citizens United*, corporations could spend unlimited sums from their treasuries on campaign activities if they did not coordinate with individual candidates. 501(c) nonprofits, by definition, are considered corporations and were, therefore, subject to these new rules, and allowed to directly campaign for or against candidates.¹³² Consequently, though other groups already had the ability to make these expenditures, the ruling in *Citizens United* allowed groups to form and, with no disclosure, spend unlimited sums on explicit advocating.¹³³

Dark Money

Following *Citizens United*, independent expenditures in elections began to play an ever increasing role. Immediately following the decision, the number of 501(c)(4) organization almost doubled, and their spending levels skyrockets far beyond previous years. Since the Supreme Court decision, the number of groups applying for 501(c)(4) status alone has increased, growing greater than two fold since the ruling occurred. Furthermore, the money spent by these groups increased

¹²⁸ Frequently Asked Questions About 501(c)(4) Groups, Center for Responsive Politics.

¹²⁹ *Ibid*

¹³⁰ Business Leagues, Internal Revenue Service.

¹³¹ *Ibid*

¹³² Frequently Asked Questions About 501(c)(4) Groups, Center for Responsive Politics.

¹³³ *ibid*

almost 53 percent between 2008 and 2012.¹³⁴ Consequently, the age of increased expenditures and decreased disclosure came about, which created what would be called “dark money.”¹³⁵

In 2012, total outside spending “was more than \$1 billion, almost triple the amount spent in 2008.”¹³⁶ Super PACs, which arose as a result of the 2010 case *SpeechNow v FEC*, made up approximate 60% of the spending in the 2012 election and 25% came from 501(c) businesses.¹³⁷

¹³⁸ A bulk of the 501(c) spending came about by trade associations, unions, and social welfare groups that have never before been allowed to make such expenditures to a campaign. One of the most telling indicators of the impact that *Citizens United* had on United States Elections was this newfound eagerness to form 501(c)(4) organizations. Mutch notes that after the Court ruled in favor of Citizens United in 2010, applications for this status doubled and spending by these groups tripled before the 2012 election.¹³⁹ He similarly argues that businesses would want to hide their contributions from the public “for fear of offending customers,” and as a result, would use 501(C)(4)s that were not required to disclose to the public.

This drastic increase in application and spending was a consequence of the ease with which organizations under this tax exemption status could hide from the public by creating “nonpolitical groups to do political spending” because of a promise of anonymity.¹⁴⁰ Thus it could be argued that the Supreme Court effectively allowed for a dramatic increase of millions of dollars into elections at the hands of elite, wealthy corporations and individuals hiding behind an organization

¹³⁴ Ibid

¹³⁵ Mutch, Robert. *Buying the Vote*. 178

¹³⁶ Mutch, Robert. *Buying the Vote*.

¹³⁷ Ibid, 177.

¹³⁸ *Super PACS*, Open Secrets: Center for Responsive Politics.

<https://www.opensecrets.org/pacs/superpacs.php>

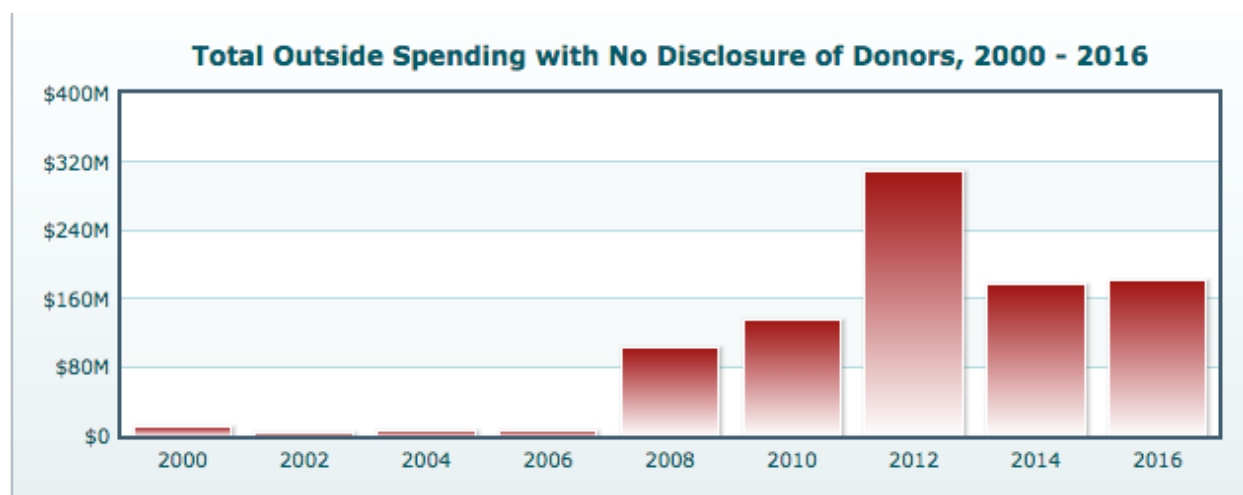
¹³⁹ Ibid.

