Super PAC-ed:

How *Citizens United* Sets a Faulty Precedent for Corruption and Distortion

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Super PACs

"Paid for by Bernie 2016 (not the billionaires)." Every email sent by the Bernie Sanders presidential campaign ends with that tagline. While disclosing the fact that his campaign paid for the email, he also is making a slight jab toward the current, broken state of our political system: billionaires and corporations now have the ability to vastly influence our election processes.

As I write this essay, the *New York Times* has been covering campaign financial reports, looking for any data that indicates which candidates are moving to the forefront in the 2016 presidential election. As the *New York Times* has done for decades, it reported the amount each *candidate* has received: Hillary Clinton received $46.7 million in donations while the aforementioned Bernie Sanders brought in $15 million in donations (Lichtblau & Confessore, 2015). However, in "a stark departure from past campaigns," as described by the *New York Times*, political scientists and journalists must now consider donations to a candidate's Super PAC (political action committee) in addition to – perhaps even with a higher priority than – the amount of money given to a candidate (Lichtblau & Confessore, 2015).

What is a Super PAC, and why must we focus on its influence? The Center for Responsible Politics defines a Super PAC as a political action committee that "may raise unlimited sums of money… then spend unlimited sums to overtly advocate for and against political candidates" (The Center for Responsible Politics, 2015). What makes a Super PAC super is its ability to spend those unlimited sums of money, as compared to a regular PAC, whose contributions are limited by law. Election laws restrict Super PACs and political candidates from coordination; however, these restrictions are loose, and there are many ways to bypass these laws (Byrd & Hager, 2015). Because of these loose restrictions and the unrestricted

ability to spend money, today's political culture considers Super PACs as synonymous with the political candidate it supports.

Despite the pervasiveness of Super PACs in political culture, the majority of mainstream America disapprove of Super PACs and unlimited expenditures in general. In a 2012 Washington Post-ABC News Poll, 69% of the participants polled wanted Super PACs to be illegal, with 52% of the participants feeling strongly about the issue (Cillizza & Blake, 2012). A poll conducted by the Brennan Center for Justice also reached a similar conclusion: 69% agreed that Super PACs contributed to political corruption in the United States (Brennan Center for Justice, 2012). In addition, numerous candidates such as Hillary Clinton and Bernie Sanders have denounced the role of Super PACs in politics (Hillary for America, 2015) (Bernie 2016, 2015).

Super PACs and unlimited corporate expenditures came about as a result of many rulings, the primary one being *Citizens United v. Federal Election Commission*. The original premise of *Citizens United* was to decide whether the airing of "Hillary: the Movie," an advocacy video produced by Citizens United, could be restricted by law; however, after arguing the case once, the Supreme Court expanded the questions to be considered in *Citizens United* much more broadly so as to encompass all corporate independent expenditures (Toobin, 2012). On January 21, 2010, Justice Anthony Kennedy, along with Justices Antonin Scalia, Samuel Alito, Clarence Thomas and Chief Justice John Roberts, ruled that the government cannot prohibit corporations from making independent expenditures – expenses that are not coordinated with a specific political campaign – because political speech is protected under the First Amendment of the Constitution (*Citizens United v. Federal Election Commission*, 2010).

Because of the precedents set by *Citizens United*, Super PACs have become the premier tool to influence the outcome of elections. *Citizens United* was decided on a faulty basis that did

not consider the ramifications of unlimited corporate expenditures. Insulated from the political atmosphere of corporate corruption, five justices disregarded *stare decisis,* changing the political landscape of our country. Instead of "We the People" we now have "We the Corporations": they are one and the same after *Citizens United*. If we are to preserve our values of fairness, equity and justice for the generations after us, we must recognize the faults of *Citizens United* and the grave dangers that unbridled corporate expenditures place on our fragile political institutions.

Corruption and Distortion

What is corruption? The Merriam-Webster dictionary defines corruption as "the impairment of integrity, virtue, or moral principle" and as "the inducement of wrong by improper or unlawful means" (Merriam-Webster). Most often, society views corruption as being a literal exchange of money or gifts for some favor; however, even an external, implicit influence can have an intoxicating impact on a person's judgment. Closely related to corruption is the idea of distortion. With distortion, our ability to see clearly is diminished, and the results are very frustrating. Especially in the field of politics, distortion perverts everyone's perception of our governing bodies, causing people to lose trust in our political bodies, which makes our government less effective at its job.

