The Originalist Route to SuperPACs

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I. Bipartisan Campaign Reform Act (2002)

a. Section 203: Prohibition of Corporate and Labor Disbursements for Electioneering Communications

The goal of the Bipartisan Campaign Reform Act (BCRA) sought to prohibit, “Corporate and Labor Disbursements for Electioneering Communications.” Applicable electioneering communication meant an electioneering communication made by a corporation or labor union or by “any other person using funds donated by any entity,” whether it be a corporation or a labor union.\(^1\) This statute generated much controversy, as some saw it as a restriction on free speech. Another, less controversial point was the disclosure requirement, which essentially required that all expenditures for political speech made by corporations, labor unions, or independent groups be disclosed to “the appropriate government agency,” which was often the Federal Election Commission.\(^2\)

Numerous Senators – Republicans and Democrats alike – expressed support for the bill, which they felt would begin to curb the amount of influence that corporations had in elections. For example, BCRA cosponsor, Senator Russell Feingold remarked of the bill, “This is a modest step, it is a first step, it is an essential step, but it does not even begin to address, in some ways, the fundamental problems that exist with the hard money aspect of the system.”\(^3\) Thus, it seems that Senator Feingold would be willing to go beyond the limitations of BCRA in restricting corporate political speech. Additionally, Senator John Kerry remarked,

“Despite the ever-increasing sums spent on campaigns, we have not seen an improvement in campaign discourse, issue discussion or voter education. More money does not mean more ideas, more substance or more depth. Instead, it means more of what voters complain about most. More 30-second spots, more negativity and an increasingly longer campaign period.”

Finally, BCRA cosponsor John McCain stated that if labor unions and corporations were prohibited from making campaign expenditures there would be a sharp decrease in the number of negative attack ads. Additionally, he stated, “If you demand full disclosure for those who pay for those ads, you are going to see a lot less of [negative attack ads] . . . .” The late Senator Paul Wellstone called such negative attack ads “poison politics.” Clearly, there was substantial concern over the number of negative attack ads that had become part of campaign advertising. However, a very prominent theme in the legislative debates was the amount of money spent on political campaigns. Senator Patty Murray opined, that the first order of reform ought to be “less money in politics.” The late Senator Ted Kennedy also felt strongly about the issue of the money being spent in campaigns, “The enormous amounts of special interest money that flood our political system have become a cancer in our democracy.” Finally, Representative James Langevin stated, “[L]arge sums of money drown out the voice of the average voter.”

The concern that corporations, labor unions, or independent groups might drown out the voice of the average voter was evident in both the House of Representatives and the Senate. Additionally, both Republicans and Democrats expressed this concern; support for BCRA’s passage was not limited to one political party. A little over a year after BCRA was signed into law, the Supreme Court upheld the Constitutionality of BCRA’s limitation on the expenditures of corporations and labor unions in political campaigns in *McConnell v. Federal Election*

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Over a decade earlier, the Supreme Court upheld the constitutionality of a Michigan state statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office. Thus, in the nearly twenty years leading up to the landmark *Citizens United v. Federal Election Commission* decision, the Supreme Court upheld state and federal statutes that limited or prohibited corporations from spending money in political campaigns.

**II. Prior Jurisprudence: *Austin’s Antidistortion Rationale and Its Adoption by McConnell***

The court took up a case regarding a state statute limiting corporate expenditures during a political campaign in *Austin v. Michigan State Chamber of Commerce*. In that case, the Court expressed concern that if corporations were allowed to spend an unlimited amount of money on political campaigns, there would be a tremendous potential for a distortion of the views of political candidates and their stances on various issues. It is worth noting that the Court upheld the Michigan statute restricting corporate funds supporting a political candidate even though it determined that such expenditures were in fact political speech and thus would fall under the protection of the First Amendment. Simply because the Chamber was a corporation did not “remove its speech from the ambit of the *First Amendment*.“ Thus, as the late Justice Marshall opined, “[t]o determine whether Michigan’s restriction on corporate political expenditures may constitutionally be applied. . . [it must be first ascertained] whether [the statute] is narrow

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13 Id at 1391-1393.
14 Id.
15 Id at 1396.
tailored to serve a compelling state interest. The Court went on to find that it was narrowly tailored, holding, “We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views.” Thus, despite this high burden, the Court held that the statute was not violative of the First Amendment.

