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# Citizens United and the balance between individual and corporate political speech

Eric John Berken

*Louisiana State University and Agricultural and Mechanical College*, [eric\\_berken@yahoo.com](mailto:eric_berken@yahoo.com)

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CITIZENS UNITED  
AND  
THE BALANCE BETWEEN  
INDIVIDUAL  
AND  
CORPORATE  
POLITICAL SPEECH

A Thesis

Submitted to the Graduate Faculty of the  
Louisiana State University and  
Agricultural and Mechanical College  
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in

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by  
Eric John Berken  
B.S., University of Louisiana, 2001  
M.S., Temple University, 2003  
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## ABSTRACT

In an attempt to create stronger protection for free speech rights, the Supreme Court, in its ruling on *Citizens United v. Federal Election Commission (FEC)*, has issued a determination that limits the rights of citizens in favor of artificial industrial entities. The majority's stated position, that corporations cannot be regulated differently from real human beings, cannot be justified according to values enshrined in the Constitution. They further claim that large sums of unregulated money accrued for capital investment cannot be demonstrated to cause corruption, which is an obvious mischaracterization of financial influence in the current political process. By ignoring the purpose of the federal legislation as a balancing agent between artificial organizations and citizens, the Supreme Court has opened the door for a centralized control of public policy and other ideas through information dissemination that can now be dictated by financially privileged government instantiated organizations. My thesis is to provide a philosophical justification for the equilibrium needed between competing agents in the political and social arena that was removed by this recent court decision. One foundation to do this will be John Stuart Mill's On Liberty, a traditionally well accepted and respected commentary on balancing social freedom and interaction. Additionally I will use Milton Friedman, a respected libertarian philosopher, to elaborate on the modern impact of imbalanced regulation between citizen, state, and business entity, and outline a direction toward solutions for this difficult problem. Through analysis of the case along with these two philosopher's positions, my aim is to articulate the imbalance that currently exists in political speech.

# CHAPTER 1. THE *CITIZENS UNITED* CASE AND COMPETING AGENTS IN POLITICAL SPEECH

## 1.1 Introduction

The Bill of Rights added to the United States' Constitution provides many of the fundamental protections that allow citizens to participate in a society rooted in equality. This starts with the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In only forty-five words, the First Amendment to the U.S. Constitution lays out the fundamental principles that allow each citizen to pursue his/her own liberty, while promoting the concept of dissent by individuals or organizations. As our eighteenth century agrarian society developed into a modern day industrially driven superpower, individuals must interact with U.S. and foreign governments and business enterprises that are intimidating in their scope.

The First Amendment, and the rest of the Bill of Rights, was meant to protect each individual citizen's personal freedom in balance with the artificial union that is our great nation. Our ability to communicate is fundamental to each and every one of us. Yet we are stronger and achieve more as a group than we ever could as individuals. Since we know we must have active societal structures that act on our behalf and individual rights to express ourselves, where is the balance drawn? Are an individual's ideas still free and his/her own when corporate and government entities have control over the information that is available to individuals? What about when repercussions may follow from expressing ideas to a company that employs a person and to a government that regulates many of her daily activities? Under these changes in our

society, how can we most effectively honor the concepts that our country was founded upon? These important ongoing philosophical questions must be revisited periodically so that we know that our living constitution is working correctly.

A critical arena for this interplay between individual freedom and the ability of organizations to fulfill their proper functions is the funding of political campaigns and in particular the ability of stockholder owned corporations to advocate for candidates and points of view in these campaigns. Some believe that only individuals should vote and influence the votes of others by contributions and campaign ads. Others seek a robust public debate in which all individuals and organizations, including corporations, have a right to participate. This debate over the proper role of corporate speech supplies the basic ideas I will develop in this paper.

Until recently, campaign regulations allowed all citizens and organizations to participate, but this was done in ways that depended on their structure. Corporations were able to advocate and campaign through auditable political action committees (PACs) for for-profit corporations. Other limited liability structures were available for non-profit organizations. This all changed when the United States Supreme Court decided *Citizens United v. Federal Election Commission (FEC)* on January 21, 2010. The Supreme Court determined that the regulating of the corporate funding of campaign speech is unconstitutional.

This ruling raised many philosophical issues. My focus is to demonstrate that there is a need for government to regulate how artificial agents, like corporations, interact with people as they participate in the political process. To that end I will begin in this chapter with a presentation of the court decision in order to frame the two competing arguments in this debate. I will follow this presentation with an analysis of the competing arguments and conclude this chapter with the concerns that I want to address moving forward. In the following section, to

reach a better understanding of the general principles regarding the need for corporation's balanced interaction with individuals, I will utilize J.S. Mill's work, On Liberty. Then in the third chapter I will discuss Milton Friedman's advice on the modern evolution of corporate interaction with government and citizens, to clarify how this new and developing part of society should be handled. In the concluding chapter I will extrapolate based on some current philosophical reasoning and empirical data why the imbalance created will continue to be a problem unless addressed.

Ultimately my thesis that a balance is justifiable under the guidelines of the U.S. Constitution rests within the First Amendment. It clearly states that "Congress shall pass no law...abridging the freedom of speech... or the right of the *people*...to petition the Government for a redress of grievances." I will submit through thorough evaluation in my thesis that the laws that create corporations, our financial systems, and judicial misinterpretation that now allow synthetic organizations the rights of *people* violate individual citizen's right to speak effectively in the political process. Although businesses are needed to promote commerce in our industrialized society, they are not needed to make long-term political decisions that are based on non-civic motives. This circumvention of citizen's rights had been addressed by the BCRA. The rejection of the mitigation of this legislation by the Supreme Court directly circumvents the wording and intent of the First Amendment.

## **1.2 The Supreme Court Ruling In The *Citizens United* Case**

I am presenting the majority's decision and the minority's response in order to understand the competing philosophies in the debate over contrasting individual and corporate

rights. The majority interpreted that it was unacceptable to hinder free speech through financial regulatory limitations on how corporations or unions funded political rhetoric. In contrast, the minority argued that allowing non-human speakers, like corporations and labor unions, to participate freely in campaign speech would abridge the first amendment rights and personal intellectual liberty of actual human speakers. Valid concerns are presented by both positions.

The ruling, *Citizens United v. Federal Election Commission*, No. 08-205, overruled two precedents: *Austin v. Michigan Chamber of Commerce*, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and *McConnell v. Federal Election Commission*, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002 that restricted campaign spending by corporations and unions. The 2002 law, usually called McCain-Feingold, banned the broadcast, cable or satellite transmission of “electioneering communications” paid for by corporations or labor unions from their general funds in the 30 days before a presidential primary and in the 60 days before the general elections. The law, as narrowed by a 2007 Supreme Court decision, applied to communications “susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The majority opinion did not disturb bans on direct contributions to candidates, but the two sides disagreed about whether independent expenditures came close to amounting to the same thing. Eight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. “Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way,” Justice Kennedy wrote. Justice Clarence Thomas dissented on this point.<sup>1</sup>

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<sup>1</sup> Lipton, E. McIntire, M. & Van Natta Jr. D. October 21, 2010. New York Times. "Top Corporations Aid U.S. Chamber of Commerce Campaign." Case summary part of overall commentary on legal precedent.

1.2.1 The Justices' Majority Decision: The majority's decision seeks to remedy chilling of speech and prior restraint to free speech by removing nearly all campaign oversight in regards to corporations and large legal enterprises. The rejected legislation's approach, which allowed corporations to advocate and campaign only through PACs, was determined to treat enterprise groups differently than individual citizens, in violation of these corporations' civil rights.<sup>2</sup> Beyond the ontological nature of the corporate speaker as an artificial entity, another primary concern the legislation addressed regarding the negative affect of campaign influence from excessive corporate spending was rejected. This is because the majority justices determined that vast sums of money created through investment for the purpose of commerce could not be directly linkable to corruption in public policy.<sup>3</sup> Most notably present throughout the majority's decision is the idea that corporations chartered specifically to disseminate news could not be differentiable from other types of corporations, and therefore would be able to be censored by federal government campaign regulations.<sup>4</sup> A closer look at each of these primary blocks of reasoning will indicate more clearly the overall logic of the decision.

An essential question regarding the *Citizen's United* case specifically is the extent that the U.S. Constitution's Bill of Rights applies to corporations and unions – partially or completely. To be clear, corporations can enter into contracts, sue others, be sued, and operate as an individual entity for the purpose of commerce per its individual charters. These capacities have been supported by federal and state regulations as well as judicial rulings as part of their

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<sup>2</sup> Supreme Court Syllabus, *CITIZENS UNITED v. FEDERAL ELECTION COMMISSION* (Reporter of Decisions, October Term, 2009), (pp 32) “We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.”

<sup>3</sup> *Ibid*, beginning on pp 47.

<sup>4</sup> *Ibid*, Chief Justice Roberts on 74 and again, “*The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press.*” (pp 86)

purposes as business entities. However as the majority justices noted, these entities, by charter, cannot do many of the things that are part of our human Bill of Rights. Such things that are specific to this case are that they cannot vote, form words to express an opinion, and think with individual minds. Despite these facts the justices further noted that corporations are made up of people, and these people's voices would be unconstitutionally limited if denied unlimited unregulated spending on elections and campaigns.<sup>5</sup>

The majority decision made it a specific point to explain that corporations don't have monolithic views, and this diversity of opinion made them not differentiable, as entities, from its stockholder owners in most cases and the general public.<sup>6</sup> Because of this lack of homogeneity and the inability to verify where the thoughts and opinions of stockholders, board members, and employees ends and where the corporation's *thoughts* and goals begin, corporations should not be differentiated from their owners at all for political regulation. This was a primary motivation, expressed in the decision, for attempting to provide the full Bill of Rights protections to corporations despite their status as artificial entities.

Allowing these protections to corporations while also allowing special privileges for capital accrual and tax advantages that exist for corporations but not for individuals could possibly create a financial imbalance in political speech. The majority, in their decision, answered the question of if spending these funds on political campaigns and elections could cause those involved in the political process to become improperly beholden to the source of the funds? In the majority's stated opinion the answer is no: the only corruption legislateable or

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<sup>5</sup> Ibid, (pp 32) "*We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.*"

<sup>6</sup> Ibid, pp 48-49, The majority decision details how corporations are "like individuals" don't have monolithic views and because they have diverse opinions like individuals they are likely to be able to educate legislatures based on their dynamic and informed view points.

prosecutable in courts is quid pro quo, or direct payoff corruption.<sup>7</sup> Although campaigns are expensive, the need for advertising funds for elections could not demonstrate that corruption or excessive influence takes place when corporations support campaigns and policies. This is because it cannot be proven that candidates are beholden to the source of their funds. In addition, the majority emphasized that because real human individuals could contribute to candidate's elections, this should be no different for a corporation. Since idea expression is central to speech and liberty, excess spending is considered a tolerable side-effect.

In our society, the press has often been the counterbalance to idea domination by a chosen few, and an important protection for this role is written into the First Amendment. The majority states it is attempting to protect the press with its rejection of PACs and other legislative controls setup for non-media corporations. The idea that an exception differentiating between media enterprises incorporated specifically for news dissemination and those of non-media enterprises whose profits were made outside of the news industry was determined to be too arbitrary a distinction by the majority's decision.<sup>8</sup> In the majority justices opinion advocacy is advocacy, presented as news, campaign adds or otherwise, and it is not the governments job to determine who can advocate in what way.

1.2.2 The Justices' Minority Opinion: In presenting the dissenting opinion, Justice Stevens presents a view that the majority not only failed to make the correct judgment, but is purposefully obfuscating the issues by creating questions that did not exist within this case, the

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<sup>7</sup> Ibid, beginning on pp 47.

