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Political Gangsters: The Future of Racketeering Law in Politics Note

Jillian Henzler

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POLITICAL GANGSTERS: THE FUTURE OF RACKETEERING LAW IN POLITICS

JILLIAN HENZLER*

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I. INTRODUCTION

In 2004, Frank Fernandez was convicted under the Racketeering Influenced and Corrupt Organizations (RICO) Act for his involvement with the Mexican

Mafia.¹ The “Eme” was known as the biggest gang in the Los Angeles area, and its participants were imprisoned for conspiracy to aid and abet in drug trafficking within the Los Angeles County jail and for the conspiracies to murder four individuals.² Eme’s involvement throughout the prisons allowed the gang to expand, and this expansion allowed Eme to threaten members of smaller gangs.³ Eme’s violent actions resulted in crimes that the RICO Act was specifically designed to prevent. This law, designed to restrict organized crime, may soon be used to uncover corrupt practices in the United States’ electoral process.

In 1970, the Racketeering Influenced and Corrupt Organizations Act was passed. This statute, under Title 18 of the United States Code, was enacted to control the infiltration of organized crime within corporate businesses. Its original function was to prosecute the business practices of criminal cartels. Modern racketeering law is now applicable to more business practices than just those run by criminal organizations. Over the past forty years, the Supreme Court has developed a broad reading of the statute that is widely accepted. The inclusive nature of racketeering law can now be used to find corruption within seemingly fair businesses and organizations. Under the recent holding of *Citizens United v. Federal Election Commission* in January 2010, the RICO Act may even be applied to show corruption in the election process of our own government. In *Citizens United*, the Court held that the statute banning independent corporate expenditures to political campaigns was a ban on First Amendment speech and was unconstitutional.⁴

In the aftermath of the *Citizens United* case, corporate donations to political campaigns will continue to change drastically. Big corporate spenders will be able to endorse the candidate with the policies that best serve their business; these endorsements come in increments of thousands, or maybe even millions of dollars. Politicians will start constructing campaign platforms to attract the biggest and wealthiest corporations. Because studies in the past have shown that wealthier candidates have a better chance of winning elections,⁵ these donations might change election outcomes. These changes will take away the validity of our election process because candidates will be more focused on gaining the most contributions rather than constructing a platform that gains voter approval.

Section II will explore the general rules of corporate campaign donations before the holding of *Citizens United*. This has been a controversial issue in the

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¹ *United States v. Fernandez*, 388 F.3d 1199, 1214 (9th Cir. 2004).

² *Id.* at 1215.

³ *Id.* at 1215-16.

⁴ *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010).

⁵ Brad Alexander, *Good Money and Bad Money: Do Funding Sources Affect Electoral Outcomes*, 58 POL. RES. Q., no. 2, 353-58 (2005).

courts that started in the early 1970s with the Federal Election Campaign Act of 1971. The Supreme Court had multiple inconsistent holdings on the subject that led up to the current *Citizens United* decision.

Section III of this article will summarize the *Citizens United* case. While this case had multiple holdings, the Court's main holding on the categorization of independent corporate political donations as political speech may completely alter the election process. In coming to this conclusion, it was necessary for the Supreme Court to overturn multiple cases, which had previously been used to set the standard for political donations. While the Court's reasoning for unlimited corporate expenditures based upon the First Amendment was compelling, the ultimate holding still contains flaws.

Section IV will illustrate the immediate effects the *Citizens United* case had in the year following its decision. The November 2010 midterm elections were the first chance that corporations could exercise their new-found expanded First Amendment rights. The figures show that spending immediately increased. The further increase of political corporate spending may potentially change the dynamic of our election system and lead to corruption.

Section V will introduce the RICO Act and the foundation of racketeering law. A brief history of this law will illustrate how much it has deviated from its original purpose and how its expanded broad view can be used to cover many actions other than bad business practices and organized criminal cartels.

Section VI will define the action of racketeering, which is found in Title 18 U.S.C. § 1951. Racketeering can be broken down into two essential elements, which can be further defined by case law. Previous court holdings can be used to show what types of specific actions can be considered racketeering. In exploring how a person in a position of power can affect these elements, the definitions will foreshadow the possible effects of political candidates having the ability to obtain large independent corporate expenditures.

Section VII will explain how the act of racketeering fits within the RICO Act, which is found in 18 U.S.C. § 1962. This act, intentionally written to be overbroad,⁶ originated to control the infiltration of organized crime in businesses. A long list of crimes other than the explicit criminal elements that make up racketeering under § 1951 can constitute the "racketeering activity" that is the basis of this statute.

Section VIII will show how racketeering law can be applied to the holding of the *Citizens United* case. The application of this law will illustrate the possible ill effects of the *Citizens United* rule on our election process that might remove the integrity from the voting process and take the ultimate power of election away from the voters.

Section IX will discuss the dissenting opinion of the *Citizens United* decision. The four dissenting judges state that the majority's decision was misguided and offer other potential arguments the majority could have made that would not have caused such sweeping changes in the law. This reasoning can be used by future Supreme Courts if the *Citizens United* ruling is ever overturned.

⁶ Ann K. Wooster, *Validity, Construction, and Application of Racketeer Influenced and Corrupt Organizations Act*, 171 A.L.R. FED. 1, 14 (2001).

Section X will discuss some potential measures that Congress can take in preventing the corruption created by *Citizens United*. The only thing that can completely remove this corruption is a future Supreme Court case overruling *Citizens United*. Until then, Congress can create legislation that implements some regulations and restrictions to protect election integrity.

II. CORPORATE CONTRIBUTION REGULATIONS BEFORE *CITIZENS UNITED*

Restrictions upon corporate spending in furtherance of political elections began as early as 1907. The first statute explicitly making corporate donations illegal was the Tillman Act of 1907.⁷ It banned “any corporation whatever” from making “a money contribution in connection with” federal elections.⁸ There were two main motives behind the Tillman Act: first, to combat “the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, [to] respect the interest of shareholders and members in preventing the use of their money to support candidates they opposed.”⁹ The most recent regulations on corporate expenditures were written into the Federal Election Campaign Act of 1971. Title 18 § 441b explicitly prohibited corporations from making contributions or expenditures in connection with any election to any political office. The text of the statute states that it is “unlawful for any [. . .] corporation [. . .] to make a contribution or expenditure in connection with any political office.”¹⁰ This section of the Federal Election Campaign Act was ultimately found to be unconstitutional by the majority in the *Citizens United* case.

A. *Buckley v. Valeo*

The constitutionality of the Federal Election Campaign Act was first questioned in 1976 in *Buckley v. Valeo*.¹¹ The main argument was that the Federal Election Campaign Act interfered with the First Amendment.¹² The Court stressed that the First Amendment not only protects political speech and political expression, but also covers the constitutional right of association.¹³ The appellee’s main argument was that the Federal Election Campaign Act regulated the specific conduct of making donations, not the political expression or association protected by the First Amendment.¹⁴

⁷ *FEC v. Beaumont*, 539 U.S. 146 (2003). See *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 508-10 (2007) (Souter, J., dissenting).

⁸ *Wisconsin Right to Life, Inc.*, 551 U.S. at 509 (citing Tillman Act of 1907, 34 Stat. 864-65 (1907)).

⁹ *Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting).

¹⁰ 2 U.S.C. § 441b(a) (2010).

¹¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹² *Id.* at 14.

¹³ *Id.* at 15. See also *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

¹⁴ *Buckley*, 424 U.S. at 15.