Over thirteen years later, the constitutionality of BCRA was challenged in McConnell. The statutes were very similar; one key difference was that the statute at issue in Austin was a state statute, while the statute at issue in McConnell was a federal statute. The result in McConnell was very similar to the one in Austin: the Court found that the government had a compelling interest in restricting political speech by corporations and labor unions due in large part to the amount of money to prevent the actual corruption threatened by large financial contributions. Clearly, the Court felt that this potential for corruption expressed in McConnell and the potential for distortion expressed in Austin sufficed to meet a compelling interest.

a. The Concerns of the Dissenters in Austin and McConnell

It should be noted that the Court was not unanimous in its decisions in Austin and McConnell. In Austin, three justices, Anthony Kennedy, Antonin Scalia, and Sandra Day

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16 Id at 662. The compelling interest standard is a very high standard. If that standard is met, then the statute must also be narrowly tailored to meet that interest. Of course, this is the standard for any rights deemed to be fundamental. This standard was first suggested by the Court in United States v. Carolene Products Co. Thus, in this case, the government bears a heavy burden in arguing for the law to be upheld, since the statute restricted a fundamental right: freedom of speech. See United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).
17 Id at 660.
18 Id at 668-669.
O’Connor, all dissented from the majority opinion authored by Justice Thurgood Marshall.\textsuperscript{20} Justice Scalia, writing in dissent, stated that the Court had effectively made an “Orwellian announcement” and had endorsed “the principle that too much speech is an evil that the democratic majority can proscribe.”\textsuperscript{21} Such a principle, “is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the ‘fairness’ of political debate.”\textsuperscript{22} He further explained that the majority incorrectly overruled Buckley v. Valeo, explaining that “prohibiting overt advocacy for or against a political candidate satisfies a ‘compelling need’ to avoid ‘corruption’ is easily dismissed.”\textsuperscript{23}

Additionally, Scalia argued that if “persons and groups desir[ed] to” influence the political process, they will be able to do so using expenditures that skirted the restriction on express advocacy” in the hopes of electing or defeating a candidate. He further argued, echoing the language in Buckley, that a belief to the contrary would “naively underestimate the ingenuity and resourcefulness of persons and groups.”\textsuperscript{24} Ultimately, Scalia believed that the right to engage in political expression is in fact a fundamental right that can be applied to natural persons and corporations.\textsuperscript{25} Thus, the statute would presumably have to be narrowly tailed to meet the compelling governmental interest, assuming the interest is compelling. Justice Scalia, however, makes clear that the goal of restricting corporate political speech itself is not a compelling

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\item \textsuperscript{21} Austin v. Michigan Chamber of Commerce, 110 S. C.t 1391, 1408 (1990).
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.} at 1410. In Buckley, the Court held that placing ceilings on campaign expenditures was unconstitutional. Buckley v. Valeo 424 U.S. 1, 20 (1976).
\item \textsuperscript{24} \textit{Id.} at 1411.
\item \textsuperscript{25} \textit{Id.} at 1412.
\end{itemize}
interest. Since this the interest was not compelling, he argued, it would make no difference whether or not the law was narrowly tailored to serve the goal. Hence, any law passed with this goal, under Scalia’s analysis, would not pass constitutional muster because the government does not have any (emphasis added) interest in restricting the political speech of corporations. Additionally, in a separate dissent, Justice Kennedy opines, “There is no reason that the free speech rights of an individual or an association of individuals should turn on the circumstance that funds used to engage in the speech come from a corporation.” Clearly, there was serious concern by the dissent that by limiting the political speech of corporations, the government would be effectively restricting the speech of individuals or groups of individuals simply because they were members of a corporation.

The McConnell case saw four justices dissent from the majority holding that the government did in fact have a compelling interest in restricting corporate expenditures on political campaigns and that the BCRA was sufficiently narrowly tailored to meet that interest. In dissent, Justice Kennedy stated, “The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide

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26 Id. at 1413.
27 Id.
28 Id. at 1422.
30 The Court found that the statute was “narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption: those contributions to state and local parties that can be used to benefit federal candidates directly. Further, these regulations all are reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anti-corruption interests to be served. We conclude [the statute] is a closely-drawn means of countering both corruption and the appearance of corruption. Id. at 167. Of course, the part of the BCRA the Court is speaking of is § 323, which seeks to ban “soft money” that was being used in political campaigns. The Court, however, also upheld the provision restricting corporate expenditures on political speech dealing with funds for “communications that expressly advocate the election or defeat of a clearly identified candidate.” Id. at 191. The later provision’s constitutionality would serve as the central issue in the case of Citizens United v. Federal Election Commission.
for themselves which entities to trust as reliable speakers.”

Furthermore, he opined, “Government cannot be trusted to moderate its own rules for suppression of speech. The dangers posed by speech regulations have led the Court to insist upon principled constitutional lines and a rigorous standard of review.” Justice Kennedy’s highlighting of the need for such a rigorous standard of review demonstrates the concern he and his fellow dissenters had for the majority’s holding that the government was justified in restricting political expenditures by corporations and labor unions, effectively preventing corporations from engaging in political speech directed at electing or defeating a political candidate.

