A RIGHT TO SPEAK AND SPEND: CITIZENS UNITED AND ITS CONSEQUENCES FOR OBJECTIVE JOURNALISM

Michael Ellement, Catholic University of America
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BY

MICHAEL ELLEMENT

The Supreme Court's decision in Citizens United changed much of modern campaign finance regulation. The Court relied on the First Amendment's Speech Clause in finding that corporate speakers, like natural persons, enjoy an unlimited right to disseminate information in support of a political candidate in the lead-up to a federal election. The decision likely has far reaching consequences for the future of campaign finance regulation, and the administration of elections across the country.

A further concern presented by Citizens United is the implication the decision may have on political information dissemination in general, beyond the effect it may have on any one given election. More specifically, what consequences will the Court's holding have on independent news gathering? This article puts forth two concerns for the future of journalism post-Citizens United.

2 Id. at 913.
3 See Molly J. Walker Wilson, Too Much of A Good Thing: Campaign Speech After Citizens United, 31 Cardozo L. Rev. 2365, 2387 (2010) (stating "[t]he Justices who make up the Citizens United majority have the power and the purpose to shape campaign funding in monumental ways over the next several decades. Their belief that unfettered corporate campaign speech benefits the electorate will drive future campaign finance Court decisions."). But see also Francis Bingham, Show Me the Money: Public Access and Accountability After Citizens United, 52 B.C. L. Rev. 1027, 1047-48 (2011) (Note) (stating "arguments predicting a hitherto unseen flood of corporate wealth in elections fall flat against the history of campaign finance regulations, the limited nature of section 203, the continuing operation of disclosure and disclaimer requirements, and the nature of money in politics.").
First, *Citizens United* blurred the line as to what the "press" is.\(^4\) Prior to *Citizens United*, press entities were traditionally exempt from campaign finance regulations because of their status as non-partisan information sources.\(^5\) This gave the press a unique status to participate in political process not enjoyed by other groups. Such a distinction has been eviscerated by *Citizens United*.\(^5\) Any corporation, whether it be an establish press agency, or a for-profit company having nothing to do with newsgathering, now has the equal right to disseminate unlimited amounts of advocacy for a candidate or political position in the time preceding an election.\(^7\)

Second, the decision in *Citizens United* allows for news organizations to contribute and advocate for a candidate separate and apart from their normal news coverage. A news corporation may now support, directly, a political candidate as a function of their corporate spending, while at the same time presenting itself to the public as an objective news source.\(^8\) While this concern may not be readily apparent—since news outlets may be wary of using their profits in support of a political candidate—currently most news outlets are owned by larger corporate parent companies, which do not have as their principle function news dissemination.\(^9\) These parent companies, armed with their new right to spend unlimited funds in support or political candidates, are less likely to respect values of journalistic objectivity sought by their subsidiaries engaged in newsgathering. The question becomes what is to occur if a parent corporation seeks to endorse a political candidate, while at the same time owning a news


\(^5\) Id.; See infra Part II.


\(^8\) See infra Part IV.

\(^9\) RON F. SMITH, GROPING FOR ETHICS IN JOURNALISM 4ed. 261 (1999).
organization that presents itself as an objective source of information? Such a structure necessarily calls into question journalistic values, and erodes public confidence in media.

Part I of this Article describes the historic development of media in the United States. Part II discusses campaign finance laws and their history, with special reference to how the press has been treated when such laws have been enacted. Part III reviews the Supreme Court's decision in *Citizens United*, with an emphasis on the Court's discussion of established media outlets. Part IV discusses the implications the Court's decision in *Citizens United* may have for journalistic objectivity and the public's perception of the media.

**I. Journalistic Values: Development of the Press and the Age of Big Media**

The state of American media has undergone transformations since its inception. The reformulation of how news is covered and disseminated is modified both by society's needs as well as the motives of those controlling news outlets.

**A. News In Early America: Mixing Journalism and Politics**

From the colonial era through the nineteenth century, American newspapers were often highly politicized publications. In fact, many newspapers were run by political parties and utilized as propaganda tools to push information. A prominent example of such news

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11 David T. Z. Mindich, *JUST THE FACTS HOW "OBJECTIVITY" CAME TO DEFINE AMERICAN JOURNALISM* 17 (1998). Mindich describes how newspapers dominated by party affiliation gained prominence during the American Revolution and were utilized by all major political parties through the first several decades of the nation's history. *Id.* The power of the mail was also of great importance to early distribution of information. A consequence of this reality was that many postmasters general became editors of newspapers, making their position highly political and influential. *Id.* See also Matthew A. Melone, *Citizens United and Corporate*
manipulation was the battles between the Jeffersonian Republicans and the Federalists—culminating with Thomas Jefferson's defeat of John Adams in the election of 1800.\textsuperscript{12} Beginning in the 1790s, Jefferson instructed followers to create a national newspaper that could be distributed throughout the states.\textsuperscript{13} The \textit{General Advertiser} and other Jefferson friendly publications were in distribution by the campaign of 1799, and used by Republican supporters to promote their political views.\textsuperscript{14} Following Jefferson's victory, disgruntled Federalists led by Alexander Hamilton launched the \textit{New York Evening Post} in 1801 with the sole purpose of criticizing the new Jefferson administration.\textsuperscript{15}

The trend of political factions owning media outlets dissipated beginning in the 1830s, when independent newspapers severed ties with political parties.\textsuperscript{16} Indeed, newspapers became less political altogether—limiting political coverage and, instead, choosing to focus on major events of the day (such as crime) as opposed to political thought.\textsuperscript{17} Much of this can be explained by the increased level of advertising that began to appear in newspapers in the latter half of the

\textit{Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?}, 60 DePaul L. Rev. 29, 98 n.13 (2010) (noting "Newspaper costs were the most significant campaign costs throughout the early 1800s.").