The appellate court agreed with the appellee's argument, and based its reasoning largely upon that of *United States v. O'Brien*.¹⁵ The appellate court in *Buckley* distinguished the facts at hand from *O'Brien*, when it stated that this was not a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."¹⁶ The Supreme Court agreed with the appellate court, by stating that the intent of the Federal Election Campaign Act was to equalize "the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups."¹⁷ The Court further stated that contributions are only one way of communication; corporations are not wholly prevented from political expression under the Federal Election Campaign Act because donations in smaller denominations are allowed, and other forms of communication are still open and valid.¹⁸ The Supreme Court ultimately held that the limits on corporate contributions by the Federal Election Campaign Act were constitutional, despite the arguments against these regulations.¹⁹

B. First Nat'l Bank of Boston v. Bellotti

The court revisited the issue of corporate contributions again in 1978 when deciding *First National Bank of Boston v. Bellotti*.²⁰ In this case, the constitutionality of a Massachusetts criminal statute that prohibited banks and corporations from making contributions was questioned. The conceptual questions asked about this state statute were similar to those asked in *Buckley*, but here the Court's decision was in direct opposition with that found in *Buckley*.

The Massachusetts statute in question banned corporations from making contributions "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."²¹ This Court again turned to the question based upon the extension of First Amendment rights to corporations

¹⁵ *United States v. O'Brien*, 391 U.S. 367 (1968) (holding the prohibition on burning a selective service registration certificate constitutional, as such conduct was not protected political speech under the First Amendment).

¹⁶ *Buckley*, 424 U.S. at 16 (quoting *O'Brien*, 391 U.S. at 382).

¹⁷ *Id.* at 17. The court also held that additional governmental issues include the prevention of corruption or the appearance of corruption, and to open the political system more widely to candidates with smaller amounts of funding. *Id.* at 25-26.

¹⁸ *Id.* at 21.

¹⁹ *Id.* at 79.

²⁰ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

²¹ *Id.* at 767-68 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). The Court ultimately broke down the statute into two distinct regulations: the prohibition of corporate spending to influence ballot questions not materially affecting its business interests, and a *per se* illegality standard for corporate spending to influence a question of individual taxation. *Id.* at 772.

making political donations.²² This Court ultimately held that if these speakers were not corporations, but rather citizens using donations as political expression, the donations would not be regulable under the First Amendment.²³ This reasoning changes the question from whether corporations have First Amendment rights, to a question asking if the corporate identity of the speaker deprives them of these rights.²⁴ This question has been answered in the past, but the answers have been fact-specific. The Supreme Court has already held that corporate speech to educate and inform the public²⁵ or to increase the flow of commercial information²⁶ are both protected under the First Amendment. The Court stated that, in order to be consistent with these two prior holdings, the First Amendment should protect corporate speech in the form of political donations that can be considered political expression, even though the speaker has a corporate identity.²⁷ The clause in the Massachusetts statute that limits corporate speech on subjects that “materially affect” the corporation is inconsistent with the First Amendment rights, as this sort of restriction was never intended when the First Amendment was created.²⁸

The Court then addressed the “prevention of corruption” reasoning discussed in *Buckley*. It did not dispute that this reasoning is important in keeping our electoral system fair, and that the “preservation of the individual citizen’s confidence in government is equally important.”²⁹ It ultimately found that “there ha[d] been no showing that the relative voice of corporations ha[d] been overwhelming or even significant in influencing referenda in Massachusetts or that there ha[d] been any threat to the confidence of the citizenry in government.”³⁰

C. *Austin v. Michigan Chamber of Commerce*

The holding from *Bellotti* on corporate political donations was the precedent until 1990 when the Court decided *Austin v. Michigan Chamber of Commerce*.³¹ Here, a Michigan statute that prohibited corporations from using treasury funds to make independent expenditures in connection with elections for state office was challenged.³² The statute in question did not completely prevent corporations from making political donations—it only required them to make

²² *Id.* at 771.

²³ *Id.* at 777.

²⁴ *Id.* at 778.

²⁵ *See Mills v. Alabama*, 384 U.S. 214, 219 (1966).

²⁶ *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976).

²⁷ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

²⁸ *Id.*

²⁹ *Id.* at 789 (citing *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)).

³⁰ *Id.* at 766.

³¹ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

³² *Id.* at 655.

the donations from a fund separate from their corporate treasury. The Michigan Chamber of Commerce argued that making donations from a segregated corporate fund, rather than its treasury fund, “burden[ed] the Chamber’s exercise of expression.”³³ While considering this burden, the Court used a balancing test, and decided that the need to prevent “corruption or the appearance of corruption” outweighed the burden caused by having a segregated fund.³⁴ This case was the active applied precedent until *Citizens United* was decided in January 2010.

D. *McConnell v. FEC*

One last case that is important to consider in the standards before the holding of *Citizens United* is *McConnell v. FEC*.³⁵ This case specifically addressed the Bipartisan Campaign Reform Act of 2002, which amended the Federal Election Campaign Act. This amendment put further restrictions on contributions to candidates and money spent on communications that are intended to influence election outcomes.³⁶

The Court once again considered the arguments originally made in *Buckley* and stated the importance of preventing corruption or the appearance of corruption within the election system, and ultimately affirmed that holding.³⁷ More importantly, the Court addressed the definition of a new term introduced in the Bipartisan Campaign Reform Act: “electioneering communication.”³⁸ The Court held the definition of “electioneering communication” to be constitutional because it is both “easily understood and objectively determinable.”³⁹ While it agreed that the statute was a restriction on speech, the Court stated that the plaintiffs did not make a sufficient argument showing that this restriction created a significant burden on “First Amendment expression” or a constitutionality argument based upon over-breadth.⁴⁰ The Court ultimately held that the definition of electioneering communication was “wholly consistent with First Amendment principles as applied to the media.”⁴¹

³³ *Id.* at 658. See also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

³⁴ *Austin*, 494 U.S. at 659. See *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

³⁵ *McConnell v. FEC*, 540 U.S. 93 (2003).

³⁶ *Id.* at 94.

³⁷ *Id.* at 95.

³⁸ *Id.* at 102. The definition of this term is especially important in the evolution of campaign donation restrictions preceding the holding of *Citizens United* because the conduct at issue in that case was considered “electioneering communication” under the statutory definition. “Electioneering communication” is defined as any “broadcast, cable, or satellite communication” that clearly identifies a candidate for federal office within sixty days of a general election and thirty days of a primary. 2 U.S.C. § 434(f)(3)(A)(i).

³⁹ *McConnell*, 540 U.S. at 103.

⁴⁰ *Id.* at 105.

⁴¹ *Id.*

III. *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

Citizens United is a nonprofit corporation that released a movie entitled *Hillary: The Movie* in January 2008.⁴² They wanted to increase distribution by offering it through video-on-demand via digital cable.⁴³ Citizens United was prepared to pay \$1.2 million to make this movie and three separate advertisements for it to be available on video-on-demand.⁴⁴ Afraid that these actions would violate 2 U.S.C. § 441b (part of the Federal Election Campaign Act), Citizens United sought declaratory and injunctive relief against the Federal Election Commission.⁴⁵ This statute prohibits corporations from making independent expenditures to elections for political office.⁴⁶ Subsection (b)(2) of this statute would specifically bar Citizens United from making the film by preventing “electioneering communication,” which is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office.”⁴⁷ In its original suit, Citizens United argued that 2 U.S.C. § 441b was unconstitutional as applied to the *Hillary* movie. The district court granted the Federal Election Commission’s motion for summary judgment, holding that § 441b was facially constitutional under *McConnell*,⁴⁸ and that it was constitutional as applied to the *Hillary* movie because its only interpretation was that Senator Clinton was unfit for office.⁴⁹

In addition to the holding in *McConnell*, Citizens United’s arguments were also at odds with the holdings of *Austin v. Michigan Chamber of Commerce*.⁵⁰ In that case, the Court held that the application of a state statute similar to 441b was constitutional.⁵¹ The Court here stated that the statute in question prevented potential corruption by independent corporate donations.⁵² Between these two holdings, the federal 441b seemed to be facially constitutional.

On appeal, the Supreme Court considered that the holdings of *McConnell* and *Austin* were binding upon the district court—this gave the district court little power in deciding the *Citizens United* case because lower courts do not have the

⁴² *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 888.

⁴⁶ 2 U.S.C. § 441b (2010).

⁴⁷ § 441b(b)(2).