Seeing the detrimental impact of corruption and distortion, our government has passed several bills to combat corruption throughout the years. One of the first of these bills was the Tillman Act, passed in 1907. This act prevented corporations from directly contributing to a candidate's campaign (Toobin, 2012). Another example of Congress reacting to corruption is the Federal Election Campaign Act in 1971, which capped individual contributions to candidates, among others things (Federal Election Commission). By capping individual contributions to candidates, Congress blocked one manner of corrupting politicians.

However, by the early 2000s, politicians and political parties had found ways to bypass these earlier regulations. To prevent that, Congress passed the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Act. A summary from the Cornell University Law School describes many anti-corruption stipulations of the act: it banned "soft money", created disclosures on ads and banned minors from contributing to campaigns (Cornell University Law School, 2003).

One of the more controversial parts of this act, at least in the purview of *Citizens United* and this essay, is its restrictions against corporations from funding "electioneering communications," defined as advertisements for or against a federal candidate within a certain number of days before an election, depending on the type of election. Under the McCain-Feingold Act, corporations are prohibited from funding "electioneering communications." In 2003, the Supreme Court's ruling in *McConnell v. Federal Election Commission* declared most of these provisions to be facially constitutional (*McConnell v. Federal Election Commission, 2003*). By 2010, however, the Supreme Court changed its mind with its decision on *Citizens United*.

Citizens United represents a massive shift in the constitutionality of preventing corruption and distortion in the field of campaign financing. Before, the Supreme Court had looked favorably upon such regulations in *McConnell* and *Austin v. Michigan Chamber of Commerce*. Now, *Citizens United* has created new electioneering principles; through the auxiliary court case *Speechnow.com v. FEC*, decided only a few months after *Citizens United*, those principles created the now ubiquitous Super PACs. In order to see whether this shift was necessary, we must examine whether the anti-corruption and anti-distortion bases used in *McConnell* and

Austin are flawed – as Justice Kennedy argues – or whether the Court should have enforced the precedents made in *McConnell* and *Austin* – as Justice Stevens argues.

Justice Kennedy writes in his ruling that laws which place "burdens on political speech are subject to 'strict scrutiny'" (*Citizens United v. Federal Election Commission*, 2010, p. 30). Under strict scrutiny, a law must "'further a compelling interest'" of the government, and it must also be "'narrowly tailored'" to accomplish that interest (*Citizens United v. Federal Election Commission*, 2010, p. 30).

After deciding that Citizens United's claims could not be settled on a narrower ground, Justice Kennedy, the author of the *Citizens United* decision, states that the corporate ban on independent expenditures and ads is "an outright ban, backed by criminal sanctions" (*Citizens United v. Federal Election Commission*, 2010, p. 27). It is, however, accompanied by the accommodation that a corporation can donate money to a segregated fund, a political action committee (PAC). Kennedy acknowledges this when he writes "…notwithstanding the fact that a PAC created by a corporation can still speak." (*Citizens United v. Federal Election Commission*, 2010, p. 21).

Even though Kennedy acknowledges the alternative to corporate expenditures, he considers them "burdensome" due to all of the "regulations just to speak" (*Citizens United v. Federal Election Commission*, 2010, pp. 21-22). He refers to the precedent set by *FEC v. Massachusetts Citizens for Life*, in which the Supreme Court considered PACs to be burdensome as well (*Citizens United v. Federal Election Commission*, 2010, p. 21) (*FEC v. Massachusetts Citizens For Life* , 1986). I would argue that the burdens of establishing and maintaining a PAC are not as burdensome as Kennedy makes them out to be, which Justice Stevens corroborates in his dissent (*Citizens United v. Federal Election Commission*, 2010, p. 111). However, for the

sake of the bigger argument, let us suppose that Kennedy's argument is correct. Under this argument, the ban on independent expenditures and electioneering communications would be subject to strict scrutiny as mentioned above.

In *Citizens United*, the government argued that banning independent expenditures by corporations is constitutional because the government has a compelling interest in preventing corruption and distortion. Elena Kagan, the Solicitor General of the United States at the time, proposed that these corporate independent expenditures pose "a sort of a broader harm to the public" due to their "distortion of the electioneering" process (Kagan, 2009). She adds that this statute in the Bipartisan Campaign Reform Act of 2002 allows lobbying to be "just persuasion…not coercion" (Kagan, 2009).