<sup>8</sup> Ibid, (pp 86) "*The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press.*" -- Freedom of the press will be removed if unregulated funding of corporate advocacy in campaigns is not allowed because reporters and news writers working for companies that only disseminate news cannot be differentiated from non-media corporations for regulations purposes, according to the majority. This poses an interesting question about differentiating between types of corporation, and whether that is possible, but seems to be a separate question that does not need to be addressed in the context of this case.

overturned legislation, or prior judicial cases. A main point woven throughout the dissent is that corporations rather than being inseparable from those who own them, are in fact distinct from their stockholders as separate chartered non-human entities. A topic that I will elaborate on is one that the justices in the minority also contend that rather than intending to “chill speech,” the purpose of campaign finance legislation was to protect speech as an individual liberty of human citizens from being dominated by government sanctioned privileged (because of their financial resources) synthetic “speakers.” The minority argues that despite the clear lack of human characteristics that would preclude their full inclusion in the protections of the Bill of Rights, corporations and unions were not disallowed from participating in the political process, but were given specific means to exercise a logically human right to affect the outcome of elections.

Where the majority found it difficult to find the lines that differentiate a corporation and its owners, the minority had no such difficulty in determining their status as ontologically unique non-human separate entities:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.<sup>9</sup>

The fact that corporations are chartered by states to conduct business, with unique provisions built into their charters insulating those that own them from personal liability and requiring all personal funds be kept separate from corporate funds, makes distinguishing them from individuals rather easy. The foundational differences between human participants and

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<sup>9</sup> Ibid, pp 89.

corporations and the different level of resources they can bring to campaigns warrants protection for the voices of individuals.

In regard to the media, the legislation in question along with subsequent federal and Supreme Court decisions had determined that media corporations designed and chartered for the purpose of earning money to gather and distribute news to the public were exempt as differently chartered. Due to this purposeful distinction between entities, per the First Amendment's protection of the press right to report the news to the public, media corporations were given separate constitutionally instantiated rights.<sup>10</sup> The majority justices' decision to imply that media corporations could not report the news if corporations are not allowed to spend unlimited funds directly in campaigns seems like a threat. As media corporations grow larger it may be an ongoing issue that campaign regulation has to revisit, but not an impetus to allow non-media entities the right to spend economic capital to manipulate public policy for whatever they feel is the current economic interest of the corporation. This ongoing review of media corporations' influence and identity is something that the minority justices concede, but not at the expense of allowing what they see as the potentially corrupting influence of unrestrained corporate speech.

Having established the grounds for distinguishing corporations and human persons, the dissenters detail the dangers to which the rejected campaign finance laws had responded. Corporations are non-human entities that are chartered to serve economic interests. They do not vote and are often not chartered in all the locales in which they seek to exert political influence. They are structured to accrue capital for economic activities with advantages and motivations that allow operational efficiency and swiftness that dwarfs the ability of any other civic and even political organizations to compete. As the dissenting opinion noted, there is a danger of allowing

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<sup>10</sup> Ibid, pp 112.

corporations unfettered entrance into the political process.<sup>11</sup> Because of their advantage, the decision to break from the past leaves all civic organizations, political organizations, and individuals at risk of being unable to compete. The actual human participants in advocacy, who still must abide by campaign regulations and don't have the capital accrual and tax advantages of corporations, are less able to express their views. The already expensive public policy forum will become further dominated by financial interests to the detriment of the varied interests advanced by individual citizens and other interest groups.

The minority justices were also troubled that the majority opinion ignored sections of the law and previous court rulings upholding campaign finance reform that included specific provisions to allow corporate participation. The previous rules allowed for-profit and not-for-profit organizations to affiliate and use funding to participate in electioneering while mitigating the financial influence of government privileged chartered organizations over groups of citizens. For these purposes PACs were created for corporations whose original charters were for non-advocating persons, and MCFL limited liability organizations were created for not-for-profit organizations. These organizations were available and used throughout the United States. In direct contrast to the majority's ruling, the Federal Election Commission did not censor corporations or other non-individual speakers, but gave them a specific regulation that allowed them to advocate. The caveat that existed was that since investment in corporations chartered for business was for economic purposes, only specific funds designated for electioneering could be

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<sup>11</sup> Ibid, pp 89. "The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, Ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U. S. 197, 209 (1982) (NRWC), and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209–210. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law..."

used to participate and “speak” in the processes of elections. Allowing corporate entities unfettered use of their government sanctioned economic advantages in the political process has left citizens at a disadvantage in making choices and deciding their own futures. The minority justices attempt to make evident that by ignoring the purpose of the federal legislation as a balancing agent between artificial organizations and citizens, the Supreme Court has opened the door for a centralized control of public policy and other ideas through information dissemination that can now be dictated by financially privileged government instantiated powerful organizations.

### **1.3 Competing Views On Political Speech**

To frame the debate and highlight the differences between the majority and minority justices differing views on political speech regulation I will begin with the basic framework that Kathleen Sullivan introduces in “Two Concepts of Freedom of Speech.”<sup>12</sup> The majority justice’s view of free speech appears to come from a libertarian philosophical foundation that sees the first amendment right as a negative right meant to check the potentially controlling forces of government. Whereas the minority justices egalitarian position views the first amendment as a mandate to provide equal capacity to speakers and regulation that promotes this capacity is in accord with this position. Understanding the interplay of these competing views should provide a strong structure to evaluate both arguments.

The duty of the government under this first view of free speech protection as a negative duty is very specific. No law shall be passed that abridges the right of any speaker as opposed to

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<sup>12</sup> Sullivan, Kathleen M. 2010. Two Concepts of Freedom of Speech. The Harvard Law Review: The Supreme Court - Comments. Vol. 124 (143-177).

another. Under this traditionally libertarian mode of thinking government regulations should be kept to a minimum. Attempts by the government to pass regulations are an infringement on the autonomy of individuals to make choices for themselves, and any laws that would limit this autonomy should be struck down. Although not overly explicitly inculcated, these libertarian themes of limiting government to very specific regulatory capacities in regards to society and business figure prominently in the majority justices' opinion.

Conversely, the minority justice's decision represents their adherence to an understanding that the first amendment was a positive affirmation of liberty, and as such required regulation to maintain this liberty when needed. This traditional egalitarian view of a positive right that requires protection to mitigate instances of discrimination follows a long line of egalitarian based legal tradition. The addition of agents, like corporate enterprises, with financial advantage represented a clear example of a need to balance the positive rights that individuals have and could lose in the face of government instantiated financial imbalance.

It is clear to see that each side has its specific views rooted in ideological tradition. What I will pointedly try and do is show that there is a unique balance in the political arena that must be observed in order to maintain equality in election and legislation. And, even within the realm of the majority justices traditional libertarian view the need for correct balance should be attained. Despite the idea that this view holds a strong contention toward a negative duty to withhold regulation, there is a possibility that a negative constraint is necessary to properly equalize the system.

## 1.4 Questions & Issues To Explore

1.4.1 Questions: As I move forward in this debate I would like to describe the fundamental questions that have been raised that I will explore moving forward. The questions I will address will inquire into the status of free speech in the face of an ever changing and expanding financial landscape. From this landscape I will look at issues that are apparent to many in the face of the Supreme Court's decision. Through the lens of these foundations I expect to convey a clear message about the need for re-reforms.

The primary question of concern by the majority seems to be that even if corporations were differentiable from their owners and controllers, why would this matter? From a libertarian mindset, any abridgement of political speech is infringement on the speaker's right to speak and the listener's right to hear. Secondly, the acts of speech that are attempting to be regulated are indirect financial contributions. What can indirect financial contributions prove to do other than influence? The point of electioneering is to influence, as individuals do by voting. Finally, the media corporations that exist would have to be regulated against if electioneering were allowed. How could the media, in corporate form, be allowed to operate?

These primary questions from the majority I will attempt to answer in the following chapters and balance with additional inquiry. Some additional questions that I will elaborate are what fundamentally unique characteristics of human citizens that make their unencumbered participation in the political process necessary? This is at the heart of the debate between allowing unlimited funding from corporations in elections, or mitigating to make sure that the voices of unique citizens are not drowned out. This leads to an important question that I hope to

demonstrate as primary: What is the point of the right to free political speech if you can't be effective in using it faced with the overpowering effect of corporate money?

1.4.2 Issues: The issues that have been identified following the Supreme Court's decision are too numerous to chronicle. However I will attempt to focus on key issues, which will provide the groundwork for discussion and conclusions in later chapters. A primary point will be to discuss what the justices missed in deciding this case. Also, what are some signs that the justices are not supporting their own values that purport to hold the first amendment as a negative duty protecting society's members? Finally, I would like to point to conclusions drawn from empirical evidence that demonstrates that citizen's influence is eroding within the political process.

In Lawrence Lessig's "Democracy After Citizens United"<sup>13</sup> he explains how courts make errors when they ignore the facts behind supported legislation. This long standing practice of the court's capacity to intentionally ignore evidence that supports legislation is referred to as "Locknerism." In the original Lockner case, the Supreme Court ignored the facts that the legislature used to support a new law, and rejected the law claiming the legislature did not support the law with empirical facts. The obviousness of the court's bias and ignoring of fact is still well known and thus the term Locknerism is widely used by court scholars. Lessig in his critique of the courts current decision makes a strong case that a Locknerism has occurred because the court missed the effect of massive funding that corporations are capable of.

This he describes utilizing terminology pulled from economists who have studied campaign influence. The "iceberg theory" shows that although individuals can influence

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<sup>13</sup> Lessig, Lawrence. Septemeber/October 2010. Democracy After Citizens United. Viewed January 3, 2011. <http://bostonreview.net/BR35.5/lessig.php>. Lessig explains the case where the SCOTUS ignored factual findings by the US Congress and overturned needed legislature without grounds, the Lockner case.

elections the wealth of corporations is comparably a much greater source of influence. This is due to the fear that is created when a wealthy organization can intimidate a politician because of the fear of possible reprisals. In these situations, a candidate does not fear the visible threat of lack of support, but the possible threat of the overwhelming support that could be given to a rival if they do not acquiesce to corporate demands. This is a far greater consideration than just a single vote against as individuals are capable.

The effect of ignoring this type of imbalanced influence has additional consequences. These consequences hold in direct contradiction to the majority justice's apparent view that the first amendment should be limited to a negative duty of protection, which their decision supports. As I will draw out in more detail in chapter three, this decision has destabilized a needed balance between government and enterprise interaction. As the government is supposed to set up the rules of the game and allow corporations to work for citizens, the government has excessively deregulated. The effects of this deregulation have caused a near economic depression and the Supreme Court's decision now extends that deregulation to allow corporations to participate in creating new regulations.<sup>14</sup>

This additional functionality exacerbates a situation where corporations are motivated to not innovate or work to grow for their investors. In fact, by lobbying and controlling legislature and creating loopholes that advantage corporate interests, industry gains profit at 600% to 22,000% return on investment versus a 10% return from capital investment.<sup>15</sup> Conclusively, this shows that direct investment into government lobbying and electioneering without attempts at

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<sup>14</sup> Piety, Tamara R. "Commentary, *Citizens United* and the Threat to the Regulatory State," 109 Mich. L. Rev. First Impressions 16 (2010), Viewed December 30, 2010. <http://www.michiganlawreview.org/assets/fi/109/piety.pdf>. By increasing corporation's speech capacity they have given corporations control over commerce regulation and the ability to influence regulation at an absolute level.