⁴⁸ This court held that the statutory definition of “electioneering communications” was constitutionally valid. *McConnell v. FEC*, 540 U.S. 93, 105 (2003).

⁴⁹ *Citizens United*, 130 S. Ct. at 888.

⁵⁰ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

⁵¹ *Id.* at 659.

⁵² *Id.*

power to overrule Supreme Court decisions.⁵³ This led the Supreme Court to reconsider the previous holding of *Austin* and the facial validity of 441b.⁵⁴

In considering the facial validity of 441b, the Court stated that “[s]ection 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.”⁵⁵ Thus, this statute could be read as an outright ban on corporate political speech.⁵⁶ The Court further held that speech by corporations cannot be restricted just because of the speaker’s corporate identity; it stated that “First Amendment protection extends to corporations.”⁵⁷ In essence, the Court held that restricting independent corporate expenditures is against the First Amendment because it restricts political expression.

The Court then considered the previous holding in *Austin*, which held that restricting independent political donations was constitutional in order to prevent corruption.⁵⁸ The main argument the *Austin* court made was that this political speech needed to be limited to prevent “antidistortion interest.”⁵⁹ The Court intended to prevent “the corrosive and distorting effect of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁶⁰ This decision left the Court with an inconsistent precedent—the statute on its face is unconstitutional, but previous decisions state that the application of these statutes is constitutional. After considering the anti-distortion interest argument made in *Austin*, the Court rejected it because “it would permit [the] Government to ban political speech simply because the speaker is an association that has taken on the corporate form.”⁶¹

Before explicitly overturning *Austin*, the Court considered the government’s argument that banning corporate political speech would prevent corruption.⁶² The holding in *Buckley* supported this argument.⁶³ The *Buckley* court limited corporate donations in state elections in order to prevent improper commitments from candidates.⁶⁴ The Court in *Citizens United* rejected this argument on the

⁵³ *Citizens United*, 130 S. Ct. at 893.

⁵⁴ *Id.*

⁵⁵ *Id.* at 897.

⁵⁶ *Id.*

⁵⁷ *Id.* at 899.

⁵⁸ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *Citizens United*, 130 S. Ct. at 904.

⁶² *Id.* at 908.

⁶³ *Buckley v. Valeo*, 424 U.S. 1, 45 (1976).

⁶⁴ *Id.* at 47.

grounds that twenty-six states do not restrict expenditures for non-profit corporations, and that “[t]he Government [did] not claim that these expenditures . . . corrupted the political process in those States.”⁶⁵ *Citizens United* was also distinguished from *Buckley*, because *Buckley* was dealing with quid pro quo contributions from corporations.⁶⁶ The problem of corruption is one that the Court leaves to Congress to solve; it stated:

If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or reality of these influences.⁶⁷

In order to keep up with rapidly changing technology by allowing corporations to exercise their First Amendment rights in the election process, the Court explicitly overturned the holding in *Austin* that banned independent corporate expenditures to political candidates.⁶⁸ Thus, the holding of the district court that stated 441b was constitutional was reversed.⁶⁹

IV. THE IMMEDIATE EFFECTS OF THE *CITIZENS UNITED* DECISION

Changes to the way campaigns are run and financed took place almost immediately and can be seen through an investigation of the November 2010 midterm elections. It was clear as soon as the decision was final that spending would change drastically. Michael Toner, a campaign finance lawyer and former Federal Election Commission chairman stated that “[w]e might be on track for the most expensive cycles ever, even more than ‘08, which is really hard to believe.”⁷⁰ It was also clear that not everyone thought the increased spending would be a good idea. Representative Chris Van Hollen from Maryland stated “[t]his has got to be a wakeup call to every citizen that they cannot allow the big corporations to call the shots on these elections.”⁷¹ New York City Public Advocate Bill de Blasio developed an analysis of the political spending that took place during the election.⁷² He found that “[s]pending

⁶⁵ *Citizens United*, 130 S. Ct. at 908-909.

⁶⁶ *Id.* at 909.

⁶⁷ *Id.* at 911.

⁶⁸ *Id.* at 912-13.

⁶⁹ *Id.* at 917.

⁷⁰ Jim Kuhnhenh, *Election Spending Sets Records: No Recession Here*, HUFFINGTON POST (Sept. 7, 2010), http://www.boston.com/news/nation/articles/2010/12/10/anonymous_donors_spent_132_m_on_2010_campaign_ads/.

⁷¹ Deborah Tedford, *Supreme Court Rips Up Campaign Finance Laws*, NPR.ORG, (Jan. 21, 2010), <http://www.npr.org/templates/story/story.php?Id=122805666>.

⁷² Beth Fouhy, *Anonymous Donors Spent \$132M on 2010 Campaign Ads*, ASSOCIATED PRESS (Dec. 10, 2010), *available at* <http://www.wtop.com/?nid=213&sid=2070829>.

allowed by *Citizens United* accounted for \$85 million in all 2010 Senate races.”⁷³

Not only have corporations decided to spend more under the new *Citizens United* rule, they have started “funneling their money to trade associations such as the U.S. Chamber of Commerce or other groups that can air election ads, often without having to disclose their donors.”⁷⁴ Public advocate de Blasio’s analysis also made startling findings on anonymous donations—as of October 2010, “\$80 million [had] already been spent by groups with undisclosed donors this election cycle—nearly five times more than in 2006.”⁷⁵ This sort of spending shields a corporation’s interests—the shareholders and consumers have no idea what causes their funds are supporting. Craig Holman, a government lobbyist, stated:

The decision to invest corporate funds in an election is almost always solely that of the company CEO In publicly held companies, the CEO is under no obligation to get the consent of, or even inform, shareholders of how she or he is spending their money on politics. This is a new Wild West of unlimited and undisclosed corporate spending in our elections.⁷⁶

David Arkush, the director of Public Citizen’s Congress Watch division observed that “[t]he overwhelming majority of the corporate money flowing into the 2010 elections remains hidden from public view, laundered through scores of outside electioneering groups that are refusing to disclose their funding sources.”⁷⁷ In an effort to combat corruption, public advocate de Blasio convinced Goldman Sachs, Morgan Stanley, and JPMorgan Chase to keep their money out of 2010 elections; “[w]ith billions in their general funds, any of them would have been able to substantially tip the scales of virtually any congressional or Senate race with the equivalent of pocket change.”⁷⁸

These harmful effects that began immediately after the Court’s ruling in *Citizens United* may worsen in the future and may include potential racketeering actions by political candidates.

⁷³ *Id.*

⁷⁴ Kuhnhenh, *supra* note 70.

⁷⁵ Daniel Stone, *Coming Clean*, NEWSWEEK (Oct. 13, 2010), available at <http://www.newsweek.com/2010/10/13/when-corporate-strategy-meets-election-spending.html> (follow “View As Single Page” hyperlink).

⁷⁶ Press Release, Public Citizen, Unmasking a Small Slice of Independent Corporate Spending in the 2010 Federal Elections (Oct. 29, 2010) available at <http://www.commondreams.org/newswire/2010/10/29-12>. Public Citizen is a non-profit advocacy organization founded to represent consumer interests in Congress, the courts, and the executive branch.

⁷⁷ *Id.*

⁷⁸ Stone, *supra* note 75.

V. RACKETEERING LAW: A HISTORY

In 1970, Congress passed the Organized Crime Control Act to remedy the long-standing problem of legislating organized crime.⁷⁹ Part of this was the Racketeer Influenced and Corrupt Organizations (RICO) Act, contained in 18 U.S.C. § 1961, which deals with racketeering activity.⁸⁰ The most important element of § 1961 is the requirement of a pattern of activity, as many crimes other than actual racketeering can constitute a pattern of racketeering under this statute.⁸¹ The elements of the crime of racketeering itself are defined in 18 U.S.C. § 1951. This statute reads:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.⁸²

In order to constitute racketeering activity, the elements of both § 1951 and § 1961 must be met.