¹⁴⁰ Ibid

and little disclosure requirements. The effect of this followed the very understanding the dissenting parties had. However, the question lies in whether a dramatic increase in spending provides sufficient reason to argue that the Supreme Court ruled completely incorrectly; did the Supreme Court side with corporate interests or were they genuinely protecting rights under the First Amendment? This question will be addressed, and answered, in concluding portions of this paper.

Far from the transparency that the Court majority believed would occur following *Citizens United*, Jane Meyer argues, people and organizations such as the Koch brothers “took great pains to hide what they were up to,” allowing unprecedented levels of funds to pour into elections without an idea as to who the money was coming from.¹⁴¹ Meyer goes on to explain that in order to preserve anonymity further, the Koch brothers – and presumably other groups – formed 501(c)(6) organizations.¹⁴²

The following table, taken from Open Secrets, shows the level of dark money spending that occurred over the last few election cycles.



¹⁴¹ Mayer, Jane. *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right*. (Double Day, 2016). Kindle Edition.

¹⁴² *ibid*

Prior to 2012, the level of spending by non-disclosed sources began to increase. From 2008 to 2010 before the *Citizens United* decision was released, these levels made a small jump in non disclosure donors. In a roughly two-fold increase, non disclosure donors increased, though it is unsure whether these expenses came from individuals spending increased amounts, more individuals spending, or perhaps a combination of both. Regardless, from 2012 to the 2016 election, the number decreased almost two fold to almost 2010 levels.¹⁴³

Realistically, the massive increase in dark money donors from 2008 to 2012 seems to portray what happened as a result of *Citizens United*. One such issue, however, is determining why the volume of spending would have increased in 2012 and subsequently drop in the 2016 election. When looking at the two candidates, it is clear that both Donald J. Trump and Hillary Rodham Clinton were not usual candidates. Perhaps the drop can be attributed to the level of candidate self financing President Trump used or, maybe dark money donors lost interest in both candidates. Regardless, *Citizens United* cannot be said to have had no effect on financing in the political sphere.

In an almost four-fold increase the United States saw dramatic increases in expenditures by donors who faced no disclosure. Hiding in the shadows of non-disclosure, it could be argued corruption stood waiting in the wings. Unfortunately, forever, requiring no disclosure only provides the public, and candidates, with the name of the 501(c)4 or 501(c)6 organization, and thereby individual donors spending the most money are not exactly impacted or shown favoritism

¹⁴³ *Political Nonprofits (Dark Money)*, Open Secrets: Center for Responsive Politics.
https://www.opensecrets.org/outsidespending/nonprof_summ.php?cycle=2016&type=viewpt

through this. Instead, Meyer notes, individuals such as the Koch Brothers who control these organizations are put to the forefront.

Overall, there are multiple groups that have been consistent overtime in their contributions to campaigns. Consistent with the above graph showing increased contributions, there was a significant spike in activity in 2010 and, more so, in 2012 followed by a steep decrease in the 2016 election. What we do not see in the top five, however, is a dramatic increase in the number of 501(c)(6) organizations; the number of 501(c)(4)s and 501(c)(6)s stays relatively consistent over the course of the last few years.

C. The Balancing Point

Through extensive study of Supreme Court decisions, dissenting concerns, and financial analysis, we can arrive at many different opinions. It is the contention of this paper that the Court was not wrong in its decision based on precedent; in following the decisions put forth in both *Buckley* and *Bellotti*, the Court found justifiable, legal reason to reach the conclusion it had in 2010. Where I argue the Court did not make the proper decision, however, is in how far the decision went. The key issue that this paper seeks to address from this point on is where the United States can accurately find a balance between protecting the First Amendment and ensuring fair elections. Thus, while the Court was not necessarily wrong in overturning *Austin*, the decision went too far, tipping the balance in favor of the First Amendment rather than reform. Through evaluation of various factors in relation to both individual and group expenditures, I will ascertain where the United States can find an accurate point of balance.

While I have first and foremost agreed that the Supreme Court decided *Citizens United* through proper extension of *Buckley* and *Bellotti*, the implications of the decision have made it an interesting case to study. I have concluded upon further evaluation that though the reasoning is

correct, both the *Austin* anti-distortion rationale and the *Citizens United* minority had valid concerns for the future of American elections. I do not believe that the effects of such a decision were perhaps as severe as the parties held, however I find the repercussions of the case to have proven that *Citizens United* had gone too far in both its extension of personhood and its determination that corporate and other entities could spend unlimited amounts prior to an election.¹⁴⁴