<sup>15</sup> Ammori, Marvin. September/October 2010. "Corruption Economy." Viewed January 6, 2011. <http://bostonreview.net/BR35.5/ammori.php>.

product improvement is an apparent advantaged outcome of unregulated corporate buying of influence.

The current reality of politics is showing that corporations are using their vast wealth at greater rates at more advantage. They are using this advantage to overcome political challenges from weakened political parties who cannot afford to challenge their interest with relatively limited funding.<sup>16</sup> Additionally citizens and parties are disadvantaged because corporations have the ability to coerce through “shadow” organizations that don’t have to divulge the sources of funding for political campaigning. In these cases citizens and politicians can be intimidated and/or overwhelmed by spending without being able to pinpoint the source of election funding.<sup>17</sup>

As these issues detail it is apparent that their major problems within the framework of corporate enterprises participating within elections. These problems were detailed and the basis for the legislation that the court overturned. The negative duties that the court’s majority would seem to want to uphold in regards to the role of the government appear to be at odds with the result of their decision. Foreseeable problems are growing as corporations take deeper root in the election process. As stated, these framing issues and questions are what need to be answered and what I will attempt to answer in the following chapters.

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<sup>16</sup> Rosenblum, Nancy L. September/October 2010. “The Losing Role of Political Parties.” Viewed January 7, 2011. <http://bostonreview.net/BR35.5/rosenblum.php>.

<sup>17</sup> Lehman, Russ. October 14, 2010. “Effects of the *Citizens United* case will exacerbate voter frustration.” Seattle Times. In this article “non-profit” 501(c)(4)s are exposed as fronts for electioneering that corporations use in order to forcefully advocate when they don’t want their identities known by the public.

## CHAPTER 2. J.S. MILL'S BALANCED VIEW OF FREE SPEECH

### 2.1 Introduction

John Stuart Mill's classic work, On Liberty, provides a basis for understanding how individual liberties, such as those protected by our Bill of Rights, were in fact created to protect the flow of information to and from (human) citizens. Mill's key insight is that speech and thought can be chilled as much or more by unregulated enterprise as it can by direct government regulation. Modern society's intertwined socio-economic and political structure makes it critical to recognize the influence these privileged economic entities have over human citizens.

I concluded chapter one with several questions that will help outline the fundamental concerns that the Supreme Court decision raised. I will begin this chapter with the unique characteristics of human citizens that make their unencumbered participation in the political process necessary. To do this I will present Mill's basic theories on how collective organizations can harm individual's capacity to express themselves. From this I will attempt to elaborate on the primary need of having individual voters, and the ability of these voters to connect with different ideas, as the dominant factor in the electoral process.

The second question I will attempt to answer will relate to how it would be possible to view coercive legislation as a viable option even if corporations were differentiable from their owners and controllers. This will continue my response to the argument of a negative duty that the Supreme Court's majority justices appear to support. By utilizing a popular interpretation of Mill's arguments, specifically from On Liberty, I hope to show that a balanced view of the free speech right in question provides for mitigation through legislation.

In the third section I will explain how indirect financial influence from corporations changes how politics works. Building on my responses to the first two questions, utilizing the Millian framework, I intend to describe how influence from the financial sector in politics removes human thought from the election process. The excessive financial influence will push the political process beyond what citizens can control. Because of the limitations on what information is available, this influence will deny the capacity for individuals to determine what the best choices to make are.

I will close this chapter with the encompassing question about the point of a right to ineffective free speech. That is an important question because our right to free speech is in danger of becoming ineffective due to the overpowering effect of corporate money. I hope to show that Mill's perspective on free speech requires a balance between agents in society. Although there is a need to restrain government regulations that arbitrarily limit speech, another need exists to support voter autonomy in the election process. This need for balance, that the Supreme Court missed, is found in Mill's work and is what the rejected legislature addressed.

## **2.2. Why Are Individual Citizens Of Primary Importance?**

Individual liberty in general, and speech in particular, was such an important element in our nation's creation that they led the liberty rights articulated in the Bill of Rights. For a country to be great, its citizens should be allowed to grow, develop, and communicate freely. As Mill wrote his book on the importance of protecting these rights, he found it important to point out that the greatness of his country, England, drew its preeminence largely from the ability and power of individuals to develop profound ideas that they could implement with the support of

others through healthy dialogue. The pooling of individual capacity into groups accelerated rapidly, and the collective desire and will of the group became overpowering to the individuals in society.<sup>1</sup> He noted, however, that through this growing collectivism, the society was losing its ability to draw from its roots of individuality.

The great material success of businesses that came from organizing collective activity was leading citizens to imagine that their potential and abilities could only be expressed through businesses. This was because they now needed larger businesses in order to make a living for themselves and their families. Because of the power of this new requirement individuals became beholden to the businesses that they initially created. Mill expressed the hope that a return to a balance between individual and organized endeavors could deliver England from decline.<sup>2</sup>

The hope of returning balance sprang from a primary deficiency of being unable to locate bad ideas within an overpowering collective, because individual's ability to express themselves had become muted. "Forgetting that unlikeness of one person to another is generally the first thing which draws the attention of either to the imperfection of his own type and the superiority of another..."<sup>3</sup> Within growing organizational structures that families had become dependent on, fear of repercussions forced individuals into group compliance. This forced group compliance would become a guiding norm in society. Thus the "individuality that we war against" is a

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<sup>1</sup> John Stuart Mill, *On Liberty* (Pearson Longman, 2008), (Pp 124),

<sup>2</sup> Ibid. Regarding the energy of reason as most valuable and how business subverts and destroys this greatest asset of reason: (Pp 124) "... *Already energetic characters on any large scale are becoming merely traditional. There is now scarcely any outlet for energy in this country except business. ... The greatness of England is now all collective; individually small, we only appear capable of anything great by our habit of combining; and with this our moral and religious philanthropists perfectly contented. But it was men of another stamp than this that made England what it has been; and men of another stamp will be needed to prevent its decline.*"

<sup>3</sup> Ibid. Speaking about the war against individuality and how this group-think mentality hinders our recognition of our ability to find fault and improvement. There is danger of corporations defining ideas without ability to counterbalance and help them to improve: (Pp 126) "*It is individuality that we war against: we should think we had done wonders if we had made ourselves all alike, forgetting that unlikeness of one person to another is generally the first thing which draws the attention of either to the imperfection of his own type and the superiority of another....*"

primary condition for correcting epistemic corruption. What I mean by epistemic corruption is that the sources of information are now being guided by a forced group collective that rejects the validity of competing ideas.

This thought, clearly stated, is that ideas suffer when large organizations dominate the control of the dissemination of information when individuals don't have the capacity to express individual dissent. For example, individual workers seldom feel empowered to stop large organizations from rushing into projects. The calamitous results are seen in situations like the recent BP oil spill in Louisiana. There individual workers' concerns were muted and ignored, because the corporation's leadership respected the concepts of organizational financial benefits as more important than safety concerns that were brought up by individuals. The ability of individuals to see beyond and through rushed collective thinking is a needed balance in any group / individual dynamic. As Mill it saw, individuality is the best development of human beings into what they best can be, and this individuality is needed to balance a strong collective presence.<sup>4</sup>

Building from this understanding, we see that individuality as Mill describes is fundamental to all aspects of the best development of human endeavors. This would of course include the political realm. The unique makeup and concerns of individual citizens and the concerns that they have that transcend the limited financial concerns of business entities are not trivial. Emotions and concern for other citizens, the environment, and future generations that are beyond the financial motivations of corporations are primary to individuals. These tangible

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<sup>4</sup> Ibid. Regarding the best development of human beings and their opinions and that agents that prevent this or the worse (I posit corporations prevent this.): *"Having said that individuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce, well developed human beings, I might close the argument; for what more or better can be said of any condition of human affairs than it brings human beings themselves nearer to the best things they can be? Or what worse can be said of any obstruction to good than that it prevent this? (Pp 118-119) ... Persons of genius are more individual than any other people..."* (Pp 119)

facts, facts about unencumbered individual creativity that Mill describes along with our unique motivations, make the protection of the individual as primary political agent a necessary condition of a healthy society.

### **2.3. Why Would It Matter If Corporations Were Different From Their Owners?**

As I have elaborated them, and as Mill describes them, the individual and her capacity to think creatively are the primary drives of society's progression. Even if this point is conceded, the Supreme Court's majority would not change their interpretation of the first amendment. The founders' intent, the majority maintains, is that the first amendment does not provide a positive right to be balanced between agents, but provides only a restraint against government interference. Explaining Mill's doctrine of balance, even with Mill's doctrine taken as a negative duty, will show the courts disequilibrium.

In "A Theory of Freedom of Expression"<sup>5</sup> Thomas Scanlon offers an interpretation of Mill's theory of free expression. It is based on the principle that the government should be limited in its ability to restrict the autonomy of citizens. This autonomy could be incorrectly restricted, as the Supreme Court's decision implies, if citizens are not given the right to decide for themselves. But, as Scanlon makes clear, an autonomous person cannot exercise their freedom without the ability to weigh contrary opinions. Therefore, any ideological stance for negative duties will be shown to be lacking if it ignores requisite types of coercion that allow for government intervention to balance access to expression that respects autonomy.

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<sup>5</sup> Scanlon, Thomas. Winter, 1972 "A Theory of Freedom of Expression," *Philosophy and Public Affairs*, Vol. 1, No. 2. pp. 204-226.

Scanlon inculcates a principle of freedom of expression that he bases on Mill's work. This principle is premised on a primary notion that the government should not restrict speech just because the acts of expression cause others to have incorrect beliefs, and they may act on these incorrect beliefs.<sup>6</sup> He explains further that this absolute presentation would limit the government's ability to legislate against expressions that could manipulate, because the alternative would be to allow the government to determine what information would be available to citizens. Protection against this type of government overreaching is specifically what Mill's principles suggest should be avoided. If it were to be taken absolutely it would be a possible foundation for a complete negative restraint against legislative oversight of expression.<sup>7</sup>

Continuing this explanation, Scanlon describes how under these circumstances the citizen who has given up his speech right to the government no longer decides for himself. Further, he states that autonomy in making decisions loses its validity when citizens are not able to hear ideas and make decisions for themselves.<sup>8</sup> The state then as law making body would be responsible for making illegal any expression that is contrary to current laws, regardless of correctness of those laws. Left alone without further development it would appear that Scanlon's interpretation supports the majority's rejection of legislation on the grounds of negative restraint.

However Scanlon, like Mill before him, did develop parallel theories of expression to include the understanding that autonomous agents must weigh competing points of view to make decisions. Any requirement to weigh competing viewpoints must allow for the free expression

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<sup>6</sup> *Ibid.*, pp. 213. His understanding of a Millian Principle of expression is expressed in two parts.

<sup>7</sup> *Ibid.*, pp. 217-218. "In order to be protected by such a law a person would thus have to concede to the state the right to decide that certain views were false...prevent him from hearing..."

<sup>8</sup> *Ibid.*, pp. 218. "But such a person would be "deciding for himself" only in an empty since..."

of multiple views.<sup>9</sup> A need for governmental restraint must be coupled with a balancing principle that allows for access to competing viewpoints.

The balancing assertion that Scanlon finds is a competing right: the right of access to the means of expression.<sup>10</sup> If the means to express are unjustly distributed then the capacity for agents to be autonomous in their decision-making is removed because there is no longer the requisite information accessible to verify viewpoints. Individual citizens are unable to correctly participate in fair public discourse when some agents dominate the means of communication due to their far superior access to means of expression.