Justice Kennedy particularly took aim at the “generic favoritism or influence theory articulated by the Court” in the majority opinion. He indicated that individuals could favor “any given action;” and that it is impossible to prohibit political loyalty by representatives to their constituents or by constituents to their representatives. Ironically, this was a principle stated by James Madison in Federalist Paper #10, when he stated “air is to fire, as liberty is to faction.” Curiously, Justice Kennedy does not use the language of Federalist Paper #10 in his dissenting opinion. While Justice Kennedy wrote for the losing side, his dissenting opinion

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31 Id. at 286.  
32 Id. at 288. The standard of review of which Justice Kennedy speaks is the compelling interest standard; if that is the standard, then the statute must also be narrowly tailored to meet that interest.  
33 Id. at 296. In dissent, Justice Kennedy claims the Court in its majority opinion cited “common sense as its foundation for its definition of corruption.” Id. at 297. He asserts, however, that “favoritism and influence are not avoidable in representative politics. It is in the nature of the elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” Id. at 296-297.  
34 Id. at 296.  
35 Id.  
36 Federalist Paper #10. This principle essential means that individuals in a democratic society will naturally have certain opinions and gravitate to groups with certain views based on interest or belief. Id.
would eventually consist of a large part of his majority opinion in *Citizens United*, which effectively reversed *McConnell*.

There was substantial concern by Justice Kennedy that members of Congress felt that BCRA was merely a first step toward restricting the effects of big money donors on political campaigns.\(^{37}\) Thus, under Justice Kennedy’s analysis, not only is BCRA’s provision restricting corporate expenditures unconstitutional, but also, to uphold its constitutionality could lead to further restrictions on political speech. In essence, Justice Kennedy seems to think that any restrictions on speech – whether such restriction are on corporations or labor unions – would give rise to a slippery slope in which the government would be free to slowly and steadily restrict speech.\(^{38}\) Thus, any sort of restriction on speech must be given extremely high levels of constitutional scrutiny in order to prevent an erosion of this right.\(^ {39}\) The majority, however, seemingly agreed with Congress’ findings and upheld BCRA’s provision restricting corporate expenditures as constitutional. In essence, the Court found that Congress had identified a problem in the political system and had chosen a remedy which they believed would limit

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\(^{37}\) As previously noted, many Senators and Representatives (Republicans and Democrats alike) felt that BCRA was only the beginning. For example, Justice Kennedy specifically notes the statements of Sen. Feingold, who calls the bill’s passage “a modest step...a first step” and Rep. Doggett, who stated, “if [BCRA] has any defect, it is that it does too little, not too much.” Id. at 288.

\(^{38}\) Alan Dershowitz, the Felix Frankfurter Professor of Law at Harvard Law School, seems to agree with this principle. He has stated, “No government agency should be permitted to punish or censor freedom of expression” and to do so would amount to being a “dangerous and slippery slope, incompatible with the First Amendment.” Dershowitz, Alan. *Can Speech be Limited for Public Workers? A Dangerous Slippery Slope.* New York Times. 1-20-2011.

\(^{39}\) Steve Simpson, a senior attorney at the Institute for Justice, which filed a brief on behalf of *Citizens United*, stated, “The only way to avoid this slippery slope [of restricting speech] is to start treating freedom of speech as an inalienable right, not a privilege that the government can restrict as it sees fit. He further felt that the Supreme Court’s decision in *Citizens United* was a “critical step in the right direction” since the restriction on corporate speech was overturned. Simpson, Steve. *Stop the Slippery Slope of Speech Bans.* 9-8-2009. Of course, the result in *Citizens United* ultimately found that the government had no interest in restricting speech. *Citizens United*, 130 S.Ct. 876, 913.
corruption. Ultimately, over the strong objections of the dissenters, the Court deferred to Congress on the issue of restricting corporate speech during a political campaign.

The dissent, while acknowledging that Congress is entitled to affix remedies to certain issues, expressed concern that Congress had created an unconstitutional remedy, even if they had not deliberately done so. Of course, any remedy proscribed by Congress is subject to judicial review and can be struck down if it is deemed unconstitutional. The majority in *McConnell*, however, did not find that the BCRA’s provisions limiting the speech of corporations and labor unions were unconstitutional. In fact, they found felonious criminal penalties to be appropriate for corporations, labor unions, or other interest groups who broadcasted a political advertisement within sixty-days of an election. Clearly, the 5-4 decision in *McConnell* upholding BCRA’s prohibition on campaign expenditures was very contentious. Hence, it comes as no surprise that the Court later revisited the issue in *Citizens United v. Federal Election Commission*.