Title 18 U.S.C. § 1964 addresses a civil remedy for treble damages under the RICO Act.⁸³ This clause was overlooked by many after the initial passing of the RICO Act, but then caused a flood of litigation by unlikely parties in the early 1980s.⁸⁴ These cases involved private plaintiffs against defendant businesses, rather than against organized crime rings.⁸⁵

The RICO act was redefined in 1985 by the holding of *Sedima, S.P.R.L. v. Imrex, Co., Inc.*⁸⁶ The plaintiff here brought a long list of charges against the defendant, one of which was a RICO claim under § 1964 for civil treble damages; the plaintiff alleged a pattern of mail fraud.⁸⁷ The district court barred this claim for two reasons: first, because the defendant's actions had not previously been held in the trial court as mail fraud, and second, the plaintiff was not alleging any specific "racketeering injury."⁸⁸ The Supreme Court reversed this decision and remanded the case so the RICO claim could be

⁷⁹ Gregory M. Wasson, "Pattern of Racketeering Activity" *Under the Racketeer Influenced and Corrupt Organizations Act*, 10 AM. JUR. PROOF OF FACTS 3d 289 (1990).

⁸⁰ *Id.*

⁸¹ 18 U.S.C. § 1961 (2010).

⁸² 18 U.S.C. § 1951 (2010).

⁸³ 18 U.S.C. § 1964 (2010).

⁸⁴ Wasson, *supra* note 79.

⁸⁵ *Id.*

⁸⁶ *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

⁸⁷ *Id.* at 484.

⁸⁸ *Id.* at 481.

heard.⁸⁹ The Court held that just because criminal acts were making up the civil RICO claim does not mean the criminal burden of proof must apply, so there was no need to have a previous criminal conviction on the alleged charge.⁹⁰ If the wire fraud could be proved by a preponderance of evidence standard, the RICO claim would stand.⁹¹ The Court also stated that the plaintiff was not required to allege any certain type of injury.⁹² Once the plaintiff alleges each element of the RICO Act, the injury that follows from the commission of these acts is the only injury that must be shown.⁹³ This case set a low burden of proof for a private plaintiff alleging a RICO claim.

The validity and purpose of the RICO act was questioned in 1993 in *Reves v. Ernst & Young*.⁹⁴ Here, the Court stressed the importance of the “liberal construction” clause. Following 18 U.S.C. § 1961, there is a note that states “provisions of this title shall be liberally construed to effectuate its remedial purposes.”⁹⁵ The *Reves* court stated that “[t]his clause obviously seeks to ensure that Congress’ intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended.”⁹⁶ The Court held that the statute needs to be read in a flexible way to ensure that it covers all actions that Congress intended to protect against, but not more than that.

The holdings of these two cases show how the application of the RICO act has changed over time to include more types of cases and protect more against more types of crimes. The expansion of the law allows the elements of RICO to be defined broadly and applicable to the new plan of unlimited independent corporate expenditures allowed under the holding of *Citizens United*.

VI. THE ELEMENTS OF RACKETEERING

Like any criminal statute, the racketeering statute can be broken down to specific essential elements that must be present to constitute the crime. Two main elements must be present to form a racketeering action. First, the actor must obstruct, delay, or affect commerce.⁹⁷ And second, the actor must do this through robbery or extortion.⁹⁸ Some of these elements are explicitly defined within the statute, but these elements can be further explored through case law.

⁸⁹ *Id.* at 500.

⁹⁰ *Id.* at 491-93.

⁹¹ *Id.* at 491.

⁹² *Id.* at 497. This is lower than the criminal standard for the burden of proof, which requires charges to be proved beyond a reasonable doubt.

⁹³ *Id.* at 496.

⁹⁴ *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

⁹⁵ *Id.* at 183.

⁹⁶ *Id.*

⁹⁷ 18 U.S.C. § 1951 (2010).

⁹⁸ *Id.*

A. *The Obstruction, Delay, or Affect on Commerce*

Title 18 U.S.C. § 1951 defines the term commerce to mean:

commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.⁹⁹

This definition of commerce set forth in the actual statute is fairly inclusive. Case law can be used to show the standard that must be met to prove what constitutes an obstruction, delay, or affect upon this commerce. An obvious obstruction or effect on commerce would be a restriction upon the sale of goods or the transport of goods, but the courts in the past have required less action than that. Most circuits have held that a “de minimus” effect was a proper standard to constitute a violation,¹⁰⁰ but in *United States v. Jarabek*, the court held that the government only needed to show a “realistic probability that an extortionate transaction [would] have some effect on interstate commerce”¹⁰¹. An actual effect or obstruction of commerce need not be present, the affects just need to be foreseeable for the actor to have violated § 1951. The court reasoned that “the requisite interstate commerce nexus could be established if the jury found that, unless the victim gave in to extortionate demands, the victim’s business might have been hindered or destroyed.”¹⁰² Another court made a finding of affected commerce based upon the depletion of corporate funds. In *United States v. Gates*, the court held that the “extortion of money from an interstate business, thus depleting its funds” sufficed to show an effect upon interstate commerce.¹⁰³ The indirect effects of having less money to run the business would have had a long term effect upon the overall commerce involved in its operation.

B. *Extortionate Conduct*

For a complete violation of § 1951, there must also be an element of extortion. The statute defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”¹⁰⁴ The definition included in the statute explicitly states that there are two separate ways extortion can happen: first through threatened force, violence or fear, and second under color of official right.

⁹⁹ 18 U.S.C. § 1951(b)(3) (2010).

¹⁰⁰ *United States v. Smith*, 182 F.3d 452, 456 (6th Cir. 1999).

¹⁰¹ *United States v. Jarabek*, 726 F.2d 889, 901 (1st Cir. 1984). *See also* *United States v. Hathaway*, 534 F.2d 386, 396 (1st Cir. 1976).

¹⁰² *Jarabek*, 726 F.2d at 901. *See also* *Stirone v. United States*, 361 U.S. 212, 215 (1960).

¹⁰³ *United States v. Gates*, 616 F.2d 1103, 1105 (9th Cir. 1980). *See also* *United States v. Phillips*, 577 F.2d 495 (9th Cir. 1978).

¹⁰⁴ 18 U.S.C. § 1951(b)(2) (2010).

When analyzing extortion through the first method, one court considered fear of economic harm. In *United States v. Sturman*, the court held that “[f]ear of economic harm is an acceptable form of fear under section 1951.”¹⁰⁵ The term “under color of official right” means those acting in a position of authority, such as a public office. These two forms of extortion are mutually exclusive—the government does not have to show force, violence, or fear when proving extortion through color of official right. The court in *United States v. Williams* stated that “to date, eight circuits have directly held that [§ 1951] violations based on extortion by a public official need not include proof of threat, fear or duress.”¹⁰⁶ This court further stated that the definition of “under color of official right” is “consonant with the common law definition of extortion, which could be committed only by a public official taking a fee under color of his office, with no proof of threat, force or duress required.”¹⁰⁷ Another court held that the mere acceptance of payment could constitute the extortion element under § 1951. In *United States v. Butler*, the court held that “it is the position of the United States that such conduct, whether the solicitation of, or the mere acceptance of, illicit payments for the desired ‘official action’, was a clear abuse . . . falling within the proscriptions of the Act.”¹⁰⁸ Even if the actor is not soliciting payment, the acceptance of a payment for an act performed within his official capacity constitutes extortion. Extortion under color of official right can also be applied even if the actor is not currently holding public office while engaging in the illegal conduct. The court in *United States v. Salvitti* held that “to prove extortion the government need not prove that the defendant actually possessed the power to carry out his threats; it needs to prove only that the victims reasonably believed that he had such power.”¹⁰⁹ Under this ruling, if the victim reasonably believes that the actor could gain access to public office, his actions to gain payment could be considered extortionate. One court also applied § 1951 to candidates for public office. In *United States v. Meyers* the court held that if the candidates enter into a conspiracy to obtain property at a time before the election, and the conspiracy ends after the actors become public officials, § 1951 applies.¹¹⁰ This makes “under color of official right” a relative term that can be applied at any point of the election process that deals with the selection of a public official. In *United States v. Cerilli*, the defendants attempted to combat the § 1951 claim against them by considering the payments to be political contributions, and therefore valid under the First Amendment.¹¹¹

¹⁰⁵ *United States v. Sturman*, 49 F.3d 1275, 1281 (7th Cir. 1995). See also *United States v. Warner*, 292 F. Supp. 2d 1051 (2003) (applying the fear of economic harm standard).