\textsuperscript{12} Nord, \textit{supra} note 10, at 398.

\textsuperscript{13} Nord, \textit{supra} note 10, at 398.

\textsuperscript{14} Nord, \textit{supra} note 10, at 398.

\textsuperscript{15} Nord, \textit{supra} note 10, at 392.


\textsuperscript{17} Mindich, \textit{supra} note 11, at 17. \textit{See also} HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 41-42 (1989) (noting that "newspaper content [from 1830-1870] began to focus on events, as opposed to political views. Furthermore, news categories increased, from foreign, political parties, and national government reporting, to include crime, sports, and local 'beats' such as the courts and police.").
The newspaper business became increasingly more profit based, leading to coverage of general matters of public interest and less politically motivated writings.19

**B. Independent Newsgathering: The Rise of Objective Models of Journalism**

Leaving behind the era of party control, journalists in the mid-1900s began to develop their own standards for ensuring objectivity in their reporting.20 The new era of news reporting was fiercely non-partisan.21 News agencies were not threatened by politicians, and journalists made it their duty to challenge political perceptions.22 This independent model of journalism

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19 Id. However, each political party continued to maintain at least one national newspaper, which were loyal supporters of the party platform, for several decades following. See Mindich, supra note 11, at 140 (stating that the Democratic Party was supported by the *U.S. Telegraph* and *Globe*, while the Whig’s were supported by the *National Intelligencer*).

20 Michael Schudson, *The Public Journalism Movement and Its Problems*, in *THE POLITICS OF NEWS THE NEWS OF POLITICS* 136-37 (Ed. Doris Graber, Denis McQuail, and Pippa Norris, 1998). The movement toward objectivity, as measured by professional codes of ethics, began in the 1920s. Id. at 136. Reporters remained distant from issues they were reporting on, and refrained from advocacy. Id. This model underwent a slight alteration in the 1960s, when reporters covering the Vietnam war saw it as their duty to take on an active role in reporting the war. Id. However, the model of independent newsgathering, apart from political control, continued through the 20th century. Id.


22 Walter Cronkite shared one example this model of independent journalism from his coverage of the presidential campaign of 1960. Walter Cronkite, *Reporting Presidential Campaigns: A Journalist’s View*, in *THE POLITICS OF NEWS THE NEWS OF POLITICS* 63 (Ed. Doris Graber, Denis McQuail, and Pippa Norris, 1998). Cronkite, in an interview with then candidate John F. Kennedy, inquired about the challenges Kennedy would face over his religion on the campaign trail. Id. Following the interview, Kennedy phoned the then CBS president—reminding him that Kennedy may soon have the authority to appoint the head of the Federal Communications Commission, who CBS depended on heavily. Id. CBS and Cronkite did not waiver, continuing their coverage of the campaign and Kennedy's religion. Id.
encouraged reporters and press agencies to serve the public by objectively reporting on issues of concern, while at the same time providing a forum for challenging cultural norms.  

Perhaps the epitome of the era of independent journalism is the publication of "The Pentagon Papers." The papers were part of a 7,000 page report, originally commissioned by Secretary of Defense Robert McNamara to study the United State's role in Indochina from World War II on. Daniel Ellsberg, a researcher who covertly copied the report while working for the Defense Department, released the papers to the New York Times. The Times began publishing the Papers in 1971. The documents were both embarrassing to the sitting President Richard Nixon, and a condemnation of defense polices going back to the Truman administration. The revelations contained in the reports detailed high levels of dissent by defense officials as to the wisdom of the war in Vietnam, and suggested untruthfulness by top government officials as to the success of the war effort.

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23 See generally A Free and Responsible Press, The Twentieth Century Fund Task Force Report for a National News Council, 56-62 (1973) (report analyzing standards the press should follow in pursuing objectivity and noting that the press must "recognize the forces at work to humanize institutions, expand consumer participation in the marketplace, and allow individuals in our mass society to preserve a personal franchise" in order to remain relevant). Some have urged that the press should solely concern itself with an objective resuscitation of events, rather than taking on even a minimal advocacy role. See Jim A. Kuyper, Press Bias and Politics How the Media Frame Controversial Issues 200 (2002) (stating "Although dangerous enough concerning everyday issues, when concerning controversial issues, this practice of advancing its own partisan interpretation of events over a neutral presentation of facts is especially dangerous, for the public needs an account of facts that is as objective as possible.").


25 Id.

26 Id. at 384-86.

27 Id.

28 Id.
After the *Times* began to publish the papers, the Nixon administration sued. A temporary restraining order was issued, and the publication halted. The *Washington Post* picked up where *The New York Times* left off and began publishing the papers. The conflict was eventually resolved by the Supreme Court, which held the restraint on publication the administration sought violated the First Amendment.

The Pentagon Papers example demonstrates the method of news dissemination prevalent in the latter half of the 20th century. Reporters were not beholden to a political party or political ideology. Rather, they saw their profession as holding an affirmative duty to disseminate information of public concern, and a responsibility to criticize powerful sources of authority.