### III. Originalism as a Method of Constitutional Interpretation

It is worth noting, that neither *McConnell* nor *Austin* mentioned any method of Constitutional interpretation, whether: originalism, original intent, or original interpretation.  

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40 It is interesting to note that one of the Senators on “whom the Government relies to make its case” readily admitted the pressure of “appeasing soft money donors derives from the Members’ solicitation of donors, not from those donors’ otherwise giving to the party.” *McConnell* 540 U.S. 93, 303 (2003). Hence, the pressure seemingly comes from the Members asking the donors for money, not from the donors trying to give money to the Members and “buying votes.”

41 Id. at 339.

42 Of course, the Supreme Court has had this power since the landmark *Marbury v. Madison* decision, where the Court held that Congress could not expand the original jurisdiction of the Supreme Court because to do so would violate the Constitution. See *Marbury v. Madison* 5 U.S. 137, 177-180 (1803).

43 See *McConnell* 540 U.S. 93. Justice Kennedy uses the hypothetical of an environmental group broadcasting an advertisement within sixty days of an election that would inform the public of a Member of Congress’ support for a measure that would allow logging in national forests and ask that the public protest their impending vote. Such an advertisement would be a felony. *McConnell* 540 U.S. 93, 287 (2003). The dissent finds this provision to be quite unsettling.

44 See *McConnell* 540 U.S. 93 and *Austin* 494 U.S. 652.
Both the majority and the dissenting opinions in *Citizens United*, however, spent a significant amount of time discussing whether or not the BCRA would pass constitutional muster if scrutinized under originalist interpretation. The fact that both sides used originalism to make arguments to support their claims shows that originalism has become a significant method of constitutional interpretation not only by academics, but also Supreme Court Justices.

Such use of originalism by the Justices would have seemed improbable ten years before the decision in *Citizens United* was announced. This is due to the fact that there was widespread beliefs among academics that originalism was dead, having been defeated as being a plausible method of constitutional interpretation in the 1980s. Nevertheless, over ten years before the Court’s decision in *Citizens United*, there were claims among academics that originalism was “the prevailing approach to constitutional interpretation.” It should be noted that by 1999, originalism had seemingly evolved. Originalists during the 1980s and early 1990s would have proscribed to the belief that the subjective intentions of the framers were to be the guiding principle in interpreting the constitution. The shift has thus been from attempting to determine

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45 See *Citizens United* 130 S. Ct. 876.

46 Barnett, Randy. *originalism is Dead; Long Live Originalism.* 45 Loy. L Rev. 611 (1999). Edwin Meese and Robert Bork, both noted and outspoken originalists during the Reagan Administration, stated that the Constitution ought to be interpreted “according to the original intentions of its framers.” This view was trounced by many academics, who felt that originalism was not a reasonable method of Constitutional interpretation because ascertaining the intentions of the framers was “practically impossible.” Additionally, to attempt to apply those intentions to current controversies before a court was even more difficult. *Id.* at 611-612. Furthermore, other academics demonstrated that to use originalism to interpret the Constitution would not be in accordance with the intentions of the framers because the framers “did not believe such an interpretive strategy to be appropriate.” Powell, H. Jefferson. *The Original Understanding of Original Intent.* 98 Harv. L. Rev. 885, note 4 (1985).

47 *Id.* at 613. Another academic who posited that originalism ought to be the prevailing method of Constitutional interpretation was Keith Whittington. He argued that the Constitution ought to be interpreted according to the understandings made public at the time of its drafting and ratification. See Whittington, Keith. *Constitutional Interpretation: Textual Meaning, Original Intent, & Judicial Review.* Kansas University Press. P. 262 (1999).

48 *Id.* at 611-612.
the original intentions of the framers, “to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”

Some scholars have labeled this evolution from “original intent” originalism to “original meaning” originalism as moving from “Originalism 1.0” to “Originalism 2.0.” As previously mentioned, as early as 1997, Justice Scalia stated that he strongly believes in this method of constitutional interpretation. Given that a sitting Supreme Court Justice has long believed in this method of constitutional interpretation, it is clear that this method is quite plausible and has a certain amount of credibility. One other justice who has not been shy about being an originalist is Justice Clarence Thomas. In addition, Justices Samuel Alito and Chief Justice John Roberts both have been called originalists by academics. The originalist justices currently on the Court subscribe to the “original meaning” originalism, not the “original intent” originalism advanced by former Attorney General Edwin Meese during the 1980s. Hence, the Court has four justices who consider themselves originalists; this number is the highest that it has been since originalism was posited as a method of constitutional interpretation in the 1980s. Obviously, this development is particularly significant because the number of originalists on the Court could lead to originalist decisions being reached more frequently.