Consequently, striking this balance between campaign finance reform and basic First Amendment protections is a difficult task. I contend that when looking at the factors above in a multistep process, we can find the right balance. The overall goal of striking this balance is twofold. First, we must ensure that the government is not infringing upon an individual's right to participate and enjoy the very democratic processes the United States built its foundation on. Secondly, and perhaps the most challenging part of this balance, is creating or upholding reform efforts that both ensure liberty in our system and create more fair and balanced elections, free from undue influence by group interests and large sums of capital. Overtime, the cost of elections has increased tremendously and, with the increasing need to use media outlets to advertise or introduce ideas, it is likely these costs will continue to rise. While we may never again see elections free of monetary control, the first step to reestablishing control over our democratic process is to find this balance. I argue that we must evaluate and use the following as tools to bring forth proper change to campaign finance in the United States: (1) an individualist interpretation of the First Amendment¹⁴⁵; (2) an incompatibility justification for restriction; (3) a free marketplace of

¹⁴⁴ *CITIZENS UNITED v. FEDERAL ELECTION COMM'N*

¹⁴⁵ Youn, Monica, *Money, Politics, and the Constitution: Beyond Citizens United*. Part 1, Chapter 3: Pildes, Richard H. *Elections as a Distinct Sphere Under the First Amendment*. (The Century Foundation, 2011). Kindle Version.

political ideas; and (4) government intervention only when the free market is failing the system. By using a system that combines these four factors, the United States will effectively ensure a rightful balance between the First Amendment and reform.

Money as Political Speech: Liberty Theory vs. Structural Application

Since the decision in *Buckley*, money spent to support campaigns or to advocate in an election has been considered a form of political speech. With this decision and the understanding that election costs were growing, the Court held “that the right to spend money on political expression was protected by the right of free speech,” because money is necessary for political discussion in the United States.¹⁴⁶ Furthermore, it has become more or less accepted that because “money facilitates speaking or incentivizes speaking,” we should consider it as such and protect individual rights to use said speech.¹⁴⁷ With money becoming the functional equivalent to speech, determining the point of restriction becomes more complicated as this so called speech can transfer from hand to hand, expressed on our behalf by others. As seen throughout American history, the Court has struck down First Amendment protections to free speech in cases of compelling state interests. Consequently, while money has taken its place as speech, the Court may still have justifiable reason to ensure oversight and, at times, regulation.

Richard Pildes attempts to exemplify this by showing that there is a “conception of what First Amendment doctrine does.” He argues that in certain cases such as the *New York Times Co. v. Sullivan* and *New York Times Co. v. United States*, we can find the ““normal” or “standard” conception,” of the First Amendment and, consequently, any departures are “routinely denigrated as exceptions,” under a compelling interest theory. He goes so far as to argue that this view fits

¹⁴⁶ Youn, Monica, *Money, Politics, and the Constitution: Beyond Citizens United*. Part II, Chapter 5: Hellman, Deborah. *Money and Rights*. The Century Foundation, 2011. Kindle Version.

¹⁴⁷ *Ibid.*

with an “individualist conception of the purposes of the First Amendment,” holding that the First Amendment is meant to protect the rights of individual “personhood, autonomy, or dignity.”¹⁴⁸ Under this rationale, the First Amendment is meant to protect human persons. Referencing Ronald Dworkin, he holds that “rights protect individual interests by excluding majoritarian preferences or judgments about the common good,” and that, in Dworkin’s words, “it is wrong for the government to deny it [a right to something] to him even though it would be in the general interest to do so.”¹⁴⁹ The reason for this, Pildes argues, is that the applicability of the First Amendment should not depend on the context involved, meaning that whether the speech occurs in a classroom or a courtroom, there should be no difference in evaluation.¹⁵⁰ As we have seen in previous cases, however, we know the Court has established that context is, in fact, important. Students are not allowed to publish articles that have been banned by their school administration just as individuals can not protest war by burning their draft cards.¹⁵¹ Accounting for the exceptions Pildes argues exist previously, we can hold that it is possible, to some extent, to find these exemptions in the law and regulate speech, regardless of the entity it came from.

An alternative view of First Amendment protection, according to Pildes, is the “structural conception of rights,” again introduced by Dworkin. This theory, however, argues that rights help in “realizing various common goods, rather than being protections for individual interests,” therefore establishing the idea that individual rights take a back seat to doing what is right for society as a whole.¹⁵² Pildes explains that the government has the ability to invoke or restrain rights

¹⁴⁸ Youn, Monica, *Money, Politics, and the Constitution: Beyond Citizens United. Part 1, Chapter 3: Pildes, Richard H. Elections as a Distinct Sphere Under the First Amendment.* (The Century Foundation, 2011). Kindle Version.