### C. Making the News A Business: For-Profit Media in the 20th Century

At the beginning of the 20th, nearly all American newspapers were owned and produced independently by family run businesses. Modern day newspapers do not share this independence. Beginning in the 1980s, family owned newspapers were bought out by corporate investors who were less interested in publishing a quality newspaper and more interested in turning a profit. As advertising became a more profitable source of revenue, media

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30 Ellsberg, *supra* note 24, at 388-93.
33 *Id.*
35 *Id.* 263-64. As Smith puts it, "A Pulitzer Prize might be nice, but high annual yields were even nicer." *Id.* at 264. See also BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 4 (1983) (noting that by the early 1980s "[t]wenty corporations control[ed] more than half the 61 million daily
conglomerates saw an opportunity to invest in media and achieve wealth in advertising profits.\textsuperscript{36} Today, approximately eighty-percent of daily newspapers in the United States are owned by media chains.\textsuperscript{37}

The increased availability of television also played a large role in corporate control of media. As television sets became more popular, so did television news. Corporations saw an investment opportunity, particularly with the advent of twenty-four hour cable news coverage.\textsuperscript{38} Rupert Murdoch—an Australian born media mogul—went so far as to become a United States citizen, so that he could purchase television stations in the United States and not run afoul of Federal Communication Commission rules requiring station owners to be American citizens.\textsuperscript{39}

The purchase and control of these news companies led to concerns over who the news outlets were responsible to: the public, or advertisers and investors.\textsuperscript{40}

More recently, the trend in media ownership has been increasingly centralized. Large media corporations own the majority of the newspapers, radio, and television stations across the newspapers sold every day [and] more than half the revenues of the country's 11,000 magazines; [and] three corporations control[ed] most of the revenues and audience in television . . .).

\textsuperscript{36} A. David Gordon, John M. Kittross, Carol Reuss, Controversies in Media Ethics 219-32 (1996).

\textsuperscript{37} Smith, supra note 11, at 262.


\textsuperscript{39} Smith, supra note 11, at 268.

\textsuperscript{40} See Ted Turner, Monopoly or Democracy? The Washington Post, May 30, 2003 (observing that "Large media corporations are far more profit-focused and risk-averse. They sometimes confuse short-term profits and long-term value." and that further concentration of media in the hands of a few corporations may lead to corporations "abus[ing] [their] power by slanting news coverage in ways that serve their political or financial interests. There is always the danger that news organizations can push positive stories to gain friends in government, or unleash negative stories on artists, activists or politicians who cross them, or tell their audiences only the news that confirms entrenched views. But the danger is greater when there are no competitors to air the side of the story the corporation wants to ignore.").
These corporations are primarily non-media based. Rather, these corporations maintain their primary interest in other business endeavors. General Electric, whose primary business is dealing in small appliances, purchased NBC in 1986—only to sell a majority share in the company to cable giant Comcast in 2009. The Disney Corporation, whose theme parks and children's movies have been popular for decades, purchased ABC in 1995. The Westinghouse Corporation purchased CBS in 1995—only to be bought out by Viacom, a subsidiary of National Amusements, in 1999. This centralization of media outlets amplified existing concerns regarding journalistic objectivity, and the role investors play in the editorial process.

41 Id.
42 Id.
48 *See* Mark Crispin Miller, *What's Wrong With This Picture?*, THE NATION, January 7, 2002 (observing that parent corporations have encouraged their news outlets to push products of the parent company while on-air and, additionally, promote the programming of other non-news outlets that the parent corporation owns. As a example, Miller states that shortly after Viacom purchased CBS and CBS News, the Early Show was instructed to devote large segments of its show to recapping the events of the most recent episode of Survivor—a CBS/Viacom product.).
II. Campaign Finance And The Media

A full discussion of the history of campaign finance law is beyond the scope of this Article. However, a brief discussion of how press has been dealt with under campaign finance laws is warranted.

A. Campaign Finance And American Politics: Watergate Breeds Calls For Change

While efforts to control the amount of money in politics have existed throughout American history, the first successful attempt at passing sweeping campaign finance regulation came following the Watergate scandal. The scandal energized reform efforts, and renewed calls to regulate money in politics. The result was the creation of an "intricate statutory scheme adopted . . . to regulate federal election campaigns includ[ing] restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process."52

The Watergate reforms took particular account of the institutional press and their function in disseminating political information. As the Supreme Court recognized in its review of the law, "The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of

49 See Matthew A. Melone, Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?, 60 DePaul L. Rev. 29, 32 (2010) (noting that many states initially attempted to achieve fairness in elections by prohibiting corporate funding in the early nineteenth century).


effective political speech."\textsuperscript{53} Institutional press outlets were exempt from portions of the law relating to expenditures, thus permitting news outlets to editorialize on political candidates without running afoul of the new regulations.\textsuperscript{54} Whereas political candidates were prohibited from using certain funds to promote their candidacy on-air, press outlets were permitted to make endorsements or commentate on a political candidate.\textsuperscript{55}

\textbf{B. McCain-Feingold: A Renewed Push For Fair Elections}

In 2002, after a five year legislative battle,\textsuperscript{56} Congress passed the "Bipartisan Campaign Reform Act of 2002"—better know as McCain-Feingold.\textsuperscript{57} The Act was the first made campaign finance change since the post-Watergate reforms, and sought to fill in gaps that the previous legislation had left open.\textsuperscript{58} The Act's principle target was "soft money"\textsuperscript{59}—contributions made to influence state and local elections, which were left unregulated by previous campaign finance legislation.\textsuperscript{60} A separate provision of the Act prohibited corporations and labor unions

\textsuperscript{53} \textit{Buckley v. Valeo}, 424 U.S. 1, 19 (1976).