49 Id. at 621. Justice Antonin Scalia subscribes to “original meaning” originalism. Stating that he looks for a “sort of objectified intent—the intent that a reasonable person would gather from the text of the law...it is the law that governs, not the intent of the lawgiver,” Scalia, Antonin. A Matter of Interpretation: Federal Courts and the Law. Princeton University Press. P. 17 (1997).


52 See Biskupic, Joan. American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia. Sarah Crichton Books. New York. (2009). The author notes that while Justice Scalia could not convert any of his colleagues on the Court to adopt his originalist views, both Chief Justice Roberts and Justice Alito have originalist leanings that have given the Court four justices who subscribe to the idea of originalist interpretation. Id.

53 This was known as “Originalism 1.0,” where one would look to the original intentions of the framers of the constitution. “Originalism 2.0” calls on individuals to look to the original meaning of the constitution at the time of its adoption. See Barnett, Randy. Originalism is Dead, Long Live Originalism. 45 Loy. L. Rev. 611-614. (1999).
IV. Practical Problems Concerning the Implementation of Originalism

Given that originalist interpretation of the constitution could lead to overturning several long-standing precedents due to those precedents conflicting with such an interpretation of the constitution, there is great concern that applying originalism is impractical and could be very disruptive to the status quo. Additionally, applying originalism without regard to weighing the value of precedent could lead to undesirable results by overturning well-established precedent. For example, “depending on one’s reading of the Constitution’s original meaning, an originalist might be required… to reverse Brown v. Board of Education.” Thus, there are clear instances where applying originalism would simply be impractical, if not impossible. Critics of originalism are quick to point out this seemingly irreconcilable problem with originalism and precedent. It is clear, however, that there is some sort of a balancing test used by members of the judicial branch.

One such individual is self-proclaimed originalist Stephen Markman, a Michigan State Supreme Court Justice, who expresses a strong need to “reconcile originalist jurisprudence with stare decisis” by considering a few precepts. First, the burden of proof rests on “the party seeking to overturn precedent because precedent reflects existing law and the status quo.” Second, an originalist understanding of a “court’s ‘judicial power’… reinforces these views.”

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55 McGinnis, John and Rappaport, Michael. *Originalism and Precedent*. 34 Harv. J.L. Pub. Pol'y 121, 122. The authors argue that precedent and originalism are in fact compatible. *Id.* at 122. They further state that the Constitution treats precedent as federal common law. Hence, following precedent does not displace the higher law of the Constitution. It merely governs how the judiciary is to say and decide what the law is. *Id.* at 123-124.
56 *Id.* at 122.
57 *Id.* at 121.
58 Markman, at 112.
59 *Id.* Markman further believes that a judge is “obligated to demonstrate some reasonable measure of institutional humility” when interpreting the law “that may have their pedigree in past judicial decisions and have withstood the scrutiny of ensuing generations of judges . . . Earlier decisions deserve deference.” *Id.*
60 *Id.*
For example, “there are approving references to precedent, . . . in the Federalist Papers when [they address] the role of the judiciary.”\(^{61}\) Third, “a court must not unnecessarily unsettle the law.”\(^{62}\) Fourth, a judge must recognize other “historical constraints upon the exercise of judicial power: to do ‘justice under law.’”\(^{63}\) Fifth, “in confronting the parallel legal universes of originalism and stare decisis, an originalist judge may be legitimately susceptible to the criticism that he can be selectively originalist, committed to its precepts when they serve his interests, and committed to different precepts when those serve his interests.”\(^{64}\) Sixth, “the tension between originalism and stare decisis does not pose a dilemma exclusive to originalism.”\(^{65}\) It is natural and inevitable that “a similar tension” will arise “with regard to any judicial philosophy that posits any standards at all.”\(^{66}\) Lastly, each judge ought to submit himself to “external standards in deciding what a proper construction of the law requires” and submit themselves “to standards in determining when that construction must be tempered by the requirements of stare decisis.”\(^{67}\) Such standards “are hardly mechanical, and necessarily involve judgment and discretion,” however, “so does the exercise of judicial power generally.”\(^{68}\) He ultimately states that “any

\(^{61}\) *Id.* at 113.

\(^{62}\) *Id.*

\(^{63}\) *Id.* at 113-114. A judge must be away of their limited authority under our system of “separated powers” and should thus only say, “what the law is, rather than what it ought to be.” *Id.* at 114.