¹⁴⁹ *Ibid*

¹⁵⁰ *Ibid*

¹⁵¹ *Ibid*

¹⁵² *Ibid*

for the benefit of helping protect goods such as public education, the separation of church and state, and the “appropriate structure” of our democracy.¹⁵³ He goes on to argue that the Constitution was rooted more in the founding fathers’ experiences with the English government, and “did not begin with philosophical conceptions of the person,” himself.¹⁵⁴ For example, Pildes provides the idea that the First Amendment was not formed so that individual self-expression would be protected; instead, rights were created to “sustain a political culture in which “public liberty” was enhanced,” and that these so-called “domains” were not to be touched by the government.¹⁵⁵ Through this, we are led to believe that the First Amendment was created to protect, in a much broader sense, the common good and not individuals themselves. This does not, however, mean that rights cannot be applied to individuals, but rather that the Court must also consider how a decision impacts the public and not just one person at a time.

This structural view is likely to be true in the ways the Court has struck down certain rights to speak freely. For example, in *Schenck v. United States*, when Charles Schenck was distributing circulars in relation to World War I, he was charged in violation of the Espionage Act. In this case, the Court found that these circulars were not protected by the free speech clause of the First Amendment because could create a “clear and present danger,” that authorized prohibition by the Government.¹⁵⁶ The famous fire in a crowded theater line, penned by Holmes, maintains that the if certain speech has the potential to either incite violence or cause panic, that speech may not be protected. Under the individualist theory, we would assume that the context does not matter and the Government should not have been able to prohibit Schenck from distributing his circulars.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Schenck v. United States* (249 U.S. 47), 3 March 1919. <https://www.law.cornell.edu/supremecourt/text/249/47>

Through the structural concept, however, we can gauge why the Supreme Court unanimously ruled to protect the public interest.

In examining the relationship between money and speech, the *Buckley* corruption rationale and the *Austin* anti-distortion arguments come forward. Money, in and of itself, has certain capabilities in American society. Quite clearly, more money allows for greater opportunities in most areas of life. If this is so, however, it becomes concerning to consider whether individuals or groups with large amounts of wealth can simply spend more and, consequently, gain access to resources and opportunities more quickly than others. In these instances, there is an inherent concern to decipher between individual rights and what is best for the common good.

In applying both *Buckley* and *Bellotti* to *Citizens United* under a money as speech approach and the liberty theory, there is reason to believe the Court ruled correctly. Independent expenditures, protected by *Buckley* and spent without cooperation with individual candidates, parties, or committees, cannot give rise to the appearance of corruption because of the inherently separate nature of the spending. While corruption is not a considerable factor in analyzing independent expenditures, the potential for distortion can also be considered which, under the *Austin* anti-distortion argument, maintains a compelling reason to restrict corporations from “obtaining an ‘unfair advantage in the political marketplace.’”¹⁵⁷ If a large corporate entity or some similar organization has an “unfair advantage,” the structural conception of the First Amendment holds that it is in the best interest of society as a whole to restrict said speech.¹⁵⁸ Despite empirical analysis that occurred following the Court’s decision, *Citizens United* was, both logically and

¹⁵⁷ Martindale, Nathan R. Constitutional Law

¹⁵⁸ Youn, Monica, Money, Politics, and the Constitution: Beyond Citizens United. Part 1, Chapter 3: Pildes, Richard H. Elections as a Distinct Sphere Under the First Amendment. (The Century Foundation, 2011). Kindle Version.

fairly, evaluated and it was ascertained that Citizens United's speech should be protected under the First Amendment.¹⁵⁹

In theory, any single individual could wield the same power as a corporation to spend a large sum of money in the course of an election year. Addressing the precedent before them in deciding such a controversial case, the Supreme Court found for this reason, it unlikely for corporate entities to maintain such drastic power and influence over an election, thereby rejecting the distortion rationale. By declining to uphold this distortion argument, the Court accurately disregards a structural interpretation and maintains the liberty approach, choosing to ensure individual rights are protected. Individuals and corporations could inherently possess the same resources and opportunity to introduce their thoughts into the political arena, and wield the same ability to influence the electorate. This act in and of itself allows, albeit few, individuals to hold this same "unfair advantage," corporate and other associations may have to spend large amounts and potentially distort an election. Where this is important to consider is that the liberty approach, according to C. Edwin Baker, maintains that "individual self-fulfillment and participation in change," are central to our understanding of the First Amendment right to free speech.¹⁶⁰ I contend that, through this interpretation, individuals do not necessarily need to spend during an election to feel fulfilled, especially when there are others expressing similar beliefs. Further, I find that self-fulfillment can come from participating in an election by either spending, campaigning, or quite simply voting for a candidate. Such simple civic participation can provide satisfaction and it is imperative to preserve this satisfaction at the individual level. Because the Court did not find a compelling reason to believe the distortion principle, the interpretation of earlier precedent

¹⁵⁹ Citizens United v. Federal Election Commission.

¹⁶⁰ Baker, C. Edwin. Human Liberty and Freedom of Speech, Oxford University Press, 1989. Web. <https://cryptome.org/2013/01/aaron-swartz/0195057775.pdf>

provided the Robert's Court with justifiable reason to rule with *Citizens United* to protect their ability to "speak" in the political arena. In helping them to fulfil their individual goals, the Court found independent expenditures to be without issue, and therefore admissible.