\textsuperscript{54} \textit{See Buckley v. Valeo}, 424 U.S. 1, 19 n.19 (1976) (stating "Institutional press facilities owned or controlled by candidates or political parties are also subject to expenditure limits under the Act."); \textit{see also Buckley v. Valeo}, 424 U.S. 1, 51 n.56 (1976) (noting "The Act exempts most elements of the institutional press, limiting only expenditures by institutional press facilities that are owned or controlled by candidates and political parties.").

\textsuperscript{55} Id.

\textsuperscript{56} \textit{See Melissa M. Smith, Glenda C. Williams, and Larry Powell, Campaign Finance Reform: The Political Shell Game} 6-7 (2010) (describing multiple versions of the bill and several votes in both houses of Congress before the final version was passed).


\textsuperscript{58} Smith, \textit{supra} note 9, at 6-7.

\textsuperscript{59} McCain-Feingold Act, Sec. 101.

\textsuperscript{60} \textit{See McConnell v. Fed. Election Comm'n}, 540 U.S. 93, 122-23 (2003) \textit{overruled by Citizens United v. Fed. Election Comm'n}, 130 S. Ct. 876 (2010); \textit{See also John M. de Figueiredo & Elizabeth Garrett, Paying for Politics}, 78 S. Cal. L. Rev. 591, 598-99 (2005) (stating "The soft money loophole allowed political parties to raise unlimited amounts of money from individuals and organizations to be used to support nonfederal election activities, build infrastructure, and
from using general treasury funds for advertisements in support of or in opposition to federal candidates.\footnote{McCain-Feingold Act, Sec. 203-04. This was the provision eventually found unconstitutional in \textit{Citizens United. See infra Part III.}} Other provisions regulated the sale of political advertising; modified contribution level limits; and enacted new disclosure requirements.\footnote{McCain-Feingold Act, Sec. 301-19.}

McCain-Feingold, like the Watergate reforms, made special exceptions for media outlets. While the Act prohibited "electioneering communication"\footnote{Defined as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office; is made within [sixty days of a primary election, or thirty days of a primary election] . . . ." McCain-Feingold Act, Sec. 201 (a) \textit{codified as} 2 U.S.C. § 434 (f)(3)(A) (2006).} by a corporation or union in the lead up to a federal election, the Act specifically exempted media corporations from the restriction.\footnote{McCain-Feingold Act, Sec. 201 (a) \textit{codified as} 2 U.S.C. § 434 (f)(3)(B) (2006).}

The exemption permitted any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate" and, additionally, allowed "a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum."\footnote{\textit{Id.} at § 434 (f)(3)(B)(i, iii).} As with the Watergate reforms, press outlets post McCain-Feingold were granted a distinct position to editorialize on political candidates. Additionally, with McCain-Feingold's ban on electioneering fund voter mobilization programs. Soft money was also available to fund political advertisements that did not expressly advocate the election or defeat of a particular candidate when parties produced such ads independently of any candidate's campaign. In addition, corporations, labor unions, and other groups could use their general treasuries directly to fund issue advertisements developed independently of any candidate or federal party. Use of soft money by political parties exploded in 1996, and in the 2000 election it was a primary focus of party fundraising.

\footnote{McCain-Feingold Act, Sec. 203-04. This was the provision eventually found unconstitutional in \textit{Citizens United. See infra Part III.}}
communication, press outlets were now granted a unique ability compared other corporations or labor unions.\textsuperscript{66} While a typical corporation was prohibited from engaging in electioneering communication in the lead up to an election, press outlets could do so—and do so in an unlimited fashion.

III. The Supreme Court and McCain-Feingold: From \textit{McConnell to Citizens United}

The Supreme Court's history in reviewing campaign finance regulation is contentious, the entirety of which is too lengthy for substantial discussion here. This Article proceeds by giving primary attention to the cases interpreting McCain-Feingold, and then provides a discussion on the Court's several opinions in \textit{Citizens United}.

A. \textit{McConnell v. FEC: The Whip Makes His Case}

In 2003—only a little more than a year after the McCain-Feingold campaign finance reform changes were enacted—Senate Majority Whip Mitch McConnell, a long-time opponent of campaign finance regulations, reached the Supreme Court with a First Amendment challenge to the changes.\textsuperscript{67} He was joined by, among others, Congressman Ron Paul, the Republican National Committee, the National Rifle Association, the Chamber of Commerce, the American Civil Liberties Union, and the AFL-CIO—all challenging various portions of the bill.\textsuperscript{68}

A fractured Court—resulting in eight separate opinions, including multiple opinions by two justices—analyzed the challenged sections of the bill, upholding several and finding others unconstitutional.\textsuperscript{69} Notably, the Court held the soft money restrictions on political parties and

\textsuperscript{66} Korman, \textit{supra} note 4, at 5.
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.}
candidates were constitutional,\textsuperscript{70} and the prohibitions on electioneering communication by corporations and unions from general treasury funds in the prescribed time period were also constitutional.\textsuperscript{71}

**B. FEC v. Wisconsin Right to Life, Inc.: The Issue Advocacy Exception**

Four years following the decision in \textit{McConnell}, the Court again considered McCain-Feingold's ban on electioneering communication.\textsuperscript{72} The case presented an as-applied challenge to the law brought by a nonprofit advocacy organization, Wisconsin Right to Life.\textsuperscript{73} The addition of Chief Justice Roberts and Justice Alito to the Court led many to speculate on the future of campaign finance regulation.\textsuperscript{74} Sure enough, the two were the deciding votes for upholding the law.\textsuperscript{75}