To be clear, Scanlon, like Mill, found a need for government restraint in regulating speech. However, he formulates an idea of expression that acknowledges an autonomous agent may need the assistance of the government to balance the rights of expression with those of access. As Scanlon expressly states, “Access to means of expression is in many cases a necessary condition for participation in the political process of the country, and therefore something to which citizens have an independent right.”<sup>11</sup> What Mill and Scanlon both have expressed is that although the government has a right to protect expression, it has an equal right to protect the means of expression.

Now returning to the initial question, does it matter that corporations are different from their owners? Yes, it clearly matters because they have a unique financial advantage to control advertisements and information flow due to their superior levels of concentrated funds. The first amendment does not make these facts irrelevant, but makes them more relevant because of the

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<sup>9</sup> Ibid., pp. 216. He introduces the concept of a need to balance viewpoints as being the responsibility of the autonomous agent. “An autonomous person cannot accept without independent consideration the judgment... weigh the evidential value of their opinion against contrary evidence.”

<sup>10</sup> Ibid., pp. 223. “Access to means of expression for whatever purposes one may have in mind is a good which can be fairly or unfairly distributed...”

<sup>11</sup> Ibid., pp. 223.

imbalance between agents and the limitations on individuals that imbalance creates. Therefore we must observe that the first amendment is not an absolute negative or absolute positive right. It is a guiding principle that implies elements of negative restraint on the government with a balancing need for positive right regulation in the circumstances where the rights of individuals are not respected.

## **2.4. Can Indirect Contributions Do Anything That Citizens Cannot?**

I will attempt to develop two perspectives on Mill's work to answer the question of how corporate contributions can do what citizens cannot. In the first perspective, I will utilize Mill's writing to show what he thought of the overpowering influence of commerce on thought. Secondly, I will draw from a critique of the idea that Mill would support the conceptual framework of a laissez-faire "marketplace of ideas." By exploring the consequences that both of these perspectives detail, the answer to the question of what corporate contributions can do, that citizens cannot, will be clear.

2.4.1 Mill's Perspective: Mill lived in a rapidly changing time of industrialization that was quickly changing the world. He saw that collective development was reformulating the capacities for individuals to express themselves, even in this early version of industrial society. He posited that this best development can be removed, possibly permanently, by the unrecognized encroachment of commerce. This encroachment could spread through society and into government. The result would likely be a passive society where the natural rights of individuals can be redefined as limited:

The increase of commerce and manufacturers promotes it, by diffusing more widely the advantages of easy circumstances and opening all objects of ambition, even the highest, to general competition, whereby the desire of rising becomes no longer the character of a particular class, but of all classes. A more powerful agency than even all these, in bringing about a general similarity among mankind, is the complete establishment, in this and other free countries, of the ascendancy of public opinion in the state. As the various social eminences which enabled persons entrenched on them to disregard the opinion of the multitude gradually became leveled; as the very idea of resisting the will of the public, when it is positively known that they have a will, disappears more and more from the minds of practical politicians, there ceases to be any social support for nonconformity---any substantive power in society, which, itself opposed to the ascendancy of numbers, is interested in taking under its protection opinions and tendencies at variance with those of the public.<sup>12</sup>

Individual thoughts can be controlled by the inability to express an individual's nonconforming viewpoint, and if individuals don't have access to a realm where ideas can be generated in an environment in which there are powers that provide protection from group control of the means of gaining knowledge and presenting ideas. There are instances where group motivations need to be balanced. For example, politicians may need to tell a corporation that has some individual citizens as members that their financial interests are counter-productive to society. If this capacity is removed from individual civic leaders, and all other individual citizens, then reckless short-term interests will cause irreparable damage. This is evident in cases where environmental protection, education needs, the needs of those in poverty, and other needs must be weighed against the purely collective impulses of corporate and other collective entities.

2.4.2 A Critique Of The "Marketplace Of Ideas": To promote a better understanding of how Mill's fundamental principles are supposed to be geared to diversity in idea dissemination, Jill

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<sup>12</sup> Mill J.S., (pp 127-128). Detailing the power of the public being transformed by commerce and further reflected by politician's realizations of this trend and codifying wealth ascendancy above all other practical needs.

Gordan proposes a critique of the view that Mill supported an open marketplace of ideas.<sup>13</sup> This critique is centered on the overall misunderstanding that Mill supported the absolute minimization of government in the lives of citizens. This misunderstanding has led to a further misrepresentation that Mill supported an exchange of expression that centered on idea dominance over equality in the expression of ideas. Although this point seems to have an intuitive basis, it does not reflect the tradition of Mill's work.

A longstanding view that has been attributed to Mill and his views on idea creation and free expression is an analogy based on a business marketplace. The analogy is based on the modern understanding of commerce that sees an idea marketplace where the best ideas win out similar to a business marketplace where goods are sold and the best goods are chosen by the consumer. This assumes that the consumer has been pre-educated about what the best items are. It further assumes that we all enter the marketplace with the same access to ideas, or market access and buying power to continue the analogy, and can attain the goods we need readily. Following this line of reasoning then the most persuasive idea that is represented best would be attained by the most consumers and would be determined to be the best idea.

As Gordan points out in her critique of this analogy, it suffers from several problematic assumptions. An initial primary false assumption is that these idea consumers are already educated on the best ideas before approaching the marketplace. In fact Mill supports an even distribution of ideas that allow idea consumers to educate themselves on different viewpoints as they explore. Additionally, not all consumers have the same access to receive ideas, and a marketplace may "overprice" valuable ideas.<sup>14</sup> Therefore, what a marketplace would seemingly

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<sup>13</sup> Gordan, Jill. Summer 1997. "John Stuart Mill and the 'Marketplace of Ideas'." *Social Theory and Practice*, Vol. 23, No. 2. 235-249.

<sup>14</sup> An example would be superior knowledge that college graduates can get at private colleges that the rest of society could not afford to have access to. Does this entitle these graduates to better lives? Mill would say no.

do is promote the idea of singular strong viewpoints at the expense of the complete removal of what is deemed inferior viewpoints by the majority or strongest purchasers.

This type of introduction of economic modeling into the debates on free speech is the antithesis of what Mill promotes in On Liberty. A fundamental idea to his program of free expression is the promotion of minority opinions. He specifically wanted to avoid the tyranny of the majority in part because this majority in many instances could be wrong, and because even these ideas need to be expressed from competing viewpoints even when some are in fact wrong. Also the education process requires that citizens be able to educate themselves while learning and comparing, and not through acceptance of the most attractive options, because, for example, there are cases where the short-term best option is destructive in the long term. This type of forced conformity that ignores competing expressions that would come from the reliance on the most attractive unchallenged answers is directly at odds with Mill's principles of balanced idea generation.

How does this answer the question of *whether* indirect contributions to political speech does something that citizens cannot? It should be clear that by allowing corporations to spend money on electioneering, the most powerful organizations can use economic market practices to control information content. Because Mill did not actually endorse this type of limitations on idea expression, its effects are counter to the balance that Mill supported. As Gordan points out, this limiting of the flow of information to what a financial majority sees as pertinent creates a true marketplace of ideas that limits the actual ideas produced for consumption. This presentation of dominant ideas which excludes minority ideas directly imperils the possibility of a free exchange that Mill's doctrine requires for a balanced marketplace. For these reasons,

anyone accurately interpreting Mills work would not attempt an analogy that promotes this type of exclusionary dominance that limits expression.

## 2.5. What Is The Point Of The Right If It Can't Be Effectively Used?

Society requires specific elements to allow citizens optimal liberty in pursuing their best states and to thereby better society as a whole. One such element is to recognize the influences on an individual thinker's capacity to portray thoughts and messages to others that add value to society. Mill points out that, "There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit...is as indispensable to a good condition of human affairs as protection against political despotism."<sup>15</sup> Liberty and the rights of the individual must be protected and counterbalanced with those of society as a whole. This balance however can and does swing both ways, as a healthy liberty to think *and* discuss requires that all ideas should be published without prejudicial rules.<sup>16</sup>

Mill goes even further in describing us as "fallible beings" that must be able to have constant access to ideas whose value is not immediately apparent in order to understand and discover these undeveloped foundations of knowledge in our own time.<sup>17</sup> The Supreme Court's majority sought to achieve this goal by allowing corporations and large entities to spend

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<sup>15</sup> Mill, J.S. (pp 66): Regarding potential groupthink control, *"There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism."*

<sup>16</sup> Ibid. Regarding the need to allow ideas to be openly explored, the loss of which would create ideas and truths devoid of deeper context (pp 97): *"If the teachers of mankind are to be cognizant of all that they ought to know, everything must be free to be written and published without restraint."* (Following paragraph elaborates on how a loss of this ability would hollow truths.)

<sup>17</sup> Ibid. Regarding openness to question ideas and not impinge on ability to question anything (pp 81): *"...we have neglected nothing that could give the truth a chance of reaching us; if the lists are kept open, we may hope that if there is a better truth, it will be found when the human mind is capable of receiving it; and in the meantime we may rely on having attained such approach to truth as is possible in our own day. This is the amount of certainty attainable by a fallible being, and this the sole way of attaining it."*

unlimited funds to express their ideas. In allowing them to dominate the political in addition to the business world, the Court failed to realize that by allowing one group to overpower all others, the balance of ideas will become too one-sided and limit the thinking of individuals in our society. As Mill described, the liberty of others to unite in groups must hold to the same limits as those of the individual. The group leaves the realm of liberty when it encroaches on the rights of free and equal thoughts and expressions of the individual. It violates the delicate balance of freedom and liberty made available to individuals by the Bill of Rights.<sup>18</sup> The importance of the interplay between individuals and society cannot be minimized in this discussion, as neither would exist in the state that they are without the other. With the freedom of society to organize as agents of coercion, equilibrium should always be observed to verify the overall health these organizations have on individuals and vice versa.

Mill defined this particular balance as the area where liberty ends and societal law and the rules of morality begin. Individual liberty is defined as the realm where people are responsible only to themselves. When there is risk of damage to others, either individually or to the public as a whole, then the individual or group by their actions subject themselves to the rules of societal control.<sup>19</sup> Mill stresses that these rules must be as rigorous as possible in limiting the

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<sup>18</sup> Ibid. See p. 73, on regarding groups coming together, seemingly speaks to groups that are formed for a specific purpose, non-economic but purposeful, and not using it's association to harm : *"Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others---the persons combining being supposed to be of full age and not forced or deceived.* Regarding the mental well-being of mankind, which all other well-being depends (not financial), and the four grounds that dictate that opinions, even those incorrect, should be allowed even when wrong to strengthen debate, internal and external. (Pp 108-109) The bounds of fair discussion conclude the discussion of these four grounds and the chapter as whole. These bounds within debate of individuals cannot be clearly defined – however the utilization of dominant opinions against the relatively defenseless is addressed. (I find parallel between human individuals relative defenselessness against large inhuman corporations.): *"Yet whatever mischief arises from their use is greatest when they are employed against the comparatively defenseless; and whatever unfair advantage can be derived by any opinion from this mode of asserting it, accrues almost exclusively to received opinions. The worst offense of this kind... is to stigmatize those who hold contrary opinion..."*

<sup>19</sup> Ibid. Regarding wealthy at whim of less wealthy seems to imply that there should not be too much restraint, regulation without over regulation. (pp 141) Regarding actions and their effects on others. If the actions only

power over individuals, in their own actions and in those actions that they allow others to take on their behalf.<sup>20</sup> He warns that overreaching legislation can cause limitations on personal and group liberty if exercised haphazardly. This is a warning apparently taken seriously by the Supreme Court's majority justices in their decision in favor of removing legislation mitigating unlimited corporate funding for electioneering. However this assertion by the majority ignores the fundamental need for a balance in idea development through free processes and exchanges that are another necessary part of promoting liberty of the individual and organized society. The balance that protects the individual's ability to generate and communicate ideas is absent in the *Citizens United* decision.