¹⁰⁶ *United States v. Williams*, 621 F.2d 123, 124 (5th Cir. 1980). See also *Hathaway*, 534 F.2d at 393.

¹⁰⁷ *Williams*, 621 F.2d at 124.

¹⁰⁸ *United States v. Butler*, 618 F.2d 411, 417 (6th Cir. 1980).

¹⁰⁹ *United States v. Salvitti*, 464 F. Supp. 611, 616 (E.D. Pa. 1979). See also *United States v. Mazzei*, 521 F.2d 639, 644 (3d Cir. 1975).

¹¹⁰ *United States v. Meyers*, 529 F.2d 1033, 1036 (7th Cir. 1976).

¹¹¹ *United States v. Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979).

The court held that “the coercive solicitation of political contributions is within the realm of actions that are illegal under [§ 1951].”¹¹²

C. Intent

Because both civil and criminal charges can be brought under § 1951, intent becomes an issue. Some criminal charges require specific intent, while others have no intent requirement. When considering intent, the court in *United States v. Furey* stated that “[§] 1951 is only a general intent statute, not a specific intent type of statute. A general criminal intent is required, however.”¹¹³ The court further stated that a general intent to obtain property must be present, but a specific intent to affect commerce is not required.¹¹⁴

VII. RACKETEERING UNDER THE RICO ACT

Just as the elements of racketeering are explicitly defined under Title 18 U.S.C. § 1951, the elements for a pattern of racketeering are stated under Title 18 U.S.C. § 1962, which is the RICO Act. It states:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.¹¹⁵

¹¹² *Id.* at 421.

¹¹³ *United States v. Furey*, 491 F. Supp. 1048, 1061 (E.D. Pa. 1980). *See also* *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959).

¹¹⁴ *Furey*, 491 F. Supp at 1061.

¹¹⁵ 18 U.S.C. § 1962 (2010).

In order to understand how the statutory language of § 1951 fits in under the language of the RICO Act, § 1961 must be referenced. Section 1961 explicitly defines some of the key phrases used in the RICO Act. Section 1961 states:

1. “racketeering activity” means . . . any act which is indictable under . . . section 1951 (relating to interference with commerce, robbery, or extortion.) . . .
2. “person” includes any individual or entity capable of holding a legal or beneficial interest in property;
3. “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
4. “pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.¹¹⁶

Essentially, any series of racketeering actions can be used to form “racketeering activity” under this statute. In plain language, if someone obtains property through extortion that affects interstate commerce and uses this money to establish or operate an enterprise, he is acting in violation of section (a). Multiple racketeering actions that take place within ten years create a “pattern of racketeering activity.”¹¹⁷

VIII. USING RACKETEERING LAW TO FIND AND PUNISH POLITICAL CORRUPTION

Political corruption is not something that can easily be defined. An act considered completely corrupt by a voter may fall within the regular course of business for a public official.¹¹⁸ Corrupt acts can be broken down and “partitioned into the ‘public official’ involved, the actual ‘favor’ provided by the public official, the ‘payoff’ gained by the public official, and the ‘donor’ of the payoff and/or ‘recipient’ of the ‘favor’ act.”¹¹⁹ A study¹²⁰ has shown that a situation in which a legislator accepted a large campaign contribution in return

¹¹⁶ 18 U.S.C. § 1961 (2010).

¹¹⁷ PAUL BATISTA, *CIVIL RICO PRACTICE MANUAL* § 2.02 (3d ed. 2011).

¹¹⁸ John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definition and a Theory, or If Political Corruption Is in the Mainstream of American Politics Why Is it Not in the Mainstream of American Politics Research?*, 72 *THE AM. POLITICAL SCI. REV.* 974, 974 (1978). See generally *POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS* (Arnold J. Heidenheimer, ed., 1978).

¹¹⁹ Peters & Welch, *supra* note 118, at 976.

¹²⁰ *Id.* at 978. This study sent questionnaires to state senators in 24 states. The questions posed hypothetical situations and asked the senators to judge based on levels of corruption.

for voting a certain way on a bill would be considered corrupt by a majority of people.¹²¹ The fact that “the payoff is very direct and immediate”¹²² leads to a higher level of corruption, which seems to be generally accepted. It is probable that “if a campaign contribution were not involved, almost all [of the senators, rather than just most] would have seen the act as corrupt.”¹²³

Now that racketeering law under the RICO Act has been clarified, it can effectively be applied to the new donation rules of *Citizens United*. The major holding of that case, as previously stated, is that the statute banning independent corporate expenditures to political campaigns was a ban on speech and was unconstitutional.¹²⁴ The possibility of unlimited corporate expenditures may change the way politicians run their campaigns.

A recent study¹²⁵ has shown that candidates who gain large pools of money through donations have a statistically better chance at winning public office.¹²⁶ There have been findings that state “the higher the percentage of donations a candidate accepts from PACs [political action committees],¹²⁷ the more likely they are to win.”¹²⁸ Another study states that “it seems that effects are strongest when more money is spent.”¹²⁹ This has been viewed as a problem, especially when corporations are spending independently; this is the exact sort of spending that the majority opinion of *Citizens United* endorses. It has been found that “independent spending is seen as a problem that campaign reformers must correct. Independent expenditures represent special interests’ uncontrolled influence over both legislators and elections.”¹³⁰ These findings are not shocking—more money can be used to convey more complete information to the public. It allows for more presence in the media and a more extensive and active role on the political trail, leading to more voter contact by the candidate.

¹²¹ *Id.* at 979. This action was found to be corrupt by over 90 percent of the sample.

¹²² *Id.*

¹²³ *Id.* The fact that donations were involved seemed to rationalize the activity for some, making it more acceptable.

¹²⁴ *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010).

¹²⁵ Alexander, *supra* note 5, at 354. The specific study referenced is based upon all open seat House races for 1996, 1998, 2000, and 2002. These were chosen specifically because sitting Congress members usually have a strong force in deterring high-quality challengers. Competitive races also tend to encourage larger donations. All of the data used in this study was acquired online through the Center for Responsive Politics, at www.opensecrets.org or the Political Moneyline, at www.tray.com.

¹²⁶ Alexander, *supra* note 5.

¹²⁷ *See id.* Before independent corporate expenditures were unlimited, corporations formed together to donate through political action committees to support the candidate or party of their choice. These still currently exist; the donations are now just substantially larger.

¹²⁸ *Id.*

¹²⁹ Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 POL. RES. Q. 885, 888 (2002).

¹³⁰ *Id.* at 899.

Media coverage and campaign contact with the voters are two of the main factors that can affect changes in the electoral system.¹³¹ Having corporate money to accomplish these things during a candidate's campaign will give that candidate an advantage to control voter turnout. The media can be used to either positively or negatively charge the political atmosphere of a campaign; "quality news coverage may mobilize [the voter] while sensationalist tabloid television may turn off the electorate."¹³² Extensive contact with the voting population on the campaign trail, on the other hand, will usually always have positive effects. "[W]hen parties and candidates make personal contact with voters, it is assumed to have a positive influence."¹³³ A candidate's access to extra funds to structure his campaign will allow him to construct attack ads that might demobilize the opposing parties' voters, while adding the maximum amount of cities to his campaign trail to mobilize his own voters. Now that candidates will be able to obtain all of these things through money from corporations, they may begin structuring their platforms around issues that are most important to businesses.

The *Citizens United* case deals directly with media coverage during an election. The judges of the dissenting opinion believe that corporations will eventually take over the media coverage of elections. They state:

If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound. In the real world, we have seen corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.¹³⁴

This language shows that, following the majority's decision, there was a legitimate fear that corporate finance toward election media would damage the election process by affecting the voters' thoughts, behavior, and likelihood to vote.