Writing only for himself and Justice Alito, Chief Justice Roberts wrote what became the controlling opinion in the case.\textsuperscript{76} Roberts treated \textit{McConnell}'s precedent as binding, and therefore upheld the restrictions on electioneering communication generally.\textsuperscript{77} However, Roberts

\textsuperscript{70} \textit{Id.} at 188-89.
\textsuperscript{71} \textit{Id.} at 194.
\textsuperscript{73} \textit{Id.} at 456-57.
\textsuperscript{74} Adam Liptak, \textit{Alito Vote May Be Decisive In Marquee Cases This Term}, \textsc{The New York Times}, February 1, 2006 available at http://query.nytimes.com/gst/fullpage.html?res=9A06EEDC1F3FF932A35751C0A9609C8B63 &pagewanted=all; \textit{see also} Robert Barnes, \textit{Roberts Court Moves Right, But With a Measured Step}, \textsc{The Washington Post}, April 20, 2007 available at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/19/AR2007041902675.html (summarizing Court’s decision on an abortion case during Justice Alito’s first term and speculating what the addition of the two justices may mean for the future of important precedent, including campaign finance laws).
\textsuperscript{75} \textit{Wisconsin Right To Life}, 551 U.S. 476-82 (opinion of Roberts, C.J., and Alito, J.).
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
further considered the as-applied challenge brought by Wisconsin Right to Life.\textsuperscript{78} In Roberts's view, the ban on issue advocacy by a non-profit corporation enacted by McCain-Feingold violated the First Amendment.\textsuperscript{79} Specifically, Roberts referenced the Court's decision in \textit{Buckley} as standing for the proposition that the government may regulate election communication that "prevent[s] corruption [or] the appearance of corruption."\textsuperscript{80} According to Roberts, the non-profit issue advocacy by Wisconsin Right to Life did not raise this concern.\textsuperscript{81} As Roberts' opinion stated, "[i]ssue ads like WRTL's are by no means equivalent to contributions, and the \textit{quid-pro-quo} corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech."\textsuperscript{82}

\textbf{C. Citizens United: Overruling Precedent}

In 2009, the Court considered a challenge by a non-profit membership corporation, Citizens United, which sought to release a 90-minute documentary critical of then Senator and presidential candidate Hillary Clinton.\textsuperscript{83} Originally, the Court was set only to consider an as-applied challenge by Citizens United to the documentary.\textsuperscript{84} However, after hearing oral

\textsuperscript{78} \textit{Id.} at 477-78.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 478 (quoting \textit{Buckley v. Valeo}, 424 U.S. 1, 45 (1976)).

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 478-79. Three Justices would have went further, and found the restrictions on electioneering communication facially unconstitutional, but joined in the judgment striking down the law as-applied to non-profit issue advocacy groups. \textit{Id.} at 483-504 (Opinion of Scalia, J., joined by Kennedy, J., and Thomas, J.)

\textsuperscript{83} \textit{Citizens United v. Fed. Election Comm'n}, 130 S. Ct. 876, 886-87 (2010). The documentary would be available as video-on-demand, meaning the subscribers of particular cable packages would be able to watch the documentary at any time at no additional charge. \textit{Id.} at 887. Citizens United additionally planned to advertise the documentary by running commercials containing clips of the film on broadcast and cable television. \textit{Id.}

\textsuperscript{84} \textit{See} Brief for Appellant, \textit{Citizens United v. Fed. Election Comm'n}, 130 S. Ct. 876, at i, \textit{available at} 2009 WL 61467 (describing question presented as "[w]hether the prohibition on
arguments on the as-applied challenge, the Court ordered re-argument and supplemental briefing to answer whether the Court should overrule McConnell and find facially unconstitutional McCain-Feingold's ban on electioneering communication.\textsuperscript{85}

\textbf{1. Majority Opinion: Justice Kennedy}

Rejecting the government's position that the case could still be decided on narrow grounds, the majority in \textit{Citizens United} found that a facial consideration of the law was appropriate.\textsuperscript{86} The three members of the Court who voted to find the law facially unconstitutional in \textit{Wisconsin Right To Life} maintained that position, and were joined by Chief Justice Roberts and Justice Alito, who now took the position that the First Amendment required the striking down of the ban on electioneering communication in its entirety.\textsuperscript{87}

The majority based its holding on the nature of the restriction. As Justice Kennedy's opinion stated "The law before us is an outright ban, backed by criminal sanctions . . . [t]hese prohibitions are classic examples of censorship."\textsuperscript{88} Justice Kennedy made clear that the fact that the speech originated from a corporation did not make it any less worthy of First Amendment

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\textsuperscript{87} \textit{Id.} at 913.

\textsuperscript{88} \textit{Id.} at 897. Justice Kennedy included several examples of advocacy that would fall within the restrictions of the law, "The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech." \textit{Id.}
protection.89 Citing to the Court's opinion in *First Nat. Bank of Boston v. Bellotti*,90 Justice Kennedy stated "political speech does not lose First Amendment protection 'simply because its source is a corporation.'"91

Justice Kennedy additionally invoked the example of media corporations in dismissing two of the government's principle arguments for upholding the ban on electioneering communications. First, Justice Kennedy dismissed the government's reliance on the antidistortion rationale, a principle recognized by the Court in *Austin v. Michigan Chamber of Commerce*.92 The antidistortion rationale holds that a government maintains a compelling interest "in preventing 'the corrosive and distorting effects 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.'"93 Justice Kennedy dismissed this as a justification for the ban on electioneering communication, stating the effect of the principle would have "dangerous, and unacceptable, consequence[s]" for media corporations.94 Namely, Justice Kennedy recognized that most, if not all, media outlets today are corporations.95 According to Justice Kennedy, if the government's reasoning under the antidistortion rational were to hold, the government could limit the speech of these press outlets simply because of their