In his dissent to *Citizens United*, Justice Stevens echoes Kagan's argument, stating that the Supreme Court has set the precedent of regulating elections, including corporate expenditures. He writes that in 1982, a unanimous Supreme Court ruling held that "the governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized" (*Citizens United v. Federal Election Commission*, 2010, p. 133, citing *Federal Election Commission v. National Right to Work Committee*, 1982). He then cites numerous cases in which the distinction between corporations and individuals has not been challenged, including challenges against the aforementioned Tillman Act and the Federal Election Campaign Act (*Citizens United v. Federal Election Commission*, 2010, pp. 129-135).

Included in his dissent is his analysis of *Austin v. Michigan Chamber of Commerce*, one of the major precedents for the constitutionality of the Bipartisan Campaign Reform Act. Stevens refers to the important role of the government in preventing distortion, saying that the court has

recognized "the importance of 'the integrity of the marketplace of political ideas' in candidate elections" (*Citizens United v. Federal Election Commission,* 2010, p. 134). Concerning *Austin*, Stevens mentions that "in light of the corrupting effects such spending might have on the political process, ibid., we permitted the State of Michigan to limit corporate expenditures on candidate elections to corporations' PACs" (*Citizens United v. Federal Election Commission, 2010, p. 135)*. This is the *stare decisis* logic of the dissent: the government has an interest in preventing corruption, and this interest should expand to independent expenditures, as was done in *McConnell v. FEC.*

Justice Kennedy and the majority disagreed. He writes that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" (*Citizens United v. Federal Election Commission*, 2010, p. 42). In addition, he claims that independent expenditures do not equal *quid pro quo* corruption because an independent expenditure is "not coordinated with a candidate" (*Citizens United v. Federal Election Commission*, 2010, p. 44). He adds that these expenditures "will not cause the electorate to lose faith in our democracy" (*Citizens United v. Federal Election Commission*, 2010, p. 44). In Kennedy's reasoning, the anti-corruption basis for independent expenditure bans is unjustifiable because there is no *quid pro quo* corruption associated with independent expenditures. Therefore, according to Kennedy, this provision is unconstitutional because it fails strict scrutiny; it does not have a compelling governmental interest.

With respect to Justice Kennedy, independent expenditures do create corruption – even if it is not *quid pro quo* corruption –, and the government does have a valid, compelling interest in regulating those expenditures. Even though these expenditures are not coordinated with a specific campaign, they do have ramifications for those involved in the election. In a *New York*

Times video about Super PACs, Aaron Byrd and Emily Hager explain that Super PACs and candidates can indirectly coordinate advertisements: a candidate can issue a statement that indicates which day their ads will be playing, and then their Super PAC can fill the other days with their own advertisements (Byrd & Hager, 2015).

A local application of this would be the 2014 House of Representatives race between incumbent Nick Rahall and Evan Jenkins. On Monday, people watching WSAZ could see an ad by the actual Evan Jenkins campaign. On Tuesday, the same audience could see an ad by Americans for Prosperity, a Super PAC that opposed Nick Rahall in the election. From personal experience canvassing voters in the area, the double onslaught of Evan Jenkins and Americans for Prosperity ads really had a detrimental impact on Nick Rahall's approval rating.

Not only did this advertising have an impact on the actual election, it most likely has an implicit impact on the way that Evan Jenkins votes in Congress. For example, if Evan Jenkins had an epiphany and started voting for labor, the environment and social welfare, he might have an Americans for Prosperity-sponsored Kelli Sobonya competing against him in the 2016 Republican primary. This Kelli Sobonya primary challenge is conjecture, of course, but it does highlight a concern of unlimited expenditures: the allure – or threat – of unlimited money by Super PACs can scare congressmen into doing the bidding of a Super PAC. That is corruption, even if Evan Jenkins and Americans for Prosperity never speak a word to each other.

Because our Founding Fathers are not alive today, they cannot exactly comment on the hypothetical Evan Jenkins-Americans for Prosperity situation. However, in the 57th Federalist Paper, James Madison writes something that is relevant to *Citizens United*. He writes:

> Who are to be the electors of the federal representatives? Not the rich, more than the poor… The electors are to be the great body of the people of the United States.

I cannot say for certain whether James Madison would feel that unlimited independent expenditures violate this principle. In 2015, we must refer constitutional matters like this to the Constitution, the Framers' words, and the Supreme Court, the premier judicial body who interprets those words for us.

Before *Citizens United*, the Supreme Court had already visited this specific issue in two other cases: *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*. This does not include the numerous other times that the Supreme Court has made a distinction between corporations and individuals, or the numerous other times that the Supreme Court has allowed Congress to restrict corporate contributions to candidates.