\(^{64}\) *Id.* at 115. Such “criticism poses valid concerns, for an intermitten originalist is no originalist at all.” *Id.* Thus, might some originalists merely be originalists when it suits their particular beliefs?

\(^{65}\) *Id.*

\(^{66}\) *Id.* at 115-116. Justice Markman further argues that though some critics of originalism may say that originalism leads to more pronounced tension between itself and stare decisis, this is merely “because the standards of originalism are more rigorous and more genuinely binding than those which purportedly characterize alternative judicial philosophies.” *Id.* at 116.

\(^{67}\) *Id.* at 117.

\(^{68}\) *Id.* at 117. While serving on the Michigan Supreme Court, Justice Markman heard the case of *Robinson v. City of Detroit*, which involved the court considering the parameters of civil liability for governmental agencies and police officers when a police chase resulted in injuries or death to a person other than the driver of the fleeing vehicle. The court held the police owed a duty to innocent passengers, but owed no duty to passengers who are themselves wrongdoers whether they help bring about the pursuit or encourage flight. Second, the court held that the city of Detroit is entitled to judgment as a matter of law because one cannot reasonably conclude under a narrow reading of the motor vehicle exception to governmental immunity, under the relevant statute, that plaintiffs’ injuries resulted from the operation of the police vehicles. *Robinson v. City of Detroit*, 613 N.W. 2d 307,
serious judicial philosophy needs judicial standards;” such standards may conflict with stare
decisis.\textsuperscript{69}

One academic originalist who believes strongly in having a balancing test is Professor
Lee Strang of the University of Toledo. He posits that in order for an originalist to overrule
precedent, three factors should be considered. First, how much of a deviation from original
meaning is the precedent? Second, would overruling the precedent substantially undermine the
rule of law? Third, even if the precedent is wrong, does it establish a just result?\textsuperscript{70} Professor
Strang also notes that a common criticism of originalism is that to strike down long-standing
precedents would upset the rule of law. Thus, the second prong should be strongly considered
when deciding whether or not to overrule precedent.\textsuperscript{71} Interestingly, Professor Strang readily
admits that originalist judges are usually vehemently opposed to having any sort of balancing test
when issuing their decisions.\textsuperscript{72} Hence, to expect an originalist judge or justice to use a
balancing test to reach an originalist result seems potentially problematic. It is interesting,
however, that both some justices and some academics alike feel that there should be some sort of
balancing test for originalists when determining whether or not to overrule precedent. More
specifically, both agree that stare decisis should be strongly considered when deciding a matter
of constitutional law. The justice went so far as to say that it is the preferred method of

\textsuperscript{69} The court further stated that stare decisis is indeed the “preferred course,” however; it should not “be applied mechanically to forever prevent the court from overruling earlier erroneous decisions.” \textit{Id.} at 118, citing Robinson \textit{v. City of Detroit}, 613 N.W.2d 307, 319-320 (Mich. 2000).
\textsuperscript{70} Id. at 116.
\textsuperscript{71} Id.
\textsuperscript{72} Strang, Lee. Professor of Law. University of Toledo. \textbf{Lecture at Loyola University New Orleans College of Law.} 11-3-2011. Professor Strang explains the third prong of his overruling precedent test by explaining that cases like Brown \textit{v. Board of Education} (1954), while not decided based on originalist principles, was clearly a just result. \textit{Id.}
\textsuperscript{71} Id.
\textsuperscript{72} Id.
constitutional interpretation,\textsuperscript{73} while the academic opined that, “the burden of proof” lies with the party seeking to overturn precedent.\textsuperscript{74}

Interestingly, Justice Thomas would overrule any precedent that is inconsistent with the original meaning of the constitution.\textsuperscript{75} Chief Justice Roberts and Justice Scalia have stated that they would sometimes allow for precedent to stand even if the precedent conflicts with the original meaning of the constitution.\textsuperscript{76} Hence, it is reasonable to assume Justice Roberts and Justice Scalia would weigh the significance of the precedent when deciding whether or not it should be overruled. Thus, it is interesting to see that even among originalists, there are questions about when it is appropriate to overturn precedent or whether to adhere to the principle of \textit{stare decisis}. Additionally, it is interesting to see that in spite of an attempt by scholars at having some sort of balancing test, not all originalist Supreme Court Justices use the test when determining the Constitutionality of an issue. Furthermore, even among originalists who use the balancing test, there potentially could be disagreements about when to overrule precedent, given that one judge may feel that the value of a precedent in question is high enough not to overrule it and another may conclude that the value of that same precedent is not high enough to sustain it. Thus, there is a potential for inconsistent results even amongst originalist judges and justices.