Evaluating the *Citizens United* decision on these grounds, there is a strange dichotomy between both the structural and individualist theories. When looking at the case, the Court found little reason to believe the *Austin* anti-distortion argument held any weight. They reasoned that only *Buckley's quid pro quo* corruption provided sufficient justification for restricting speech. This restriction could be said to fall very much in line with both theories. Under the individual liberty conception of rights, free speech may be restricted in certain circumstances, but this was an exception to the rule; though the Court may want to protect speech, a compelling interest such as corruption gives permissible reason to put forth restrictions. The structural idea, on the other hand, examines what is best for public welfare.¹⁶¹ If *Citizens United* had been about *quid pro quo* corruption or had the Court found distortion to be a viable threat to the democratic process, the structural theory would have presented a stronger argument for upholding the legal restrictions on corporate entities. Anti-distortion being the prominent factor and unsatisfactory to the Court, however, cannot be upheld under an individual, liberty approach.

At face value, therefore, I find the Court to have ruled accurately in its application of *Buckley* and *Bellotti* case precedent and with the individual theory of the First Amendment, protecting individuals rather than trying to increase public welfare. Since the *Citizens United* decision, however, we have seen large groups come forward that do have the power to influence elections. Unlimited corporate expenditures, dark money, and a lack of disclosure have perhaps

¹⁶¹ Youn, Monica, *Money, Politics, and the Constitution: Beyond Citizens United*. Part 1, Chapter 3: Pildes, Richard H. *Elections as a Distinct Sphere Under the First Amendment*. (The Century Foundation, 2011). Kindle Version.

led to the distortion that the *Austin* Court and the minority attempted to avoid. Consequently, while the Court has logically extended the precedent of *Buckley* and *Bellotti*, and thoughtfully overturned *Austin* in their decision, the implications of the decision have conceivably been greater than they may have considered. For this reason, I find the unexpected consequences to have gone too far, tipping the scales in favor of unrestricted speech.

The Compatibility Argument

In *Grayned v. Rockford* of 1972, the Court ruled on another free speech issue regarding an ordinance prohibiting demonstrations near a school. In this case, a demonstration protesting the level of underrepresentation of black students in school activities was barred “under an “anti-noise” ordinance,” such that no protests could occur adjacent to a school when classes are in session. The Court, sustaining the ordinance, found that “the nature of a place” determines the “time, place, and manner” of restrictions. Marshall, writing for the Court, maintained that the focus should be on “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”¹⁶² The Court consequently created a system that would find restrictions constitutional if said speech was incompatible with the given activity by disrupting its everyday, normal flow. If, however, speech did not disrupt activities, that speech would be protected under the First Amendment. Through extension of this principle of First Amendment application, speech should be restricted in certain instances of disruption, regardless of what form that disruption takes.

Extending this to our understanding of *Citizens United*, the decision is put into another perspective. If the mission of an election is to ensure individuals can participate and choose a candidate that best suits their interests, independent expenditures are not necessarily incompatible

¹⁶² *Grayned v. City of Rockford* 408 U.S. 104 (1972). 26 June 1972.
<https://supreme.justia.com/cases/federal/us/408/104/case.html>

with an election. If the stated purpose of an election is, instead, to ensure equality of participation and assure that no single individual or group has a greater influence than another, such that there is no sign of corruption or distortion, then we can begin to see a sense of incompatibility. For this paper, I contend that elections should allow for equality of participation, but an individual's level of participation is up to their discretion. Elections should be held fairly, without corruption or distortion, and anything that would be incompatible with these factors should be restricted from the political arena.

Factoring money into the equation, participation can occur as either direct contributions or independent expenditures, which receive different treatment under the law. This fact aside, an individual can still participate even with minimal means. Unfortunately, it is inherently impossible to ensure total equality of influence for several reasons. First, money would need to be eliminated from the equation. This, however, is nearly impossible without a public financing system that treats all donors the same and a sum of money to be provided by the government. In addition, even if money were wholly and completely removed, everyone still maintains a different level of influence dependent upon his or her background. For example, those with a background in military or foreign affairs can and should maintain a greater voice over an everyday individual with no experience. Influence, is therefore, not solely based in monetary value in an election. Of course, we would like all individuals to start out on the same level, but that is impossible in a society that has many different classes and with people pick up different skills or interests. Influence can even be pure name recognition, making it nearly impossible to eliminate it though this does not mean nothing can be done. Society should be evaluated and, in instances where there is incompatibility with the goal of elections, reform should be implemented.