This misunderstanding of the need for regulations to balance the individual and the collective was specifically mentioned by the minority: "The majority seems oblivious to the simple truth that laws such as §203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other."<sup>21</sup> Because of this truth important issues are raised when regulating elections and artificial organizations that represent companies in advocating for elections. The balance requires regulating those instances when people separate themselves from the individual perspective and advocate under unique artificial government sanctioned economic forms. These new forms have a real impact on other

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effect oneself then the individual is not accountable to society, but if others are affected then the individual is accountable (pp 147): "*Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishments if society is of [the] opinion that the one or the other is requisite for its protection.*"

<sup>20</sup> Ibid. See p. 157, on where liberty is granted where it should be withheld, relevant in justifying regulations. (pp 157): "...A person should be free to do as he likes in acting for another, under the pretext that the affairs of the other are his own affairs. The state, while it respects the liberty of each in what specifically regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him over others..."

<sup>21</sup> Supreme Court Syllabus, op. cit. (pp 171) "*The majority seems oblivious to the simple truth that laws such as §203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective, ante, at 1, 48, it becomes necessary to consider how listeners will actually be affected.*"

beings in society, and this impact, the impact of massive centralized funding, affects the way that elections are conducted and information is exchanged in those elections. It gives corporate and other similar non-human forms the ability to impact society through commerce, and then leverage that impact to dictate what regulations individual citizens must abide by.

## CHAPTER 3. MILTON FRIEDMAN: A LIBERTARIAN'S TAKE ON A CORPORATIONS PLACE IN SOCIETY

### 3.1 Introduction

In presenting my arguments for balance in political speech, I have thus far attempted to present the framework of the greater debate, and outlined an initial response to this debate. I started chapter one by detailing the key elements of the Supreme Court's majority justices decision, and their insistence on prevention of government interference in regulating political speech. I followed, in the second chapter, with a response to these arguments centered on the balance needed between negative constraint and positive regulation utilizing J.S. Mill's On Liberty. Moving forward I am now compelled to respond specifically to the majority justice's assertion of absolute constraint in regulating political speech amongst competing agents based on the first amendment.

I will accomplish this task by drawing on the arguments of Milton Friedman, a libertarian philosopher who is famous for his views on limiting government regulations where they are not needed. Like Mill, Milton Friedman stresses the importance of understanding the interplay between differing agents in society. Interplay, under his free market ideology, begins with the consumer's ability to make a free choice. These "choices" should not be dictated to them by self-interested, non-consumer directed organizations that are manipulating the market system. For the system to work effectively, the government should serve only as the administrator of basic rules of conduct for the market players, as an arbiter of disputes, and in only the worst cases as a safety net for the indigent.<sup>1</sup> If the business market and society rules are working

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<sup>1</sup> Milton Friedman, Capitalism and Freedom (The University of Chicago Press, 2002), Chapter 1, *Economic Freedom and Political Freedom*: (pp 15) Speaking on the government's key role to supply the rules of the game and arbitrate disputes, but not become singularly dominant. Economic interest can help partially govern in this way by

effectively together, they must insure that all entities are promoting the greater goals of a healthy society for individuals to flourish.

In this chapter I will use these libertarian framing principles to show how Friedman details a basic modal where government and enterprise agents work for the consumer. To this end I will elaborate on the three primary issues that I concluded chapter one. The first of these issues relates to the majority justice's interpretation that the right to free speech is a negative right that is only useful in constraining the government from overreaching. I will show that although a libertarian believes in a limited role of the government in all affairs, including business, that there is a specific role for promoting a positive legislation to protect a balance of rights. To this end, I will demonstrated that Milton Friedman, one of the most respected libertarians who believed strongly in reduced government legislation, was critical of actions like the majority's decision to reject legislature on an absolute basis.

I will also use Friedman's framework to explain the motive for businesses to seek political influence. These motivators create incentives to use vast treasury capital to promote legislation that benefits business interest. This interest may be at odds with citizen and stockholder interests, but I will detail how the benefits cause harms to be ignored. In his writing and interviews, Friedman specifically noted the danger of these motivations in corrupting the commercial and legal systems.

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the vote of economic choice by each individual. However, a fundamental threat to individual liberty is too much control – either by monarch, oligarch, dictator or monetary majority. Therefore government control of business should be limited to allow it to serve its function as a check on government, but also the monetary majority and those with economic strength should not conversely control the government – this would pervert the system and create another limitation on the freedom and liberty of the individual. Additionally in an interview (Mark Achbar, Jennifer Abbot & Joel Bakan, "The Corporation" (DVD) (Zeitgeist Films, 2004).) Friedman comments on Too Much Government: Government should under correct circumstances have 10%-12% of income going to government to pay for basic functions – (judicial, defense, law & order, and hard indigent cases). Currently far from society where government has proper role (he claims) government spends 40% of national income. Through regulations spend 10% more of income. 50% socialized... (Problems made by government: slums created because of drug prohibition, government schools, welfare); government created inner city. Government made crime of activities; victimless crimes; drugs, etc. (Ethically cannot control people).

A third and final summary issue I will discuss is the actual effects that the rejected legislature was used to mitigate. Friedman described these effects and showed them to be true through the empirical data that tracks financial spending on political influence. A harsh reality is that despite the need for balancing legislation that the justices rejected, the rights of citizens will continue to be marginalized.

Through a detailed treatment of the libertarian position on businesses' interactive role with citizens and government, I will represent a delicate balance that is needed for proper functionality. This position, while respectful of limitations of government infringement on consumer's rights, does require some rules of the game be set to protect the primary structure. By removing important rules, the Supreme Court's majority ignored the competing motivations that exist between human and artificial agents. Ignoring these facts has created a primary financial market within elections, which should be dominated by citizen ideals. Conclusively in this chapter, I will show that the justices have negatively affected citizens, businesses, and society as whole by ignoring the reasoned legislation that was rejected.

### **3.2 A Libertarian's Proper Expectation of Negative Rights**

As I introduced in chapter one, the justices are operating under competing interpretations of how the First Amendment should be instantiated. The majority justices, who rejected campaign regulations that mitigated corporate treasury spending on electioneering, determined that the first amendment is a strict negative right meant only to constrain government from any interference in the production of types of expression and speech. This traditional libertarian perspective was seemingly at odds with the egalitarian principles of positive rights needed to

protect citizen freedom. However, I will demonstrate through Milton Friedman's libertarian principles that this extreme view represented by the decision is odds with the libertarian principles with which the justices identify.

The understanding that the rules of the game are needed to protect citizens is the foundation of the Bill of Rights, which acts as a guide toward our goal of greater equality. Friedman for his part clarifies that liberty and equality are two very different things, and explains the differences between the two in his writings on how the market system should properly function. On his account, equality is only the starting point from which we are all allowed to begin our quest for liberty.<sup>2</sup> Liberty in turn represents the ability to pursue the life and goals you set for yourself. Understanding that these principles operate in balance is key to understanding Friedman's libertarian account of what are legitimate government rules and what are unfair constraints.

Liberty then functions properly only when there is individual equality as Thomas Jefferson and our constitutional forefathers intended. This key distinction allows for each individual to be self-determining in their life pursuits. Without the constitution's protection that allow for beginning equality, it would not be possible for each of us to have the opportunity to pursue our ambitions and be successful. This pursuit of our individual interests is the liberty that we can achieve from the base of equality. In this way, we are each autonomous and can achieve

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<sup>2</sup> Milton Friedman & Rose Friedman, Free to Choose (A Harvest Book - Harcourt, Inc. 1990), Chapter 5, *Created Equal*: (page 129) Liberty and equality are separate ideas according to Thomas Jefferson and the constitutional forefathers. Equality was regarded as the beginning ability to have access to pursue your life's ambitions and to not be dominated by others. Liberty functions as an opportunity to not be dominated by others in the pursuit of the life you are capable of living from this base starting point, and conversely not allowing a weaker majority to dominate the pursuit of liberty of the strong and vice versa. Equality interacts with liberty, but is not liberty defined. (Page 130) Government meant to protect rights and not give majority rule (he utilized quotes and ideas of Alexis de Tocqueville). This underscores a need for allowing for participation by all in government and dominance by none – (conceptually applied, no persons should concentrate resources to control others, in a corporate/government form or otherwise).

the American ideals of choice and individual determination that are guaranteed by our constitution and bill of rights.

In contrast, the collective financially motivated interests of organizations, like corporations, provide a different imbalanced starting point. If this type of inequality is allowed to take place in regards to speech rights, the capacity to pursue liberty is limited. This possible conflict between rights of equality and the rights to pursue liberty must be accounted for if our basic rights are regulated correctly. Balancing these elements of autonomy and freedom between citizens and organizations is requisite, but do conflict when proper regulatory needs are ignored.

The liberty that Friedman allows for citizens is situated in a starting point of equality. From this starting point they can promote themselves based on their individual talents and abilities. A negative duty that government would have is to not pass legislation that would put forth barriers to these pursuits. However, to properly setup the rules of the game, the government must make sure that rights are established that allow all to have an equal base position. So, within the concept of government restraint, it is possible for a libertarian who supports this restraint to still promote legislation that promotes an initial starting point that allows for the necessary balance.

Therefore, those who would attempt to balance government and regulation in their own favor would be at variance with the fundamental balance needed for initial equality. Be it the disenfranchised poor looking to control the wealthy *or* a highly financed sector, like that made up of powerful corporations, looking to utilize regulations to extend their power, any attempt to create imbalance through regulatory influence is improper. Limitations that promote the dissolution of basic structures that define our equality would be at odds with responsible libertarian doctrines. What the Supreme Court has done has hurt the liberty of individuals by

removing regulation for base equality that should be guaranteed to the individual. This was done to establish a situation where corporate collective control is possible due to unfair financial advantage. This is a fundamental reason why control through excessive political influence should not be allowed according to Friedman's doctrine, and why the legislation was in line with setting the proper rules of the game needed to have balance between individuals who lack corporate financial capabilities.

### **3.3 Why Corporations Motivated To Erode Citizen Influence**

Concerning business executives, Friedman stated in his famous *New York Times* article that their "responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society."<sup>3</sup> This is not just a personal duty, but also a legal duty in that the corporate form is instantiated as a means to promote commerce. If an agent of these state chartered enterprises does not perform her legal duty to financially promote the interests of their corporate owners, she is in violation of the law. Therefore, without guidelines that promote responsible interaction, the only rules would be those that promote the maximizing of profits for the corporation.

As detailed in the previous section of this chapter, this is why additional rules are needed for businesses to operate in permissible manners. Again, this is to balance the primary financial motivations of corporations with those of individual citizens who have diverse motivations outside of financial gain. It is because of these differences in motivations that the election

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<sup>3</sup> Friedman, Milton 1970. "The social responsibility of business is to increase its profits." *The New York Times Magazine*, 13 September.

process specifically needs to be mitigated with rules that balance the concentrating funding capacities of corporations with those of individual citizens and smaller civic groups.