A. Meeting the Racketeering Elements

In the current struggling economy, proposed legislation on corporate tax cuts, the addition or limitation of restrictions upon factory regulations, or provisions on employee healthcare can stifle or lengthen the life of a corporation. If a corporation has a questionable future, and the chances of it flourishing are dependent upon a candidate's proposed legislation, the directors may decide that donations in furtherance of that candidate's campaign will be in

¹³¹ Susan A. Banducci & Jeffrey A. Karp, *How Elections Change the Way Citizens View the Political System: Campaigns, Media Effects and Electoral Outcomes in Comparative Perspective*, 33 BRIT. J. POLITICAL SCI. 443, 448 (2003).

¹³² *Id.* at 446.

¹³³ *Id.* at 447.

¹³⁴ *Citizens United v. FEC*, 130 S. Ct. 876, 975-76 (2010) (Stevens, J., dissenting).

the company's best interest. It is situations like these where we could likely find potential racketeering actions.

To constitute the specific action of racketeering, the actions will only have to fulfill § 1951. To constitute a pattern of racketeering activity under the RICO Act, the actions will have to fulfill both the elements of §§ 1951 and 1962.

Under § 1951, the candidate must affect or delay commerce through extortion,¹³⁵ so the target company that he is seeking contributions from must be involved in interstate commerce. If the candidate is able to obtain funds from a corporation involved in interstate commerce, then commerce is affected under the holding of *Gates*.¹³⁶ Because the affect on commerce can be judged under a "de minimus" standard,¹³⁷ a very minimal action can fulfill this element of the racketeering statute. Even if no actual affect on the business can be found, the element can still be fulfilled if the court uses the "realistic probability" standard¹³⁸

When analyzing the extortion element, the question of whether the candidate will be subject to the "under color of official right" standard first needs to be answered. Under the holding of *Meyers*, this standard can be applied if the candidate accepts the money while he or she is a candidate and keeps the money after taking the position of public office.¹³⁹ It was also held, in *Salvitti*, that the actor must not have actually possessed the power to carry out the actions, but that the victim reasonably believed he had such power.¹⁴⁰ If the candidate is an incumbent with a strong presence, the parties donating may reasonably believe that he will hold office for another term. If the "under color of official right" standard is applicable, no evidence of force, violence or fear is required to prove extortion.¹⁴¹

If the court decides that the "under color of official right" standard is not applicable to the candidate, there may be another way to fulfill the extortion element. Under the holding of *Sturman*, fear of economic harm is an acceptable form of fear to sustain extortion.¹⁴² If the only reason the corporate directors donated to the candidate was in furtherance of proposed legislation that would save their business, then the extortion element can be fulfilled.

The government may still have a case against a candidate if he loses the election. The court in *United States v. Tropiano* held that attempted extortion

¹³⁵ 18 U.S.C. § 1951 (2010).

¹³⁶ *United States v. Gates*, 616 F.2d 1103, 1105 (9th Cir. 1980) (holding that the mere depletion of funds from an interstate business affects interstate commerce, because it leaves less money for the company to use in furtherance of its business).

¹³⁷ *See United States v. DiCarlantonio*, 870 F.2d 1058, 1060 (6th Cir. 1989).

¹³⁸ *United States v. Jarabek*, 726 F.2d 889, 901 (1st Cir. 1984) (stating that the government only needs to show that there is a realistic probability that the transaction could have an effect on interstate commerce).

¹³⁹ *United States v. Meyers*, 529 F.2d 1033, 1036 (7th Cir. 1976).

¹⁴⁰ *United States v. Salvitti*, 464 F. Supp. 611, 616 (E.D. Pa. 1979).

¹⁴¹ *United States v. Williams*, 621 F.2d 123, 124 (5th Cir. 1980).

¹⁴² *United States v. Sturman*, 49 F.3d 1275, 1281 (7th Cir. 1995).

that would affect interstate commerce is enough to violate § 1951.¹⁴³ Even if the candidate used his potential power to introduce proposed legislation to gain contributions and he never took office, his actions can still be held as racketeering.

In order to sustain a claim under the RICO Act, the candidate has to have committed two or more racketeering acts within the course of ten years of each other, and he has to invest the money obtained in the establishment or operation of his campaign.¹⁴⁴ Accepting two or more corporate contributions to be used in furtherance of his campaign within ten years of each other will constitute a violation of the RICO Act, then becoming organized crime.¹⁴⁵

These actions can create corruption or the appearance of corruption, which was exactly what the Federal Election Campaign Act was designed to prevent. The new rule that came from the holding of *Citizens United* can dismantle the integrity of our election system, which the government has been taking action to protect since 1907.

IX. PROTECTING THE ELECTORAL PROCESS: THE DISSENTING OPINION OF *CITIZENS UNITED*

In order to prevent racketeering activity from becoming a possibility, the rule from *Citizens United* that allows corporations to make unlimited independent expenditures to campaigns must be changed. The dissenting opinion of this case, written by Justice Stevens, suggests that the majority created this rule to dissolve irrelevant issues. He also proposes alternative holdings the majority could have applied that will not have the same ill effects of the sweeping constitutional change that was actually applied to decide the case.

A. *The Constitutional Arguments*

Justice Stevens suggests that the main issue in this case was “whether Citizens United had a right[. . .] to pay for broadcasts during the 30-day period [before elections].”¹⁴⁶ This should not have turned into an argument over First Amendment speech, because Citizens United was permitted to take part in electioneering communication under the Bipartisan Campaign Reform Act.¹⁴⁷ Not only was the majority’s First Amendment ruling unnecessary, it was also wrongly decided. The First Amendment protects the free speech of citizens; “[a]lthough [corporations] make enormous contributions to our society, [they] are not actually members of it.”¹⁴⁸

¹⁴³ *United States v. Tropiano*, 418 F.2d 1069, 1076-77 (2d Cir. 1979).

¹⁴⁴ *See* 18 U.S.C. § 1961 (2010) (This assumes that a campaign can be considered an “enterprise” under the definition given in § 1961 because it is said to include “any union or group of individuals associated in fact although not a legal entity.”).

¹⁴⁵ *United States v. Butler*, 618 F.2d 411, 417 (6th Cir. 1980) (holding that the acceptance of payment falls within the elements of racketeering).

¹⁴⁶ *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 930.

While the majority opinion stresses the importance of extending the free speech elements of the First Amendment to corporations, it neglects to analyze how this will impede upon the speech rights of the shareholders of that company. “When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill.”¹⁴⁹ The shareholders are citizens whom the First Amendment rights were undoubtedly designed to protect—one class’s rights should not be hindered to serve the rights of another class. The rule prior to *Citizens United* allowed corporations to fund independent expenditures through segregated funds that would not interfere with the rights of the shareholders.¹⁵⁰ If a shareholder disagrees with the spending of a corporation’s general treasury fund, the remedies available to them, like derivative litigation, are long, expensive processes.¹⁵¹ Their only other option is to sell their stock.¹⁵² This solution also may not be completely fair to the shareholder; “the injury to the shareholders’ expressive rights has already occurred; they might have preferred to keep that corporation’s stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like.”¹⁵³

Citizens United’s original claim included a facial constitutional challenge, but this claim was “expressly abandoned” in its summary judgment motion.¹⁵⁴ *Citizens United* changed its claim to an “as applied” challenge.¹⁵⁵ The plaintiffs never asked the Court to reconsider the holding of *Austin*, so the majority’s decision to explicitly overturn the *Austin* rule and change the standard may have been completely outside the scope of the case.¹⁵⁶ In the dissenting opinion, Justice Stevens states that “[e]ssentially, five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”¹⁵⁷

The courts generally disfavor facial challenges.¹⁵⁸ The facial challenge that was applied in *Citizens United* by the majority was also decided upon pure speculation.¹⁵⁹ The dissenting opinion states that if *Citizens United* had decided to raise a facial challenge, “the parties could have developed, through the normal process of litigation, a record about the actual effects of § 203, its actual

¹⁴⁹ *Id.* at 977.