Thus, to maintain the stated mission that individuals can participate in a corruption democracy, the question must delve deeper to consider if there is some level of incompatibility consistent with corporate entities spending unlimited sums during an election. When the Court was evaluating *Citizens United* they were given two arguments that would, if satisfactory, allow restrictions to be placed on independent expenditures. Independent expenditures themselves are wholly independent of candidates and parties, and were deemed constitutionally protected by the First Amendment. The ability to participate through these expenditures is afforded to all individuals regardless of economic capabilities. Holistically, if all individuals or groups are afforded these rights, self-fulfillment and civic participation can still be met without restrictions on the level of spending. When looking to promote a corrupt free democracy, I hold that the independent nature of these expenditures is sufficient to prove that there is little reason to fear corruption. Neither candidates nor organizations are spending in conjunction with a candidate, and all work is considered separate because individual candidates or parties are not directly seeing the money being spent. The independent nature allows us to hold that there was not a reason to fear corruption, as decided in *Buckley*, and I subsequently find the incompatibility argument to fail when examining corruption.

Further, the Court is also responsible for ensuring there is not a level of distortion in the political arena to maintain the goal of elections. Examining, *Citizens United* taken at face value, there was reason to find that corporate expenditures were legally acceptable and, because no state that allowed unlimited expenditures complained of a level of distortion, the Court found it to be unconstitutional to restrict this type of campaign spending. The minority, however, argued that allowing these expenditures would allow large groups to distort the majority consensus, impeding on election integrity. Where the fears for distortion were not deemed sufficient in *Citizens United*,

the actual consequences show how the decision resulted in incompatibility with the goal of an election. Increased levels of undisclosed spending through abuse of the 501(c)(4) loophole, and an overall dramatic increase in the cost of elections are clearly incompatible with a distortion free election. For example, with tremendous amounts spent in opposition to candidates such as Obama in 2012, it appeared that the majority did not support his reelection. However, we know that Obama won a large victory in 2012, and thus the spending did distort some information on the political stage. If we hold that the purpose of reform is to ensure this distortion does not occur, then we see the incompatible nature of the Court's decision in practice.

By itself, the *Grayned* theory is interesting to consider in relation to *Citizens United*. If we are to assume that the only purpose of an election is to allow all eligible individuals to participate and choose the best candidate for their needs, it is not unfair to say that *Citizens United* correctly applied the First Amendment. Independent expenditures allow all individuals to participate, regardless of total resources, because civic participation does not require individuals to spend; the ability to advocate or express opposition, listen to ideas of those around oneself, and the most important action, voting itself, all provide individuals with the ability to fulfill themselves during an election. Where this theory is compelling is in its consequences and the ability for increased levels of spending with less disclosure, meaning that perhaps *Citizens United* did not get it wrong, but rather, that the Court must be more careful in the future and the government has an important role in shaping future campaign finance reform measures. Through my analysis, I find the Court's decision to maintain the integrity of elections by preventing corruption though I do believe distortion did occur as a result, thereby proving incompatible with the goals of elections in the United States. Therefore, I maintain that in the future, this incompatibility theory should be considered to determine the acceptable balance between reform and Free Speech. Through this

interpretation, if any action would disrupt the ability for individuals to fulfill their needs through participation in fair, transparent elections, that action should be prevented.

The Free Marketplace of Ideas and Anti-Distortion

The marketplace of ideas theory also plays an integral role in understanding the way in which we find the balance between free speech and campaign finance reform. The First Amendment right to freedom of speech inherently includes the ability to freely discuss political matters. Central to understanding campaign finance reform, is the idea that all designated legal persons under the law must be able to participate and share in the discourse if they so choose. As in basic economic theory, the free market refers to the exchange of goods, often called commodities, or services in society “as a voluntary agreement between two people or between groups of people.”¹⁶³ These exchanges occur because a minimum of two people have a mutual understanding that in participating, they will receive some sort of benefit from the transaction. What is important to note about these exchanges is that individuals place an inherent value on things they own ranging from tangible objects to their time and, if that value is greater than participating in trade will offer, they will not engage in the transaction. Subsequently, in the free market there are neither winners nor losers in society because all individuals engage in trade that provides them with either a net zero or positive gain.¹⁶⁴ According to a prominent economist of the Austrian School, Richard Ebeling maintains the following are essential to “a genuine free-market economy:” competition drives the price for goods and factors of production; “the success or failure of individual corporate enterprises is determined by... their greater or lesser ability to

¹⁶³ Rothbard, Murray N. *Free Market, Library of Economics and Liberty*.