Without this balance, corporate managers can feel compelled to promote their profit motivation through promoting imbalanced electioneering that benefits their corporate goals, and does not take into consideration implications that would be considered if profit was not the dominant motivating force. These corporate goals are separated from the personal and mitigating emotional constraints (like respecting others rights, environmental/health concerns, and legal punishments and repercussions that corporate limited liability mitigate) that citizen agents experience in participating in the election processes. Therefore, it is easy to see that emotionless organizations with motivations that remove mitigating factors that are beyond financial motivations would circumvent the balance needed between financial and emotional reasoning needed for responsible electioneering and governance. Through Friedman's philosophy it is possible to pinpoint the processes and reasoning that would cause corporations to purposefully be motivated to dominate the electioneering and political processes.

Throughout Friedman's interviews and written works he returns to the theme that the attempts to utilize government control for advantage are fundamental drags on our political and enterprise systems. Speaking about this drag Friedman said,

...producer groups tend to be more concentrated than consumer groups. This is an obvious point made but whose importance cannot be overstressed... In consequence, in the absence of any general arrangements to offset the pressure of special interests, producer groups will invariably have a much stronger influence on legislative action and the powers that be than will be than the diverse, widely spread consumer. Indeed from this point of view, this puzzle is not why we have so many silly licensure laws, but why we don't have far more...<sup>4</sup>

Examples like these types of excessive regulations that benefit special collective interests and ignore the adverse effects on consumers are symptomatic for Friedman. They are symptomatic

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<sup>4</sup> Milton Friedman, Capitalism and Freedom, Chapter 9, *Occupational Licensure*: (pp 143).

of the effects that legislatures directive by organized financial interests have. By recognizing these symptoms of allowing unmitigated group control of politics, Friedman expresses an overall outlook of a society hindered by organized collective interests.

This drag then translates to our overall culture as it relates to individuals as consumers. He points to the many forms of industry utilization of the government, such as occupational licensing in specialist fields to limit the number of providers for consumers to use,<sup>5</sup> tariff controls demanded by industries that promote inefficiency and hurt individual consumers,<sup>6</sup> and worker unions that promote the belief that they are helping consumers even though their utilization of regulations generally create less of a demand for workers while protecting a chosen few.<sup>7</sup> In all of these instances, corporations and unions subvert the individual consumers' liberty and right to free choice.

To be clear, Friedman is fully aware that many consumers very well need clarifying information about the services that they use. His claim is that certification without government regulations that require licensing is prevalent. Because this would allow consumers to have information that doctors or other certified professionals they go to are competent. However, Friedman wishes to leave up to the individual citizen the right to utilize non-certified

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<sup>5</sup>Ibid. Chapter 9, *Occupational Licensure*: (pp 143) Discussing licensing and occupational organizations he addresses the fact that special interests can dominate a field at the detriment of the individual consumer without the consumer having an ability to counteract this because their many diverse interests divide their attentions.

<sup>6</sup> Milton Friedman & Rose Friedman, Free to Choose, Chapter 2, *The Tyranny of Controls*: (page 49) Controls, such as tariffs, are instituted by organized pressure from industries. The infant argument for protective tariffs were used to create industry protection through political pressure from large businesses and similarly with union protections that hurt the public but are enacted because of organized political pressure.

<sup>7</sup> Ibid. Chapter 8, *Who protects the workers?:* (page 236) Unions utilize government regulations to control their monopolies and businesses interests over workers by head quartering political activities in D.C. Similarly, business corporations do the same thing to the detriment of all except those at the topes of these organizations. (Page 242) Unions provide useful activities services for members but unchecked have used organizational concentration to use political power to take advantage of the overall system against the interest of all other consumers. Conclusively, these organizations should be allowed to operate to enhance individuals but not to control markets and government activities.

practitioners as well. Under these rules, citizens have a protective element of certification that provides the basic starting point of equality without the limiting liberty of consumers.<sup>8</sup>

To make this “rent seeking” activity politically palatable in a representative democracy, these organization utilize electioneering and advertising to gain government approval to limit the individual’s knowledge of the actual effects of these regulations. Friedman’s arguments, like Mill’s, point to the need for society to be balanced. The best and most efficiently run society finds this balance when the market and government operate to give the consumer the *liberty* to make the most *informed* choices. This is not occurring now because enterprise is being allowed to create an imbalance by using government to dictate its singular financial interests to the consumer.

Friedman argues further that the imbalance is magnified because governments and industry are centralized forces. Individual consumers have many dispersed interests that do not often allow them to compete with the unified aims of producers who seek government control. As industry has become more centrally ingrained in government, it becomes more difficult to distinguish regulations that set up “the rules of the game” and those inserted to protect the largest players in the game. Friedman is concerned that corporations are no longer beholden to their owners, stockholders, or consumers. They instead utilize funds to promote electioneering and transform their images without the direct consent of their owners.

In closing this section I think it is worth restating an empirical point that I made in chapter one. Corporations gain profit at a rate of 600% to 22,000% return on investment when they invest in lobbying for corporate friendly tax and industry regulations versus a 10% return

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<sup>8</sup> Ibid, pp 149. Friedman concludes his argument that regulations can provide a balance against over regulation. This is found in his support of certification of licensure regulations that exclude membership in industries where the current participants exclude new entrants.

from capital investment for new product design and development.<sup>9</sup> Corporations and their executive managers have a legal obligation to make profit. Without mitigating campaign legislation, it is easy to see that they could easily convince themselves to manipulate the political process for their advantage, as it is more profitable and within their prime directive as managers. It is also easy to see that this leaves citizens who don't have the financial advantage of capital accrual at a distinct disadvantage.

### **3.4 Business & Societal Consequences Of What The Justices Missed**

From these descriptions of business operation and how this operation can effect legislation, it is apparent that the adverse consequences for citizens are real. The Locknerism, choice to ignore the empirical evidence that lead to legislative action, that occurred in this case is the court's decision to ignore the corrupting influence that legislative activity influenced by financial indebtedness can and does have. This influence was monitored, and ultimately led to the Bipartisan Campaign Reform Act that attempted to rightly mitigate this influence. What the majority justices have chosen to do in rejecting this legislation is ignore the competing agents differing financial means. Friedman specifically addresses the consequences of this type of ignorance in legislation and judicial review.

This lack of acknowledgement of the artificiality of the corporate enterprise structure is a sign of inefficiency in designing of the base principles, or rules of the game. Also it is a move from an individualist state to that of a collectivist culture devoid of our founding principles of

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<sup>9</sup> Ammori, Marvin. SEPTEMBER/OCTOBER 2010. "Corruption Economy." Viewed January 6, 2011. <http://bostonreview.net/BR35.5/ammori.php>.

liberty and equality.<sup>10</sup> In his interview for the documentary ‘The Corporation’ Friedman states that the real threat from corporations is that they have become so large as to be able to control government, and act as self-interested non-representative governments themselves.<sup>11</sup> Here, if the negative duty of governmental restraint is not balanced with accurate balance between agents, the consequences will be dire.

Friedman sees these consequences as the industrialized democracies moving away from the military industrial complex spoken of by Eisenhower to the new government-enterprise complex. By replacing old inefficiencies of military spending beyond need with regulatory protections that stagnates development we are leaving one problem for another. In each case the individual citizen and new development suffers while protecting the most established industry players are unfairly protected. While this is allowed to continue we may all slowly be monopolized out of our liberties. If this trend does not abate, we will all be subservient to industry and government, and not the other way around as the Bill of Rights intended.

### **3.5 A Libertarian’s Support Of Balancing Legislation**

Friedman has pointed out these problems, but did not win a Nobel Prize for only noticing them – he also offered an alternative. To change this dynamic, our government, at the behest of

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<sup>10</sup> Milton Friedman, Capitalism and Freedom, Chapter 8, *Monopoly and Social Responsibility*: (pp 135-136) Discussing the giving of corporate funds for charity and to universities – Mr. Friedman states his specific displeasure because it removes the right of stockholders, as the only owners of properties, to control the property they own. Corporations are not the owners, nor the executives, but the stockholders. If corporations are allowed to use stockholder funds then we move “away from and individualistic society and toward the corporate state.”

<sup>11</sup> Mark Achbar, Jennifer Abbot & Joel Bakan, "The Corporation" (DVD) (Zeitgeist Films, 2004). “Corporations are a real threat to freedom because they get so large that they begin to control government.” A real danger is a government controlled by large enterprises. Big corporations lead to big government and vice versa. Eisenhower talked of the military-industrial complex; now, government-enterprise complex. Big Corporations have a stronger incentive and ability to control government regulations than the consumers whom are diffused and have individual dispersed concerns that they worry about and occupy their time.

its individual citizens, must be allowed to mitigate the influence of industry on government. To accomplish this, our government must set rules of the game that promote election equality that take back the possibility for individual rights of liberty with correct mitigating rules to return the primacy of equality to consumers. As the only real owners of our market system, Friedman purposes the implementation of an “Economic Bill of Rights” to establish greater clarity about the role of government, vis-à-vis business. This covenant would remove the ability of business to interact as an agent with the government.<sup>12</sup>

A separate Bill of Rights to regulate businesses would likely be a strong step in settling the confusion regarding the ontological differences between corporations and citizens found in *Citizens United*, because it would establish unique rules for the separate agents in society. The recognition of the unique difference between these agents would be explicit because of the acknowledgement for and inclusion of separate legislation that would update the Constitution. Even if an addendum to the Constitution is not an answer that we choose, it does distinctly promote a view of balancing legislation with restraint from a libertarian perspective.

Friedman’s purposed reforms represent a basic understanding that individual consumers should have the right to liberty to pursue their own destiny. The rules that are set up by the government should not create an arbitrary equality or protection for the weak or the strong. By allowing industry to improperly influence government we are moving away from his initial concerns about a government welfare state to one of state control by artificial financial interest. These interests remove the ownership rights from stockholders and give them to executives whose primary concerns are not of those of the stockholders, individual consumer, or of society as a whole. If we agree with Friedman that reform is needed, giving greater influence to a

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<sup>12</sup> Milton Friedman & Rose Friedman, *Free to Choose*, (page 299) Economic bill of rights to eliminate government control and limitation of liberty – this would also remove business interaction with/and influencing of the political process.

dominant entity like centralized corporations by the Supreme Court is a huge step in the wrong direction. If we want to return to the liberty guaranteed by our Bill of Rights we must recognize the real difference between the interests we mitigate. I think Friedman said it well when describing a proposal for a Sixteen Amendment regarding a change for taxation:

The congress shall have power to lay and collect taxes on incomes of persons, from whatever sources derived, without apportionment among the several States, and without regard to any census enumeration, provided that the same tax rate is applied to all income in excess of occupational and businesses expenses and a personal allowance of fixed amount. The word “person” shall exclude corporations and other artificial persons.”<sup>13</sup>

Artificial entities should be treated differently, as servants to their owners. In his proposal of a separate “Economic Bill of Rights” they should be regulated differently as they are clearly different from individual citizens.

In conclusion, what has been demonstrated is that even a robust supporter of government restraint knew that there are basic positive duties that are primary to insuring citizen’s liberty. These duties are what support the primary structure of the Bill of Rights. Only from these duties and the beginning balance that they guarantee can we have the possibility of pursuing the liberty that we deserve. This is not what we have in the wake of the Supreme Court’s decision to ignore the influence of dominant financial entities who promote their own unique political expression.

What Friedman thinks we have now is an improperly regulated corporate state that threatens our liberty and freedoms to pursue our rightful opportunities. How this threat to our liberty can be met appears would be to remove the unregulated capacity of corporations to spend on elections directly from their treasuries. With this balance between agents, all parties would be able to represent their views in the political arena with balanced motivations. Then our

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<sup>13</sup> Ibid., pp. 307. Reinforces prior thought that corporate taxes should be removed and dividends paid to investors, who would decide what to do with corporate property they own (instead of active donation by corp.). Persons should pursue their interests without encumbrance by corporations and unions on individual liberty through special interest control.

democracy would be returned from the industrial government complex back to a representative democracy that serves citizen's full interest.