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89 Id. at 899. Nor did Justice Kennedy find persuasive the government's argument that a corporation could form a political action committee and speak through the committee. Id. at 897 (noting burdensome nature of forming a political action committee).
91 *Citizens United*, 130 S. Ct. at 900 (quoting *Bellotti*, 435 U.S. at 783).
93 *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 660).
94 Id. at 905.
95 Id.
While Justice Kennedy recognized that press entities were currently exempt from such restrictions under existing law, he maintained there was no existing "precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."97

Secondly, Justice Kennedy dismissed the government's argument that the ban on electioneering communication protected the shareholders of the corporation from their profits being used to fund political speech.98 On this point, Justice Kennedy again invoked the example of media corporations, noting that this reasoning would "allow the Government to ban the political speech even of media corporations. . . . Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. . . . Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech."99

2. Concurring Opinion: Chief Justice Roberts

Chief Justice Roberts, along with Justice Alito, joined the majority opinion in full, but wrote separately to address the issue of stare decisis.100 Although noting that the principles of

96 Id.
97 Id. Justice Kennedy additionally noted the change in media ownership, and the methods by which media is distributed in the modern era. He indicated his belief that the press exemption contained in McCain-Feingold resulted in unfairness to corporations who did not own media outlets. Id. at 906. Justice Kennedy was troubled that the exemption allowed large corporations with varying interest, who also happened to own a media outlet, to take advantage of the exemption by using their media outlets to speak on matters that advance their overall corporate interests, while at the same time denying the same ability to speak to corporations that do not control an established media outlet. Id.
98 Id. at 911.
99 Id.
100 Id. at 917 (Roberts, C.J., concurring).
deference to prior decisions and constitutional avoidance were appropriate goals for the Court to pursue, Chief Justice Roberts viewed the case as presenting an unavoidable constitutional question that required the Court to overrule its prior decision in *Austin.*

Chief Justice Roberts additionally made reference to media corporations, and the consequence of *Austin*’s holding that corporate political speech is deemed less protected than speech originating from natural persons.* His opinion, like Justice Kennedy’s, took little solace in the fact that media corporations were currently exempt from these restrictions. Rather, Chief Justice Roberts wrote off the media exemption as "simply a matter of legislative grace" and maintained it made no constitutional difference "that the law currently grants a favored position to media corporations" given the "danger[s] inherent in accepting a theory that would allow government restrictions on their political speech."

### 3. Concurring Opinion: Justice Scalia

Justice Scalia, joined by Justices Thomas and Alito, joined the Court’s opinion but wrote to address Justice Stevens' dissent—specifically on the issue of the original understanding of the First Amendment. Justice Scalia maintained that, as a historic matter, there was no evidence to suggest that corporations were not entitled to free speech protections.

Justice Scalia additionally engaged in an analysis of the First Amendment's Press Clause in support of his argument that corporations, like natural persons, deserved speech rights.

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101 *Id.* at 918 (Roberts, C.J., concurring).
102 *Id.* at 923 (Roberts, C.J., concurring).
103 *Id.*
104 *Id.*
105 *Id.* at 924 (Scalia, J., concurring).
106 *Id.*
107 *Id.* at 927 (Scalia, J., concurring).
Specifically, he stated that the Press Clause has always been understood to provide protections to publishers—many of whom are for-profit businesses. Justice Scalia stated "the notion which follows from the dissent's view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind."  

4. Dissenting Opinion: Justice Stevens

Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, concurred in part and dissented in part. Justice Stevens rebutted the majority's premise that the government was prohibited by the Constitution from making distinctions on speakers based on their corporate identity. In his view, Congress had historically been permitted, for over one-hundred years, to regulate the use of corporate funds in the electoral process. Given the corrosive nature of corporate money in politics, and the dangers unlimited electioneering communication may produce for democracy, Justice Stevens would have held that the government maintains a compelling interest in regulating such speech.

Justice Stevens further addressed the majority's concern for press outlets. His opinion stated that McCain-Feingold "exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the

108 Id.
109 Id. at 928 (Scalia, J., concurring).
110 Id. at 929 (Stevens, J., concurring in part, dissenting in part). The concurrence portion of Justice Stevens' opinion was limited to his joining Part IV of the majority opinion, which upheld the disclosure requirements of McCain-Feingold. Id. at 931. Justice Thomas also wrote separately to address the disclosure requirements of McCain-Feingold, and stated that it was his view that the disclosure requirements violated the First Amendment. Id. at 979-80.
111 Id. at 930 (Stevens, J., concurring in part, dissenting in part).
112 Id. (citing Tillman Act of 1907, ch. 420, 34 Stat. 864).
113 Id. at 929-30, 946-47 (Stevens, J., concurring in part, dissenting in part).
institutional press in sustaining public debate."\textsuperscript{114} In Justice Stevens view, the press exemption provided ample safeguards to ensure that the voices of neutral press agencies were not compromised.\textsuperscript{115} This made the majority's striking down of the entire statute, rather than considering an as-applied challenge, inappropriate.\textsuperscript{116}

**IV. The Consequences Of *Citizens United* For Journalistic Objectivity**

The Supreme Court's decision in *Citizens United* presents two primary concerns for journalistic objectivity. On one end of the spectrum, the press now has a less powerful voice because of the abrogation of the press exemption. On the other end of the spectrum, the new right granted to corporate speakers post-*Citizens United* raises questions of who is controlling the message of news distributors.