<http://www.econlib.org/library/Enc/FreeMarket.html>

¹⁶⁴ ¹⁶⁴ Rothbard, Murray N. *Free Market*.

satisfy consumer demand in competition with their rivals;” and the government has a limited role in its actions.¹⁶⁵

Under the *Buckley* Court, it was found that restrictions on expenditures “reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,” a theory that was later applied to the *Citizens United* decision.¹⁶⁶ Geoffrey Stone argues that this is a “commodity rationale,” because of the way in which political speech is “measured by dollar value,” in the marketplace of ideas.¹⁶⁷ The first factor to consider is the idea that competition in the marketplace occurs, which eventually leads to a voluntary exchange between individuals or groups. In the marketplace of ideas preceding elections, all individuals and groups could spend money alone or in conjunction with others, to influence the outcome of an election. With millions of individuals across the United States, multiple viewpoints can be brought forth, and it is up to those introducing ideas to compete to appeal to voters. For example, when issue advertisements are aired, individuals can evaluate them and choose which they find the most persuasive and which is in their best interest to listen to. This exchange of ideas comes in the form of accepting political speech and advocacy to promote or defeat a candidate for election, which consequently later plays a role in America’s future.

On the issue of success and failure in the marketplace, individuals and other entities must satisfy the demand of the people if they want to be successful. In relation to elections, the more competitive, persuasive speech will normally be more successful because it can satisfy the most

¹⁶⁵ Ebeling, Richard. *The Free Market versus the Interventionist State*, *Foundation for Economic Education*. 1 January 2008. <https://fee.org/articles/the-free-market-versus-the-interventionist-state/>

¹⁶⁶ *Buckley v. Valeo*.

¹⁶⁷ Youn, Monica, *Money, Politics, and the Constitution: Beyond Citizens United*. Part 1, Chapter 2: Stone, Geoffrey R. “Electoral Exceptionalism” and the First Amendment. (The Century Foundation, 2011). Kindle Version.

voters. It is also important to note that in the marketplace of ideas, while all individuals could participate and share on the national stage, there are state, county, and even local communities that people may participate in. Even without participating in direct trade, individuals have their own thoughts on candidates for election and the most common beliefs can be argued to result in either success or failure for a candidate, regardless of a level of expenditure in elections by any single individual or organization. Because the marketplace includes candidate speech through the press, platforms, or debates, the candidates are the ones responsible for gaining support for themselves. While individuals, corporations, or other entities may play a role in persuading individuals to their side, the candidates are, first and foremost, the idea consumers are buying. Those candidates who are neither persuasive nor satisfy the American people will be unsuccessful in an election, and this is perhaps the most sacred part of our democracy.

In the political marketplace, I do agree that it is inherently possible that a larger number of resources can distort the picture and present a larger degree of support than actually exists. What is troubling about the free market theory to Stone is the idea that individuals must “outspend corporate treasuries to make their ideas available to the electorate,” in the same, biased way “a race event that pitted a human runner against a car,” would be.¹⁶⁸ It is comparisons like this that bring forth the anti-distortion rationale. When there are large groups such as the NRA that have a vast array of resources to present their thoughts on the national stage, there is a level of concern that must be evaluated. Groups that are known to appear front and center in most elections can often be caught spending hundreds of thousands of dollars to influence an election. Where I find issue with Stone is that there have been multiple elections where candidates that have outspent others still lose an election. Similarly, candidates that face the most opposition spending, as we

¹⁶⁸ *Ibid.*

have seen, can still manage to win an election. While I agree with Stone that perhaps the free market could lead to such a distortion problem, it is not evident that this has always occurred in practice.

Evidently, it is as hard to maintain a free market for political ideas as it is to maintain a true free market economy. In the *Citizens United* decision, the Court ruled that because spending would be done without cooperation with individual candidates, unlimited spending did not give rise to corruption or its appearance.¹⁶⁹ Through the ideological principle that money is speech, this theory effectively gives rise to the implication that more money equates to more speech. I holistically agree that the marketplace of ideas theory works and that, everyone can put forth their ideas and concerns. When money and power are involved, however, it becomes much more difficult to ensure that smaller voices are not kept from the marketplace because of their lack of resources. While I agree with the *Citizens United* Court that this does not necessarily give rise to corruption or a significant level of distortion, I do believe that there has been perhaps unintended or accounted for consequences that came from the conclusion drawn in *Citizens United* that have, ultimately, resulted in the very problems the *Austin* Court and *Citizens United* minority feared.

The outcome of *Citizens United*, though logically sound, resulted in a tremendous inflow of dark money in the form of independent expenditures. Therefore, the truly troubling issue with this case is what followed. Under an analysis of the free market of ideas, I hold that speech should not be restricted unless there is compelling reason to do so. Under the free market idea, I contend the balance comes from experience. When there is potential to distort, therefore, the Court should strictly evaluate past decisions to ascertain the possible extent of either upholding or striking down such speech. While it is necessary to protect the political marketplace of ideas, it is more important

¹⁶⁹ *Citizens United v. FEC.*

to ensure that no voices are being silenced. If there are instances where more money equates to more speech, it is imperative to put forth some regulation to ensure individuals are not trampled by the beliefs of wealthy individuals or groups.