## CHAPTER 4. AN ONGOING (IM)BALANCE

### 4.1 Introduction

In my thesis, I have attempted to demonstrate that a balance is needed between competing agents regarding political speech. This balance has its foundation in a fundamental understanding that liberty must start with equality amongst different types of speakers. Because competing agents may be differently advantaged, it is up to our legislators to develop laws that provide for a correct balancing. Due to the Supreme Court's decision in the *Citizens United* case it can be empirically shown that we have been thrown off balance. I will argue that for our right to freedom of speech to mean something we must have balanced access to the means to speak, which we currently lack.

As I argued, using J.S. Mill's philosophical reasoning in chapter two, corporations are competing agents when it comes to political speech. They do not have similar motivations, as corporations are dominated by financial interests while citizens have diverse interests tied to their overall well-being and emotions. This balance between emotions and financial concern is why citizens should have the primary role in determining the direction of political debates in our country. The uniqueness of our humanity is what makes Mill's principles require that there be a delicate balance between individual, groups, and businesses. Our needed balance should always protect the individual's right to ideological autonomy, the ability to evaluate differing viewpoints to formulate individual opinions, in order for society to have the best chance at being successfully innovative.

Limitations on this innovative capacity were as apparent to Mill and his philosophical doctrines as they were to Milton Friedman. Because of this shared understanding of these

limitations, Friedman supported a traditionally libertarian view that the government has an obligation to establish legal rules of the game that promote balance amongst agents. These rules are not a restraint on freedom, but a basis for liberty.

What Friedman saw as foundational was the opportunity for all citizens to be allowed to start from a place of equality. This equality should be established with fair laws that do not promote one agent over another. From this balanced starting point, all citizens should be able to pursue their liberty based on their own efforts. Unlike the Supreme Court majority justices, he understood that the negative duties of government restraint did not supersede the primary positive requirement of a fair playing field for individuals. In fact Friedman specifically derided the encroachment of business on the political process, and how this encroachment must be addressed by strong legislation. He even went so far as to suggest an amendment to the constitution to reign in corporate overreach.

In the last three sections of my thesis I will address the effects of the court's decision in light of the philosophy of Mill and Friedman. First, I will detail how within months of the verdict campaign influence has already shifted in favor of corporate interests. As the data supports these interests that are based on financial motivations are very much at odds with those of individual citizens. After analyzing the initial empirical data from this first post *Citizens United* election cycle I will conclude with a section that evaluates the status of free speech in politics followed by a final reaction based on the empirical data and status.

## 4.2 Empirical Confirmation Of Imbalance

Throughout the previous chapters I have made claims about the effects of corporate spending and the effects it will have on electioneering. One powerful statistic that I have quoted relates to the rate of return that corporations make on lobbying efforts opposed to actual capital investment and research that would promote new developments. This motivating metric in addition to the courts rejection of BCRA legislation would seem to open the election process to unparalleled forms of corrupting influence. In this section, I attempt to give a small account of this oncoming reorganization of the primary influence of corporations in our election processes.

First, I would like to give an idea of the change in capacity to influence that this court's decision has caused. Data that comprised the rankings for the Fortune 100 companies in 2008 showed that these companies had a profit of \$600 Billion.<sup>1</sup> This is the Fortune 100, not the Fortune 500 or Fortune 1000, but only the Fortune *100*. These company's' profits, which are less than the capital of their actual treasuries, were \$600 Billion.

In contrast, all electioneering for that election year totaled \$5 Billion. The \$5 Billion total includes all expenditures by the congressional and presidential campaigns, political parties, and political action committees (including corporate PACs). It is important to note that in this figure, PACs are included, and that their regulated involvement brought the total to an already amazing amount. However, this means that only *one percent* of corporate profits of a select few corporations would far exceed the amount spent on elections in the last major election cycle. Considering that corporate treasuries are greater than their profit streams, and this is only a small sample of corporations, the potential for financial imbalance is staggering.

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<sup>1</sup> Bonifaz, J. & Clements, J. September/October 2010 "Restoring the Constitution." Viewed January 7, 2011. <http://bostonreview.net/BR35.5/bonifaz.php> - Article provides statistics on Fortune listed companies and election year reported statistics.

Just because the potential is staggering, it would be unfair to assume that influence would change greatly without supporting empirical data. The first streams of data show that in the 2010 election cycle “interest groups” spent five times more in the 2006 election cycle.<sup>2</sup> Much of this massive increase in spending came from non-profit interest groups that utilized the 501(c)4 structure. This non-profit structure allows these interest groups to accept donations and use funds for electioneering without reporting who their donors are. In the *Citizens United* case, the justices decided in favor of keeping the disclosure provision because this would allow citizens the right to know who was advocating. But, with this new form of electioneering corporations are able to manipulate policy without individual citizens and shareholders knowing about their activity.

OK, even if there is an increase in spending that does not mean that balance is lost. That would be true unless the spending is targeted to defeat directives that promote citizen values and promote business profits. Unfortunately this is what the data shows us is actually happening. The most influential non-profit special interest group, the US Chamber of Commerce, a pro-business group promised to utilize its resources to promote the biggest “voter education” campaign in U.S. history. On behalf of its members, the Chamber pledged to spend in excess of \$75 million dollars on the 2010 election cycle.<sup>3</sup>

These donations from corporations given to the Chamber were to be allocated for targeted election spending in an anonymous fashion, because of the Chambers status as a non-profit advocacy group. However corporate reporting to the SEC shows that financial firms including Prudential Financial, who has a keen interest in slowing financial regulations, gave \$2

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<sup>2</sup> Beam, C. Oct. 6, 2010. *Slate*. "How much has the *Citizens United* case changed campaign finance in 2010?"

<sup>3</sup> LIPTON, E. McINTIRE, M. & VAN NATTA Jr. D. October 21, 2010. *New York Times*. "Top Corporations Aid U.S. Chamber of Commerce Campaign." Data reported in this article reflects amount collects, proposed spending, and percentage of support for candidates.

million to the Chamber. Dow Chemical who has a strong interest in limiting environmental regulation gave \$1.7 million. Additionally, several health insurance corporations who are strongly in favor of repealing the recent attempt at a health care overall gave several million dollars to the Chamber to lobby against these regulatory changes. Did the Chamber distribute their funds in a balanced manner?

The early data from 2010's elections show 90% of the funds distributed by the Chamber were to support Republican Party candidates who were against steeper environmental, financial, and healthcare regulations that would injure businesses. This bias toward corporate positions, especially larger corporations, is supported by the fact that of the 300,000 members in the Chamber, over half of the \$140 million dollars collected last year came from 45 corporations. These facts seem to point to a new ability for corporations to shape the election process without the knowledge of citizens and shareholders. To be more direct, the shaping is for the interest of business positions at the cost of those that matter to individual citizens that must be concerned with more than profits.

An empirical test would not be fair if we only talk about the inputs. The fact that these corporations have the capacity, an agenda, and are promoting this agenda does not necessarily mean that they are succeeding. So, the first fact to look at should be that the House of Representatives and Senate had a dramatic change from a legislature bent on pro-development and citizen reforms to one that is vastly pro-corporate positions. However, this could be normal political cycling and the financial picture may not show that the imbalanced parceling of corporate money played a part in actual individual elections.

To make this point quickly, I will limit to two test cases from the recent election. The data relevant to these cases is the amount spent by outside groups, similar to the special interest

non-profits. A total amount of \$294 million was spent from these groups in the 2010 election cycle.<sup>4</sup> From this amount a majority went to pro-corporate interest Republican candidates. For example, according to Bob Burnett current writer for OpEdNews.com, former businessman, and one of the executive founders of Cisco systems uncovered:

In the Pennsylvania Senate race, outside spending was more than \$12 million: \$5.9 million was spent on ads attacking the Democratic Candidate (Joe Sesta), whereas only \$1.9 was spent attacking the Republican (Pat Toomey); Sestak lost. In Illinois, \$6.2 million was spent attacking the Democratic candidate (Alex Giannoulias), whereas only \$1.5 million was spent attacking the Republican (Mark Kirk); Giannoulias lost.<sup>5</sup>

These two cases are indicative of how political races were decided throughout the country with hidden funding from corporate interests supporting an overwhelming majority of the winners.

Through empirical exploration of how the U.S. economic political process works some powerful facts emerge. Corporations have an unbelievably vast amount of capital that can change the landscape of the political process in their financially motivated favor. The interests they have are not always commensurate with those of individual citizens, because they have an overwhelming profit motivation that must outweigh other concerns that matter to individual citizens (environmental protection, health care, etc). Financial input from their treasuries did increase five-fold in the most recent election, demonstrating a shift in their intent on influencing the political process under the new legal landscape. Interests from this support were biased at a rate of over 90%, with pro-corporate interests enjoying huge corporate funding advantages.

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<sup>4</sup> Burnett, B. "2010 "Person" of the Year: The US Supreme Court." Viewed December 31, 2010. <http://www.opednews.com/articles/2010-Person-of-the-Year-by-Bob-Burnett-101231-18.html?show=votes>. In addition to the data from the test cases, Burnett sites data regarding the election as whole. "The non-partisan group, Opensecrets.org, calculated that, excluding Party Committees, \$294 million was spent by outside groups. Conservative outside groups spent twice as much as did Liberal groups. For example, the US Chamber of Commerce, a conservative-leaning outside group, spent \$32.8 million, more than the combined total of the two leading Liberal groups: the SEIU (\$15.7 million) and the AFSCME (\$12.6). (The McClatchey Newspapers reported that the US Chamber, which has foreign corporations as members, expected to spend more than \$75 million in all forms of political support.)"

<sup>5</sup> Burnett, B. 2010.

In a *New York Times* article, Adam Liptak quoting *Citizen United's* majority decision stated: "When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought... This is unlawful. The First Amendment confirms the freedom to think for ourselves."<sup>6</sup> What Justice Kennedy and his majority colleagues failed to realize is that when a unique competing agent has the power to control the sources of information then we do not have the epistemic foundations to think for ourselves. We are at the mercy of the information we have available. If this information is controlled and slanted by singular interest, our thoughts are tainted by limited knowledge.

### **4.3 What Unequal Access Means To Speech**

We lack balance between corporations, individual speakers and civic organizations in regards to political speech, and this lack of balance renders the speech of citizens meaningless. The first amendment should protect our capacity to express ourselves without government interference, but information in our political process is dominated by financial capital from government chartered organizations. This is problematic because our evolving understanding of how individuals make decisions and learn shows us that dominant sources of information can manipulate perspectives despite their lack of validity.<sup>7</sup> Because of the government's support of speaker imbalance and the effects this has on individual choices, it is clearly wrong to allow for this type of ineffective speech to continue. If we want our right to speech to actually mean what

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<sup>6</sup> LIPTAK, A. January 21, 2010. *New York Times*. "Justices, 5-4, Reject Corporate Spending Limit."

<sup>7</sup> Burton, R.A. 2008. *On Being Certain: Believing You Are Right Even When You're Not*. New York: St. Martin's Press. Although Burton explores the underlying processes in decision making and certainty through the entire book, Pp 21-54, in chapter's three-five Burton gives a specific look at a practicing MD and philosophers account of decision processes and the hidden layers of decision-making.

the first amendment intended it to, we must re-introduce a balanced between speakers that have financial capacities that are not differentiated due to government influence.