**A. The End of the Media Exception: The Press is No Longer Special**

Prior to *Citizens United*, campaign finance laws recognized the inherent differences between media outlets and other for-profit corporations.\textsuperscript{117} Namely, media outlets could editorialize on political candidates in the lead up to an election without restriction.\textsuperscript{118} Other corporations were restricted in the manner in which they could use funds to make similar

\textsuperscript{114} Id. at 943 (Stevens, J., concurring in part, dissenting in part).

\textsuperscript{115} Id.

\textsuperscript{116} Id. Justice Stevens additionally maintained that corporations could still speak by establishing a political action committee and raising funds through the committee in support of its speech. Id. This rebutted the majority's claim that the restrictions in the law amounted to a total ban on speech. Id.

\textsuperscript{117} McCain-Feingold Act, Sec. 434 (f)(3)(B)(i, iii); see also *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 943 (2010) (Stevens, J., concurring in part, dissenting in part) (stating that McCain-Feingold enacted the press exemption while taking into account "the unique role played by the institutional press in sustaining public debate").

\textsuperscript{118} Id.
statements and broadcasts.\textsuperscript{119} The exemption can be seen as being rooted in the First Amendment Press Clause which, by its very nature, recognizes the unique interest the institutional press has in society.\textsuperscript{120}

The result of this distinction granted media outlets a unique position.\textsuperscript{121} They were able to speak when others were not—creating a special place for media in electoral politics.\textsuperscript{122} It served Congress’s goal in limiting the amount of money influencing politics, while at the same time recognizing the important role that press outlets play in the electoral process.

Such a distinctions is eviscerated following \textit{Citizens United}. All corporations now have the same ability to speak on election matters—including in support of a particular candidate—and spend an unlimited amount of funds to do so.\textsuperscript{123} A corporation whose primary goal is profit

\begin{itemize}
  \item \textsuperscript{119} McCain-Feingold Act, Sec. 201 (a).
  \item \textsuperscript{120} It is true that the Court has refused to take an expansive view of the Press Clause, instead concluding that the Free Speech Clause provides ample protections for press and non-press alike. David A. Anderson, \textit{The Origins of the Press Clause}, 30 UCLA L. Rev. 455, 458 (1983). Indeed, the \textit{Citizens United} majority stated “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” \textit{Citizens United v. Fed. Election Comm’n}, 130 S. Ct. 876, 905 (2010) (quoting \textit{Austin v. Michigan Chamber of Commerce}, 494 U.S. 652 (1990) (Scalia, J., dissenting). Still, it should seem obvious that the inclusion of the Press Clause in the First Amendment is an indication of the Founders respect for press agencies. \textit{See} Justice Potter Stewart, \textit{“Or of the Press”}, 26 Hastings L.J. 631, 635 (1975) (stating "The publishing business is, in short, the only organized private business that is given explicit constitutional protection."). Although this does not answer the question of whether the campaign finance structure in McCain-Feingold was valid, it at least lends support for a statutory distinction between press and non-press outlets.
  \item \textsuperscript{122} \textit{Id.}
\end{itemize}
through manufacturing now has the same ability as a traditional news outlet to editorialize on matters of political concern.\textsuperscript{124}

The consequences of this change are not yet known. However, the end of the press exemption is problematic. The exemption played a vital role in furthering Congress's interest in maintaining fair elections, while ensuring the press received a special ability to editorialize on election matters. By removing this distinction, the Court in \textit{Citizens United} changed the face of modern political information. Shell Oil now has the same right to speak as the Washington Post; Sony the same ability as National Public Radio; and the Teamsters Union the same voice as CNN. While it is doubtless that these corporations play an important role in the lives of Americans, it should also be uncontroversial to say that they contribute to the political process in a much different, and more self-interested way, than established media outlets.

\textbf{B. Corporate Control of Media: Can the Press Remain Objective?}

The consequence of the Court's decision in \textit{Citizens United} has implications for any corporation seeking to enter the political debate in support of a candidate for office. Of critical importance is the effect the decision may have on media corporations.

\textsuperscript{124} Justice Kennedy's concern over who benefits from the press exemption is certainly warranted. As he pointed out in his majority opinion in \textit{Citizens United}, most media outlets today are owned by corporations who maintain interests in other commercial endeavors. \textit{Citizens United v. Fed. Election Comm'n}, 130 S. Ct. 876, 906 (2010). This had the potential of allowing a corporation to establish as one of its subsidiaries a media outlet, solely for the purpose of advancing a political position that aligned with their other business interests. \textit{Id.} A more substantive discussion on media ownership, and the potential for corruptive practices by media outlets owned by corporations, is found below. \textit{Infra} Part IV B. However, on the issue of the press exemption, it is important to address Justice Kennedy's concern. Justice Kennedy is right to point out the potential for scrupulous corporations to take advantage of the press exemption. But, the majority's remedy of removing any distinction between institutional press outlets and corporations does not follow the logic of that concern, nor remedy it. In fact, removing any distinction between press and non-press only amplifies the concern, as it permits corporate interests to directly influence the political process without restriction.
Media ownership is currently dominated by corporate control.\textsuperscript{125} Gone are the days of family owned newspapers. Today, large corporations own the majority of news outlets.\textsuperscript{126} Moreover, many of the corporations that maintain interest in press outlets have varying interests in other for-profit businesses.\textsuperscript{127}

While many have noted the potential conflict in for-profit corporations maintaining media outlets,\textsuperscript{128} few have analyzed the effect of that reality post-\textit{Citizens United}. This Article raises a particular concern in the area of corporate media ownership in the post-\textit{Citizens United} era—specifically the issue of journalistic objectivity.