In Application

Recently, two bills have been introduced in Michigan that provide an exceptional example for use in understanding how both the State and the Court should treat campaign finance reform and the First Amendment. These bills would be allow candidates to solicit unlimited donations to Super PACs though the FEC has previously ruled “candidates aren’t personally allowed to solicit more than \$5,000 in contributions to a Super PAC,” thereby allowing candidates to circumvent current laws.¹⁷⁰

As discussed in previous sections, it is first important to ensure individual rights are valued more highly than promoting public welfare. Unless protecting individual rights results in public disruption, *Buckley’s* corruption, *Austin’s* distortion, or *Grayned’s* incompatibility, free speech can and should be protected, even if said speech is in the form of political contributions to a campaign. The bill in Michigan, which does codify the *Citizens United* decision in so far as allowing super PACs to form and spend without direct affiliation to a candidate, protects the individual rights of candidates to solicit funds but gives rise to the appearance of corruption. Independent expenditures, to truly be permissible in an election must remain independent of candidates. Michigan’s law would disrupt this, allowing candidates to have a more direct relationship with these groups, giving rise to the appearance of a major conflict of interest. In allowing the unrestricted solicitation of funds, candidates wield the ability to help organizations raise larger sums than the candidate could

¹⁷⁰ Lawler, Emily. Michigan Candidates could Solicit Unlimited Funds to Super PACs Under bills, Michigan Live, 4 May 2017. Web.
http://www.mlive.com/news/index.ssf/2017/05/michigan_candidates_could_soli.html

legally raise him or herself, therefore endangering the integrity of elections. Directly tying candidates to these organizations subsequently endangers public welfare and, for this reason, the liberty approach would not be justified. Instead, we should maintain a more structural interpretation to protect the public welfare over individual interests.

Furthermore, elections should provide for self fulfillment and participation in neither corrupt nor distorted elections or campaigns. While these new bills in Michigan would not, under any circumstances, prevent self fulfillment or participation, there is a clear sense of incompatibility to concern oneself with. It is nearly impossible to ensure that elections are run justly without corruption or distortion when candidates are able to circumvent the independent nature of expenditures by soliciting funds for organizations that will, in turn, spend on their behalf. The *Buckley* Court ruled that expenditures and contributions were vastly different and therefore deserved different rights under the law. Michigan would be, in allowing this circumvention, allowing the distinct line between contributions and expenditures to be blurred and therefore, makes it incompatible with the goal of elections. The incompatibility theory consequently invalidates the plan to allow these solicitations.

In considering the political marketplace of ideas, it can be argued that these solicitation of funds allow candidates to find large donors that will spend more on their behalf. This could, potentially result in distortion and should be limited in the political sphere. In sum, these laws are undermined and should be struck down on incompatibility and the state should maintain a structural argument in examining this law. Through the rationales put forth in this paper, this law does not protect free speech. Rather, it strays too far in the direction of protecting entities and candidates instead of ensuring integrity of elections.

IV. Conclusion

The *Citizens United* Court made a very difficult, but correct, decision in deciding in favor of independent expenditures. Having followed case precedent established in *Buckley* and *Bellotti*, independent expenditures can and should be protected by the First Amendment if we are to consider money speech. Where the Court has since faced issue is the unfortunate consequences that occurred as the result. From skyrocketing costs of elections to an increase in the 501(c) loophole, unintended effects of allowing corporate entities to spend in elections has had an impact on American elections. These unintended consequences do not invalidate the Court's decision and instead give reason to be more careful with respect to future decisions and reform. Thus, the question becomes where does the government go from here?

To that, legislators and the Court have a lot of work to do. First and foremost, legislators should aim to close the 501(c) loophole that has led to increased dark money. The free marketplace of ideas cannot adequately work if there is a level of distortion by large, undisclosed interests. To make truly informed decisions society must know who is spending and how much is being spent by those donors to ensure they can make the best decision and do not buy into advertisements simply because they are more visible in the political arena. By taking the first steps to closing this loophole we may, perhaps, see a level of distortion dissipate as some individuals or groups may not wish to be disclosed to the public, decreasing overall costs of elections. Regardless of this next step, the Court and legislators should also keep the rationales put forth in this paper in mind when making decisions on campaign finance reform.

Ensuring that individual rights are protected unless there is potential to endanger the public welfare is essential in our society. In conjunction with a free marketplace, society benefits when individuals are protected from the government and without sufficient reason to believe protecting individual rights or limiting speech in the marketplace causes harm, speech should not be

restricted. In addition, the Court must maintain that *Austin* was not necessarily wrong for aiming to prevent distortion in the marketplace. Fair, transparent elections require the government to ensure self-fulfillment and participation without any form of corruption or distortion. To do so, any action or law that would infringe upon this stated purpose must be stopped. The future of campaign finance reform and First Amendment application remains unclear and there will be long sustained debated on the matter for years to come. Taking the first steps to understanding how we can balance First Amendment protections with ensuring fair elections is imperative, and following the guidelines set in this paper allows us to do just that.

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