¹⁵⁰ *McConnell v. FEC*, 540 U.S. 93, 204 (2003).

¹⁵¹ *Citizens United*, 130 S. Ct. at 978.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 931.

¹⁵⁵ *Id.* at 932-33.

¹⁵⁶ *Id.* at 932.

¹⁵⁷ *Id.*

¹⁵⁸ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

¹⁵⁹ *Citizens United*, 130 S. Ct. at 933.

burdens and its actual benefits, on all manner of corporations and unions.”¹⁶⁰ Facial challenges made based purely on speculation are obviously not as strong as those that can be backed up by actual evidence. Claims based on speculation “raise the risk of premature interpretation of statutes.”¹⁶¹ The dissenting opinion also states that while electioneering communication is a newer issue brought in by modern technology, it is not unique enough to require a facial challenge.¹⁶² Justice Stevens states that “the fact that a Court can hypothesize situations in which a statute might, at some point down the line, pose some unforeseen as-applied problems, does not come close to meeting the standard for a facial challenge.”¹⁶³ The majority also states that it must use this case to make a facial challenge, because if they continued to decide as applied challenges “that process would itself run afoul of the First Amendment.”¹⁶⁴ The Court today cannot be responsible for future judicial error—it cannot decide an issue that is not presently at hand to protect future decisions.¹⁶⁵ The majority’s last argument for making a facial challenge is that the plaintiffs’ “dismissal of the facial challenge does not prevent [the court] ‘from making broader pronouncements of invalidity in properly “as applied” cases.’”¹⁶⁶ While the analysis of this portion of the cited law review article is correct, the majority neglected to state that this Court used the same law review article for the exact opposite point in a previous case.¹⁶⁷ For all of the above reasons, the majority’s facial challenge that sparked the extension of First Amendment rights to corporations was unnecessary.

B. *Alternative Rulings*

Had the majority decided this case upon narrower grounds, which would have been more appropriate, three alternate holdings could have been considered. First, the majority could have held that the movie that Citizens United was attempting to distribute did not qualify as “electioneering communication,” therefore, the Bipartisan Campaign Reform Act would not apply.¹⁶⁸ Because the movie was being distributed through a video-on-demand program, and this type of technology was not main stream at the time the Bipartisan Campaign Reform Act was written, the Court could have made the argument that this was not the type of communication the Act was meant to regulate, and would have had the power to create a new standard for it.¹⁶⁹

¹⁶⁰ *Id.* (emphasis in original).

¹⁶¹ *Id.*

¹⁶² *Id.* at 934.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 935. See Richard Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000).

¹⁶⁷ *Citizens United*, 130 S. Ct. at 936. See *Gonzales v. Carhart*, 550 U.S. 124, 127 (2007).

¹⁶⁸ *Citizens United*, 130 S. Ct. at 937.

¹⁶⁹ *Id.*

Second, the majority could have expanded the rule for non-profit corporations to cover those that accept only a “de minimis amount of money from for-profit corporations.”¹⁷⁰ Citizens United is a corporation like this and is funded mostly through donations. Third, the majority could have just decided the case upon the “as applied” challenge that Citizens United claimed, rather than upon a facial challenge that they created.¹⁷¹ Justice Stevens states that the majority “could have easily limited the breadth of its constitutional holding had it declined to adopt the novel notion that speakers and speech acts must always be treated identically—and always spared expenditure restrictions—in the political realm.”¹⁷²

C. Stare Decisis

The majority opinion is also faulty because it violates the principle of *stare decisis*.¹⁷³ The dissenting judges argue that there was no reason for the *Austin* standard to be overturned. A case should only be overturned if the holding was “dead wrong in its reasoning or irreconcilable with the rest of our doctrine.”¹⁷⁴ The majority opinion states that relying on *Austin*’s ruling would “diminish the principle of adhering to that precedent.”¹⁷⁵ This argument is never further developed, and the majority opinion never explains why this holding is inconsistent with *stare decisis*. In overturning *Austin*, the Court also never addressed the holding of *McConnell*.¹⁷⁶ This case used *Austin*’s rationale—if the *Austin* rule was overturned, *McConnell* should have been overturned simultaneously.¹⁷⁷

One of the main reasons that the majority chose to overrule the *Austin* standard was because it created a ban on corporate political speech.¹⁷⁸ This is incorrect—the statute upheld in *Austin* did “not impose an absolute ban on all forms of corporate political spending.”¹⁷⁹ The statutes at issue in both *Austin* and *McConnell* allow corporations to spend for political purposes from segregated funds.¹⁸⁰ Shareholders also have unlimited spending power if they act outside the corporate form.¹⁸¹ The only type of corporate speech that was

¹⁷⁰ *Id.* See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986).

¹⁷¹ *Citizens United*, 130 S. Ct. at 937-38.

¹⁷² *Id.* at 938.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 939.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 940.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 942.

¹⁷⁹ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). See *McConnell v. FEC*, 540 U.S. 93, 204 (2003).

¹⁸⁰ *McConnell*, 540 U.S. at 203.

¹⁸¹ *Citizens United*, 130 S. Ct. at 943.

limited when Citizens United brought this action must fulfill all of the following elements:

- (1) broadcast, cable, or satellite communications; (2) capable of reaching at least 50,000 persons in the relevant electorate; (3) made within 30 days of a primary or 60 days of a general federal election; (4) by a labor union or non-MCFL, nonmedia corporation; (5) paid for with general treasury funds; (6) susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.¹⁸²

If the conduct in questions fails to meet even one of these elements, the speech is protected and cannot be regulated. These regulations on corporate communication are far from a complete ban on corporate speech.

After overturning the *Austin* rule, the majority's next argument is based upon the corporate identity. It held that "the Government cannot restrict political speech based on the speaker's [. . .] identity."¹⁸³ This holding by the majority is inconsistent with many previous cases in which the Court restricted speech based upon the speaker's identity.¹⁸⁴ In the past, the Court also created rules that directly regulate political expression.¹⁸⁵ These previous holdings make it reasonable for the Federal Election Campaign Act to regulate corporate speech without violating the First Amendment.

D. Potential Racketeering

Some of the reasoning in the dissenting opinion uses language that alludes to the possibility of racketeering in the future. When discussing the importance of the prevention of corruption, Justice Stevens states, "the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf."¹⁸⁶ This "special preference" he speaks of can come in many forms, but any form of reward in exchange for political spending can escalate into the solicitation of contributions through the extortionate measures discussed in Sections VI and VII. The dissenting judges also discuss

¹⁸² *Id.* at 944. (referring to the "Non-MCFL" standard set in *Mass. Citizens for Life*). See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

¹⁸³ *Citizens United*, 130 S. Ct. at 902.

¹⁸⁴ *Id.* at 945. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (restricting political speech of students); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (restricting political speech of prisoners); *Parker v. Levy*, 417 U.S. 733 (1974) (restricting the political speech of members of the military); *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n Letter Carriers*, 413 U.S. 548 (1973) (restricting the political speech of government workers).

¹⁸⁵ *Citizens United*, 130 S. Ct. at 946-47. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (allowing state-run broadcasters to exclude independent candidates from televised debates); *Burson v. Freeman*, 504 U.S. 191 (1992) (prohibiting the distribution or display of campaign materials near a polling place).

¹⁸⁶ *Citizens United*, 130 S. Ct. at 961.

the fluid nature of corruption, and how it may manifest in forms other than an action of plain bribery.¹⁸⁷ The Court further states that:

the influx of unlimited corporate money into the electoral realm also creates new opportunities for the mirror image of quid pro quo deals: threats, both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests.¹⁸⁸

This is exactly the sort of behavior that would increase the likelihood of racketeering conduct. The construction of legislation that is motivated by corporate dollars takes the focus of the government away from the citizens and turns it into a competition to please the wealthiest companies. Our political parties will become engaged in a legislative arms race designed to pump out as much favorable corporate legislation as possible.