The explicit goal of the first amendment is to allow citizens to express themselves and be heard in governance without laws infringing on this right. For this to happen, individuals must have the capacity to present their own ideas to others. If this is to work effectively then these same citizens will need access to the ideas of others in order to weigh their ideas and expressions against competing viewpoints. Therefore, the fundamental principle rests on people's ability to effectively communicate with each other to formulate opinions, and to petition the government to redress their grievances based on these opinions.

To redress their grievances, citizens must play a primary role in the production and distribution of the ideas that relate to our election system. They should not be placed in a subordinate role to organizations that are not civic-minded, like corporations. This is especially the case when it comes to producing the information that motivates political ideas and opinions that shape society. The government appears to have licensed this subordination and circumvention of the First Amendments principles by instantiating corporate businesses with unique financial and liability privileges. Then they contractually required these organizations, under penalty of law, to maintain strict financial motivations. And, finally they allowed these legally created and financially obligated structures to participate in the political process with lesser positioned individual citizens. It appears that the United States' government has made laws that have allowed corporations to abridge the rights of citizens.

This abridgement requires some explanation since at this point citizens still have the right to speak politically. The actual abridgement relates to growing modern cognitive understandings of how individuals process information. This processing can be manipulated beyond cognitive

control if sources of information are not diverse, and preferred speakers can overwhelm the channels of information flow. If this centralized control is maintained then individuals will lose their ability to develop innovative perspectives for want of diverse epistemic sources.

Although cognitive scientists are still working on understanding the entirety of human thought processing, there appears to be a growing understanding that humans do a lot of their decision-making at a pre or sub-cognitive level.<sup>8</sup> This is performed as our brains evaluate the collection of inputs that have come into it, and evaluate choices based on these vast data inputs. Once this sub-level has enough separate pieces of observed input evidence, it decides what it feels is right. The feeling that we get that a decision is correct at the level of cognitive awareness comes from this hidden voting process.<sup>9</sup> Based on this evolving understanding it is evident that we would need as much information from diverse sources to make sure this process is working correctly. Our pre-cognitive voting processes are likely at the mercy of the sources of information available.

However, as demonstrated in the prior section, the data shows that diversity in political elections is being marginalized by funding from corporate treasuries. Because corporations can spend concentrated funds at rates that exceed that of individuals, voters are at the mercy of the information they provide. Therefore, citizens in the election process are making decisions based on limited sources of information without a major counterbalance to these information options. Over time, the expressions of individual citizens have, and will continue to, fall in line with the political rhetoric that is overproduced by these bigger speakers based on the fact that our cognitive processes depend on trusting the information that it receives.

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<sup>8</sup> Ibid. pp 44-46, Burton develops the idea of the hidden layer that he has “borrowed” from the AI community in describing a key underlying process in decision-making.

<sup>9</sup> Ibid. pp 49-52, Burton describes the voting process that occurs amongst the different stored memories and data that has been received.

Because of these facts, I find it apparent that we now have a government sponsored ineffective right to free speech, and this imbalance will be detrimental to individual citizens. This is because speech is the facilitator of the thoughts we have. Since political speech now primarily comes from non-diverse and non-civic minded organizations, the decisions that are made that guide our society do not always have our best interest in mind. We should not depend on financially motivated organizations to provide our primary sources of political information.

Since speech is the facilitator of our thoughts as it provides the building blocks for base cognitions that we use to make decisions, we need to be aware of the consequences of imbalanced speech. With control of information flows coming from large corporate organizations that are more concerned with expanding current profits than developing and improving society, individual citizens suffer. This imbalance takes the form of protectionistic regulations for inefficient industries and a lack of investment into future development for societal and future generation development.

For example, in a recent article by Fareed Zakaria he described America's rapid decline in relative rankings for quality of life and material wealth, he cited our short-sightedness in allowing "powerful special interests" to specifically receive government assistance as a source for stagnation.<sup>10</sup> He also pointed out that "there are no lobbying groups for the next generation of industries," and how this lack of forward thinking and infrastructure investment was why American industries are stagnating in comparison to other countries. As JS Mill pointed out, we need balance to avoid stagnated collectivism, and Milton Friedman agreed that this would be the consequence for business and society without correct balance between government and industry.

Again, if we want our right to free speech to mean what the First Amendment states, we must not allow corporations to blunt the political speech of individual citizens. In a direct

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<sup>10</sup> Zakaria, Fareed. "Are America's Best Days Behind Us?" Time March 14, 2011: 28-33.

contradiction to the stated purpose of the First Amendment, our government has created legal organizations, namely corporations, who abridge the rights of individual citizens to speak and effectively express themselves in the political process. This is possible because the cognitive capacities of individual citizens can and are overwhelmed by excessive campaign speech sponsored by corporate treasuries.<sup>11</sup> It is wrong to allow for ineffective individual speech in the face of overwhelming corporate political speech that now dominates our political process and limits our societies overall advancement. The Bipartisan Campaign Reform Act may have not been a perfect piece of legislation, but it did provide a starting point for balance that is necessary if we intend to honor the stated intent of the First Amendment. We must re-establish this balance if actually want free speech to mean something as it is practiced.

#### **4.4 A Final Reaction To Where We Stand**

The goal of my thesis is to present a philosophical perspective on the contrasting views in *Citizens United* on the entry of corporate entities into political campaign financing. Using John Stuart Mill's concept of an individuality that must be balanced with societal organizations, I looked to provide clarity on the ontological structures at play. Mill maintains that the ability to develop one's individual opinions is not the only key to the development of each person, but that this individuality and its unique idea creation is the cornerstone of a healthy and thriving society.

When this individual development is in tune with a healthy public discourse where our thoughts can be integrated along with society's structures and organizations, a healthy synthesis can take place that allows for the mutual development of society and the individual. Therefore,

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<sup>11</sup> The *Citizens United* case actually started because the non-profit corporate funded group *Citizens United* wanted to challenge the government's ability to mitigate huge campaign spending within 30-60 periods prior to elections. This mitigation was clearly a well-designed attempt to allow citizens the ability to not be overwhelmed by corporate financing in decisions, which cognitive science has found is happening.

in applying limits to the extent any speaker or group can attempt to have to influence or control over others, the society's government must be very careful to craft rules that respect the needed balance.

Given the importance that Mill sees in communication as a way to provide proper balance, the existing campaign finance legislation rejected by the majority justices in the *Citizens United* case was vital in maintaining this balance. It did not stop business organizations from speaking, but recognized their distinct form and the impact that this separate form had on others in society. In over a century of escalating election costs that coincided with a massive growth in large industries, our society had reached a difficult place where the real and apparent danger of the commingling of the enterprises of commerce and politics had happened. It happened with horrific costs where politicians had become more afraid of industry repercussions than their constituents. Also, employees, fearing the intimidating scope of industries they worked for, were losing control over the business structures that were originally created to enhance their earning capacities. The recognition of these costs was the genesis of modern campaign finance legislation regarding the mitigation, and not censoring, of corporate and union speakers – as well as individual citizens. One reason the majority was unable to see the error inherent in their decision is that they were raised, educated, and promoted through the political ranks in this very system of political electioneering that has had strong corporate influence. As Mill knew nearly two-hundred years ago, in order to live in a society some liberty must be sacrificed to coexist with the benefits of organizational structures, but the destruction of individuality to appease artificial rule from government *or* enterprise leads us further and further away from the best that we can be.

Moving from Mill's ideas as a way to reframe the court's view of free speech between agents, I have examined Milton Friedman's ideas regarding a proper path to do so. Friedman is a well-known proponent of paired down government regulations and programs through libertarian principles. His arguments for limited government come from his core belief that the free market system is the only efficient source for creating and growing business and that the government's role in any society is to set-up "the rules of the game" for business. In this ideal system, the market can be a natural check on government as consumers make choices in what they want by purchasing products and supporting particular industry.

Friedman draws attention, however, to the danger of the overreaching nature of powerful business and union organizations in America that seek a symbiotic relationship with government to control markets and consumer choice through political means. He feels this control exists because of the central nature of producers whose accrual of resources and corporate interest overpowers consumer interest. The dispersed interests of individual consumers make them comparatively helpless to match the resources created by greater organized market forces.

It should be noted that there are other dangers besides over regulation and impingement by our government. There is also the great danger of enterprise becoming the new controlling force over government and taking the power to choose away from consumers. Through legitimate philosophical reasoning and empirical analysis these facts can be observed.

I find it ironic and sad that a new Supreme Court majority that was appointed under a system that forces political candidates to raise hundreds of millions of dollars cannot see the control that is being exerted by this organized financial influence. This influence is prevalent even in the judicial ranks where twenty-one states require elections for high court judges and

thirty-nine require elections for appellate & major trial courts.<sup>12</sup> Even the Supreme Court's justices are appointed and approved by elected officials who are subservient to the financial realities of modern elections.

They now perpetuate the vast complex of influence that has allowed them to ascend to their particular positions. A quote that Friedman utilized in regards to control and the influence on the courts in his book Free to Choose definitely is relevant here:

No matter whether th' constitution follows th' flag or not, th' supreme court follows th' iliction results...described the Supreme Court's "exercise of the amending power," its continuing revision of the Constitution under the guise of interpretation... Such conduct impels one to conclude that the Justices are become law unto themselves.<sup>13</sup>

This further underscores Friedman's pointed statement that the federal courts have allowed themselves to become a part of the government-enterprise beaurocracy<sup>14</sup> and may no longer be dedicated solely to protecting the principles of our Constitution and Bill of Rights.

Ultimately I feel that individuals should have the ability to communicate their unique views. This must be done in balance with group advocacy as they are both important elements of our society that allow people to share ideas amongst themselves and participate in the functions of society. The problem that my thesis addresses is the decision of the Supreme Court's majority to allow unlimited spending from accounts created for economic purposes that drowns out other member's right to advocate in elections. Mill's views on the importance of communication to the balance of liberty between individuals and society along with Friedman's perspective on the

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<sup>12</sup> Bonifaz, J. & Clements, J. September/October 2010 "Restoring the Constitution." Viewed January 7, 2011. <http://bostonreview.net/BR35.5/bonifaz.php>.

<sup>13</sup> Ibid, Chapter 10, *The Tide Is Turning*: (page 287) "In Mr. Doo..." "Supreme court justices are not interpreters but have become a law unto themselves."

<sup>14</sup> Ibid, (page 296) Through the growth of bureaucracy and corporate dominance, courts become part of the elite. Finalizing the removal of the individual's liberty and turning over all aspects of growth and life to dominant special interest control.

danger to individual liberty from large groups gaining control of government provides philosophical understanding that the court's decision lacked.

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## VITA

Eric Berken is a resident of Louisiana, where he was born and raised. In 1997 he began his studies in business, and worked toward completing three programs: Economics, B.S.A.T., and Management. He completed 173 hours in just over four years, studied abroad in Turin, Italy, and received his Bachelor of Science in Economics from the University of Louisiana in 2001. At the 2002 Association for Practical and Professional Ethic's national conference he co-presented a paper on business ethics that was later published in *Business Ethics Quarterly*. In 2003 he received his Master of Science in Management Information Systems from Temple University after only one year of study. After returning home to be near his family, he worked for several years as an Employment Benefits Officer and a Social Service Analyst before returning to school. He returned to school to pursue a degree in philosophy, in anticipation of pursuing a career in ethics. For the second time, at the 2011 APPE conference, Eric presented a paper at the national ethics conference. On April 4, 2011 he successfully defended his master's thesis. His anticipated graduation date for his Master of Arts degree in philosophy from Louisiana State University is May 2011.