It should be well-understood that the Supreme Court does not overturn constitutional precedents frequently.\textsuperscript{77} In fact, Chief Justice John Roberts said at his Senate confirmation

\textsuperscript{73} See footnote 70.
\textsuperscript{74} See footnote 63.
\textsuperscript{76} \textit{Id}. at 130.
\textsuperscript{77} \textit{Id}. at 129.
hearings that he is more concerned with precedent than with original meaning.\textsuperscript{78} He further stated that he would describe himself as neither an originalist nor a “top-down” judge.\textsuperscript{79} Rather, he stated that he was more of a “bottom-up” judge, which would include giving due respect to the principle of stare decisis.\textsuperscript{80} Thus, one would expect Justice Roberts to give deference to precedent and not overrule any and all precedents that deviate from the original meaning of the Constitution, as legal scholars Gary Lawson\textsuperscript{81} and Randy Barnett have argued ought to be done.\textsuperscript{82} In fact, Justice Roberts expressed the desire for the Court not to issue such ideologically driven opinions that would upset the rule of law and that the Court should strive to issue more unanimous opinions and be more “collegial.”\textsuperscript{83} It is worth noting, however, that during the 2007 Supreme Court term, “thirty-three percent of the Court’s decisions were five-to-four decisions, the highest percentage in ten years.”\textsuperscript{84} Roberts’ predecessor, Chief Justice William Rehnquist, also felt that precedents and the principles of stare decisis were to be given significant value. For example, in \textit{Dickerson v. United States}, his majority opinion stated, “Whether or not we would agree with \textit{Miranda}’s reasoning and its resulting rule . . . the principles of stare decisis weigh heavily against overruling it now.”\textsuperscript{85} Rehnquist further opined, “While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings,” this has not happened in this instance.\textsuperscript{86} Ultimately, the Court refused to overrule \textit{Miranda}, citing the rule of

\begin{flushleft}
\textsuperscript{79} Id.
\textsuperscript{80} Id. Justice Roberts described a bottom-up judge as being a neutral “umpire.” Id.
\textsuperscript{83} Rosen, at 131.
\textsuperscript{84} Id.
\textsuperscript{85} Dickerson v. United States 530 U.S. 428, 443 (2000). In this case, the Court struck down a federal statute that sought to limit \textit{Miranda}’s application. The Court found the statute unconstitutional and \textit{Miranda} was not overruled. Id. at 432.
\textsuperscript{86} Id. at 443-444.
\end{flushleft}
stare decisis.\footnote{Id. at 444.} Hence, Justice Rehnquist plainly demonstrated the value afforded to stare decisis when issuing judicial opinions.

In summary, it seems that there are numerous judges and academics who advocate giving significant weight to precedent. In fact, even the last Chief Justices of the United States Supreme Court and the current Chief Justice of the United States Supreme Court adhere to the view of giving precedent and the principle of stare decisis a high value. Additionally, the Chief Justice of the United States Supreme Court says that precedent must be given deference and that precedent may be more valuable than overturning a precedent based on the original meaning of the constitution. Furthermore, numerous legal scholars adhere to the belief that precedent not ought to be overturned simply because the result is not consistent with the original meaning of the constitutional text. Thus, it appears that there are some restraints on when to apply originalism to ensure that the rule of law is not so disturbed.

V. Originalism’s Use as a Means to Achieve Conservative Political Results

There is significant overlap between originalist constitutional theories and “substantively conservative or libertarian political beliefs.”\footnote{Fallon, Richard H., Jr. Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism. 34 Harv. J.L. Pub. Pol’y 5, 20 (2011).} Some find this overlap natural, given that “[t]he originalist movement received its foundational intellectual leadership from politically conservative thinkers who disliked the legal legacy of the Warren Court and the political legacy of the New Deal.”\footnote{Id. at 20-21.} These individuals were thus searching for an alternative constitutional theory that would not yield politically liberal constitutional results.\footnote{Id. at 21.} In the present day, roughly thirty years after originalism’s founding days, almost all participants in debates about
constitutional theory assume that “originalist theories almost invariably have conservative or libertarian implications.”\textsuperscript{91} For example, when an alleged originalist theory has a liberal leaning, there are those who begin to question whether or not that theory could even be classified as originalist.\textsuperscript{92} Thus, there are a number of reasons to assume that originalism is used as a method to achieve conservative political results.

Originalists, additionally, vary substantially to the extent to which they have sought to work out or specify the details of the theory.\textsuperscript{93} Thus, in times when originalists have not fully developed their views on what originalism requires, “they often appear to wobble from one version to another, typically in ways to promote substantially conservative results.”\textsuperscript{94} Hence, it is conceivable that originalism can be viewed as a method of constitutional interpretation simply to achieve results satisfactory to conservatives, given its historical roots and its support by conservative judges and politicians alike.