The resulting effects on our election system that the dissenting opinion predicts are consistent with those that would flow from racketeering actions by candidates. The dissenting judges state that “the opinions of real people may be marginalized” and “they may lose faith in their capacity, as citizens, to influence public policy.”¹⁸⁹ This language coupled with the possibility of racketeering conduct indicate that, at the time of the *Citizens United* decision, the danger of racketeering was a potential problem that may adversely affect our election system. By negatively changing the opinion of the voters on the election system, their active participation in the elections will be chilled, which could eventually mean less action at the polls than ever before.

X. POTENTIAL CONGRESSIONAL ACTION AGAINST CORRUPTION

In order to combat the corruption created by the majority opinion of *Citizens United*, Congress can create stronger legislation on corporate spending. Other than a complete reversal of the *Citizens United* decision, this is the only thing that can help maintain electoral integrity. The Center for American Progress offers multiple congressional solutions to contain the current spending dilemma created by *Citizens United*.¹⁹⁰

First, Congress can create further legislation to require disclosure statements on political advertising by corporations.¹⁹¹ Currently, corporations are able to funnel their spending through other organizations that are not required to disclose their donors. If Congress creates legislation that will require disclosure, all corporate spending for elections will become public information. This will inform shareholders and consumers of where their money is being spent, while

¹⁸⁷ *Id.* at 962.

¹⁸⁸ *Id.* at 965-66.

¹⁸⁹ *Id.* at 974.

¹⁹⁰ Alex DeMots, *How to Address Corporate Political Spending*, CENTER FOR AMERICAN PROGRESS (Feb. 3, 2010), http://www.americanprogress.org/issues/2010/02/citizens_united.html.

¹⁹¹ *Id.*

informing voters of the political views of corporations.¹⁹² Requiring disclosure may affect a corporation's business; negative affects from the shareholders and consumers that disagree with a corporation's view may deter them from making large expenditures.

Congress can also make an effort to define and regulate coordinated spending.¹⁹³ The *Citizens United* ruling allows independent expenditures, but is silent on the subject of coordinated spending. Coordinated spending will allow the candidate to be involved with deciding how the contribution money is spent.¹⁹⁴ Putting further separation between the candidate and the corporation may directly prevent the potential racketeering conduct, because it will decrease the amount of pressure a candidate can put on a business by limiting the interaction between them. Making sure that political candidates and corporate spenders do not work together in constructing a campaign will reduce overall corruption.

Corporations can also be further regulated if they have an international status.¹⁹⁵ If a corporation is international rather than domestic, there is a possibility that foreign money can be used to finance the contributions.¹⁹⁶ The main holding of *Citizens United* rests upon the idea that First Amendment political speech rights should be extended to include corporations. While this is obviously a debatable decision in itself, there is little argument for extending First Amendment political speech rights to foreign nationals. By restricting corporations' spending to only domestic money, the amount a corporation can possibly donate will decrease, leaving less of a chance of potential future racketeering actions. If the corporation has less money to draw from, the candidates may be less inclined to structure a campaign favorable to the corporation in exchange for endorsement.

Enacting a shareholder protection plan will also decrease the amount of money a corporation has for donating to candidates.¹⁹⁷ If corporations offered the shareholders (the ultimate owners of the company) a choice between donating funds to support a specific candidate or party, and receiving a personal dividend, the shareholders rights will be protected.¹⁹⁸ This will also give the shareholder an option other than completely divesting in the company if he or she disagrees with the views of the board of the corporation.¹⁹⁹ If Congress enacts a plan like this one, the First Amendment rights of all parties involved will be protected, and the potential funding for political contributions will be lower, which will in turn lower the chances of corruption.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

The last, and probably most effective, move Congress can make to reduce corruption is to pass the Fair Elections Now Act.²⁰⁰ The Fair Elections Now Act is an act that will give candidates the choice to run their campaign without accepting any large corporate donations.²⁰¹ The passing of this act will completely eliminate the possibility of racketeering conduct. Under this bill, candidates will fund their own campaigns through small, local contributions.²⁰² Candidates will also receive Fair Elections funding if they are able to collect a qualifying number of smaller contributions.²⁰³ After meeting the qualifying number of contributions to receive funding, the candidates can continue to receive small contributions that will be matched by the Fair Elections Fund.²⁰⁴ Candidates that participate in the plan under the Fair Elections Now Act will also have an advantage by being granted lower campaign costs.²⁰⁵ If this Act is passed, the candidates who chose to cooperate with its plan will be running in a fairer and significantly less corrupt election. Choosing to be funded through a combination of smaller, local contributions and government dollars will mean that candidates will no longer be dependent upon expenditures from corporations; their main concern will be constructing a platform that will positively affect the voters.

XI. CONCLUSION

Racketeering law and election restrictions are two areas of law that are not typically connected. Previous to the landmark decision in *Citizens United*, the chances of finding racketeering within election law were probably very slim.

The corruption created by this new ruling is a fear that the government has been trying to combat for over a century.²⁰⁶ Not only will the effects of this new rule increase the appearance of corruption, this corruption may rise to a criminal level if racketeering action actually takes place. The ever-changing and expanding definition of racketeering under the Racketeering Influenced and

²⁰⁰ *Id.*

²⁰¹ FAIR ELECTIONS NOW, <http://www.fairelectionsnow.org/about-bill> (last visited Jan. 16, 2011).

²⁰² *Id.*

²⁰³ *Id.* Fair Elections funding differs depending upon whether the candidate is running for the U.S. House of Representatives or for U.S. Senate. In order to receive funding, House of Representative candidates must collect 1,500 contributions from their state and raise a total of \$50,000. The qualifying number of contributions a Senate candidate must receive is dependent upon the number of congressional districts within the state; they must collect 2,000 contributions, plus an additional 500 contributions for each district in their state.

²⁰⁴ *Id.* “Donations of \$100 or less from in-state contributors would be matched by four dollars from the Fair Elections Fund for every dollar raised.”

²⁰⁵ *Id.* “Participating candidates receive a 20% reduction from the lowest broadcast rates. Participating Senate candidates who win their primaries are eligible to receive \$100,000 in media vouchers per congressional district in their state. House candidates receive one \$100,000 media voucher.”

²⁰⁶ *See generally* Tillman Act of 1907, 34 Stat. 864-65 (1907) (preventing corruption was one of the main motives of the Tillman Act).

Corrupt Organizations Act shows us that including political activity in its list of offenses is not a far stretch—it is already actively being applied to many situations that were not intended in its passing. The immediate effects of this rule have already been seen in the political spending in the November 2010 midterm elections; these sorts of changes will likely take place in the next presidential election in 2012, but on a larger scale.

This corruption must be remedied. Until there is another situation controversial enough to reach the Supreme Court level, the decision in *Citizens United* cannot be overruled. Until then, it is imperative that Congress take measures to limit the amount of corruption that takes place in campaigns by putting as many restrictions as possible on expenditures by corporations. If no remedial measures are taken to counteract the majority opinion of *Citizens United*, the influx of donations and contributions into government elections will affect voter behavior and may change the outcomes, which will change the internal structure of the government. These changes by Congress must take place quickly, as members of Congress are also elected in public bipartisan elections. After reviewing the amount of changes that took place in the November 2010 midterm elections, we can see that this corruption trickles to every level of the government, meaning that if corruption by the new contribution rules has already reached a congressional level, the chance to regulate the problem through legislation may be too late.

The duty to regulate this rule can and should be left up to Congress. The dissenting opinion of *Citizens United* states a long held belief by the courts: “to say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.”²⁰⁷ The potential invasion of organized crime into the election system is only one danger that can result from the controversial holding in *Citizens United*. This rule creates an ultimate need for us to exercise the self-restraint written into the foundation of our Constitution. Short of a complete reversal of *Citizens United*, congressional action is the only thing that can preserve the election system that was intended to construct the core powers of the United States government.

²⁰⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 963 (2010) (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934)).