\textit{Citizens United} granted corporations the ability to directly support candidates for office in the lead up to an election through the use of electioneering communication.\textsuperscript{129} Although it was always true that campaign finance restrictions permitted press entities to support candidate's political positions,\textsuperscript{130} it was equally true that the parent corporations of media companies were subject to the restrictions of campaign finance regulations. These restrictions, namely the ones contained in McCain-Feingold, prohibited non-media corporations from directly supporting candidates in the restricted time period before an election.\textsuperscript{131} Following \textit{Citizens United}, the

\begin{itemize}
  \item \textsuperscript{125} See supra Part I C.
  \item \textsuperscript{126} Smith, supra note 9, at 262 (noting increased ownership of press outlets by a few wealthy corporations; see also supra Part I C.
  \item \textsuperscript{127} See supra Part I C.
  \item \textsuperscript{128} See Smith, supra note 9, at 262; Bagdikian, supra note 35, at 4 (analyzing increased control of media by corporations); Ted Turner, \textit{Monopoly or Democracy?} \textsc{The Washington Post}, May 30, 2003 (noting that the further control of media outlets by a few corporations has consequences for idea exchange).
  \item \textsuperscript{130} See supra Part II (discussing the press exemption in modern campaign finance laws).
  \item \textsuperscript{131} McCain-Feingold Act, Sec. 201 (a) \textit{codified as} 2 U.S.C. § 434 (f)(3)(A) (2006) (defining electioneering communication as "any broadcast, cable, or satellite communication which . . .
\end{itemize}
parent companies of media corporations may now enter the political realm in a way they were previously prohibited. Should they choose to exercise this new power at increased levels, it will present difficulties in trusting media outlets owned by these parent corporations, and call into question their objectivity.

Suppose, for example, a manufacturing corporation that owns a national television network chooses to support a particular candidate in the hopes that the candidate's election will serve their business interests. They decide to purchase advertisements on their own and on other networks in support of that candidate. It is not hard to imagine that the corporation's interest may influence the press outlet's coverage of that candidate. Nor is it inconceivable to presume that the public will recognize this conflict, leading to a diminished confidence in press outlets.

Similar conflicts regarding news programming decisions have been recognized with regard to other business interests. Post-Citizens United, political support for a candidate is yet another business decision. If it is in a corporation's best interest, they are likely to support a candidate. One can expect that if they do, they will utilize the tools at their disposal—including press outlets they own—to achieve an economic end. The consequence is the erosion of public confidence in a press they have traditionally understood to be objective and truth-seeking, and not profit motivated.

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refers to a clearly identified candidate for Federal office; is made within [sixty days of a primary election, or thirty days of a primary election] . . .."

132 See Mark Crispin Miller, What's Wrong With This Picture?, THE NATION, January 7, 2002 (stating that parent corporations often make programming decisions based on their broader business interests).
C. The Dual Effect of *Citizens United*: Would the Pentagon Papers Happen Today?

The release and publication of the Pentagon Papers was a high-water mark in modern journalism. The Pentagon Papers case demonstrates the need for an objective and established press, not beholden to any political party or office. Further, the case describes a model of independent, advocacy driven journalism that allowed important challenges to government authority come to light. The success in communicating this information to the American people resulted from two conditions. First, both *The New York Times* and the *The Washington Post* were trusted as established and objective news sources. While both papers were certainly not immune from criticism and charges of bias, it is fair to say that they were by and large trusted to report honestly on issues of importance. This established credibility built by the papers created the environment necessary to permit the release of information that was all at once incredible and devastating—your government has lied to you, and fellow citizens have died as a result. Second, both papers were independent, and not beholden to a larger organization. While the *Times* and the *Post* were themselves corporations, and therefore had corporate interests to be concerned with, there primary business was news.

These two conditions have been altered in recent years, both for the *Times* and the *Post* as well as the majority of news outlets across the country. Although it would be a mistake to suggest that the Court's holding in *Citizens United* created this change, it is correct to say that the decision exacerbated it. The press is now a less trusted as an objective source of information.

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133 See supra Part I B.
134 See supra Part I B.
135 See supra Part I B.
136 See supra Part I B.
With the advent of new media technology, the established press is further diminished as critical outlet for news. The elimination of the press's unique voice in electoral politics that follows after the Court's decision in *Citizens United*, lessens the authority of established media further. Similarly, the ownership of media corporations by non-media parent companies has changed the nature by which reporters make publication decisions. The decision in *Citizens United* continues this trend by making it possible for the non-media parent companies of media corporations to enter the political debate in new ways, while at the same time dictating the publication decisions of their media subsidiaries.

With the combination of these changes, it is important to consider whether important journalistic decisions, like the publication of the Pentagon Papers, would have occurred in the modern era of journalism. While this Article does not suggest a definitive answer to that question, it is clear that the decision in *Citizens United* is, at the very least, likely to negatively impact the two conditions that made the release of the Papers successful: press outlets that are trusted by the public, and objective journalists free from constraint.

V. Conclusion

The Supreme Court's decision in *Citizens United* has consequences that go beyond the campaign finance area. Namely, the decision has the potential to adversely affect the manner in which politics are covered by the media. The end of the press exemption and the increased ability for corporations owning media outlets to enter into electoral politics raises serious concerns over who controls the public debate, and how the public should view the established press.

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138 See supra Part I C.
139 See supra Part IV B.