Instead, what the majority in *Citizens United* chose to do was create a loophole to allow corporations to spend whatever amount of money they want to influence elections, just as long as they do not specifically coordinate with a candidate. Justice Kennedy, along with the other five justices in the majority ruling on *Citizens United*, set a faulty precedent that will lead to increased corruption and deception in our electoral system.

This precedent has demoralized the American public. In a joint *New York Times*-CBS News poll taken in May 2015, 85% of those polled believed that campaign financing needs to be changed with either "fundamental changes" or a "complete overhaul" (Confessore & Thee-Brenan, 2015). Eighty-four percent of those same people polled also believe that money has "too much influence" in our elections, with 55% saying that politicians promote policies that "directly

help the people and groups who donated money to their campaigns" (Confessore & Thee-Brenan, 2015).

While popular opinion should not be the entire basis of how we interpret the Constitution, this polling does show evidence that contradicts Justice Kennedy's statement that unlimited independent expenditures "will not cause the electorate to lose faith in our democracy" *(Citizens United v. Federal Election Commission*, 2010, p. 44). Five years after *Citizens United*, it has caused the electorate to lose faith. Politics has been corrupted by the unlimited expenditures of Super PACs. The corruption has distorted how Americans view campaigning and politics. People do not see candidates and policies anymore; they see Super PACs and politicians doing the Super PACs' bidding. This is not democracy; this is oligarchy. For the protection of our democratic values for the generations to come, we must correct *Citizens United*.

Correcting *Citizens United*

One way to correct *Citizens United* is through a constitutional amendment. This option would allow Congress to explicitly dictate how the United States would treat corporations with regard to campaign financing. However, this method would require a substantial amount of political capital, more than what is available with the current composition of Congress. Likewise, one such amendment that proposed to overturn *Citizens United* died in the Senate back in 2014 due to a lack of Republican support (Cox, 2014).

Even if a campaign finance reform amendment were to pass in both chambers of Congress, it would face a tough battle being ratified. Thirty-eight states would have to approve the amendment. As of 2015, sixteen states have passed resolutions in support of a constitutional

amendment to overrule *Citizens United* (Schouten, 2015); finding another twenty two states, especially in today's political climate, will be very difficult.

Another possible way is through a new court case. In his book *The Living Constitution*, David Strauss highlights how court rulings can be used to shape how we view the Constitution. He uses the example of the transition from *Plessy v. Ferguson*, which allowed for *de jure* segregation, to *Brown v. Board of Education*, which outlawed *de jure* segregation. Many people assume that *Brown* was unprecedented; Strauss argues that *Brown* was a product of several smaller precedents throughout the early 1900s to 1950s (Strauss, 2010, pp. 77-92). It appears *Citizens United* is following this pattern; unfortunately, it seems that it is going the wrong direction, allowing for more corruption instead of less.

As it stands right now, the current justices will probably not agree to overrule *Citizens United*. If we want to overrule *Citizens United* judicially, that will require different judges on the Supreme Court. Getting a new Supreme Court justice requires one to step down and a new one be approved by the Senate – two contingencies that currently are not fulfilled. Even though this option is more likely than the constitutional amendment option, neither is particularly quick or guaranteed to succeed.

What the United States needs right now are stopgap measures until we have concrete plans to overturn *Citizens United*. We need to funnel our frustration over *Citizens United* into political action. One way is to persuade every politician that campaign finance reform is necessary – from the councilmen and councilwomen of Huntington to the President of the United States. If it is true that 85% of the general public wants campaign financing to be changed, as the *New York Times* and CBS News claim in their polling, then we should have 85% of candidates supporting campaign finance reform as well. Granted, many politicians will not be receptive to

the argument for whatever reason; however the more we talk about the issue, the more likely something will be done about it.

Second, we need to vote. One vote is more powerful than any sum of money spent on an election. Right now, West Virginia is faring poorly on voter turnout. According to the Secretary of State's office, only about 37% of eligible West Virginians voted in the 2014 elections (Glance, 2014). That is unacceptable. Political apathy allows Super PACs to grow even stronger; without an engaged populace, voters are more likely to be influenced by the massive amount of advertising that Super PACs use to influence elections. If we want to put a stop to Super PACs, we need to vote.

No matter what we do – from the big constitutional amendment to the simple voting – we must take a stand against *Citizens United*. By disregarding *Austin* and *McConnell*, the Supreme Court has placed our democracy up for sale. We continue to see the results of that faulty decision, even five years after the decision. It must change, and we have the power to do it. Know. Vote. Change.

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