Conversely, there are many conservatives who feel that “originalism is an inadequate and unsatisfactory approach to constitutional jurisprudence.”\textsuperscript{95} Though there have been a substantial number of conservative legal scholars who have supported a form of originalism since the Reagan administration, there are several jurisprudential theories that are more in-line with

\textsuperscript{91} Id. at 22. Noted liberal-leaning former Supreme Court Justice William Brennan was adamantly opposed to attempting to find, “the intentions of the framers.” He further claimed that it was arrogant “to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.” Brennan, William. \textit{The Constitution of the United States: Contemporary Ratification.} 27 S. Tex. L. Rev. 433, 435 (1985-1986). Though Justice Brennan seems to be refuting Originalism 1.0, it is clear that he possesses a strong position against using originalism to interpret the Constitution.

\textsuperscript{92} McGinnis, John and Rappaport, Michael. \textit{Original Interpretive Principles as the Core of Originalism}, 24 CONST. Comment. 371 (2007).


\textsuperscript{94} Id.

conservative beliefs and would produce more conservative outcomes. For example, “libertarian-oriented natural rights theories, pragmatic law-and-economic theories, moralistic natural law theories, and Burkean doctrinal theories” could all potentially reach conservative outcomes more often than originalism. Additionally, conservative beliefs have evolved over time; in particular, they have evolved since the late nineteenth century. Thus, it may be difficult to concretely conclude that there have been certain perpetual truths that have “guided conservative leaders over the decades, and that those truths can be found in the text of the Constitution.” given that conservative views have evolved over time.

Given the existence of other jurisprudential theories and the evolution of conservative political thought, it may be difficult to conclude that originalism is solely used as a method of constitutional interpretation in order to achieve conservative outcomes. Furthermore, there are even those who claim that there are “forms of ‘liberal originalism’ that promise to reach results that will be attractive to many liberals.” Thus, there exists the view that using and applying originalism could potentially reach “liberal” results. Additionally, there is the view that originalist Supreme Court Justices like Scalia and Thomas, will cast originalism aside in order to reach conservative conclusions by using other methods of constitutional interpretation, such as stare decisis. Hence, there is substantial concern that those who claim to be originalists will use originalism simply to reach a result favorable to their political beliefs.

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96 Marshall, William P. The Judicial Nomination Wars. B39 U. Rich. L. Rev. 819, 827-832 (2005). Marshall argues that Supreme Court Justices have used different methods of constitutional interpretation, such as textualism, appeals to the moral fiber of the nation, and stare decisis, in order to achieve conservative outcomes. Id.
97 Whittington, at 33.
98 Id. at 33-34.
99 Id.
100 Id. at 40., citing Balkin, Jack M., Fidelity to the Text and Principle, in the Constitution in 2020., at 11 (Jack M. Balkin & Reva B. Siegel eds., 2009).
101 See Marshall, William at footnote 100.
VI. The Arguments of the Parties in Citizens United: The Lack of a Push for the Use of Originalism

The arguments of the parties in *Citizens United*, and those who filed amicus briefs in the case, largely shied away from using originalism to reach their conclusions about why their respective parties should succeed. For example, Michael Boos, counsel for *Citizens United*, argued, “the government’s refusal to defend *Austin*’s anti-distortion rationale is tantamount to a concession that the decision was ‘badly reasoned’ and is in need of reconsideration. Because the government has failed in its effort to shore up that decision . . . *Austin* should be overruled.”\(^{102}\) Furthermore, the Appellant concludes that because *Austin* and *McConnell* were wrongly decided, they should be overruled.\(^ {103}\) Hence, the appellant is arguing for the precedents to be overturned not on originalist grounds, but on the grounds that the precedents were wrongly decided based in large part that the anti-distortion rationale was shoddy reasoning in reaching the outcome in *Austin*. Additionally, the appellant suggests that *Austin*’s “aberrational” nature ought to deny it full stare decisis effect.\(^ {104}\)

An amicus brief in support of the appellants, filed by the CATO Institute, argued, “[u]nder the common law and this Court’s jurisprudence, stare decisis does not require preserving either *Austin* . . . or the part of *McConnell* upholding the facial validity of Section 203 of the [BCRA].”\(^ {105}\) While the CATO Institute concedes that stare decisis is important in considering decisions, it ought not to control in every instance because “precedents are not

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\(^{103}\) *Id.* at 17.

\(^{104}\) *Id.* at 14.

\(^{105}\) *Citizens United*, Supplemental Brief for Amicus Curiae CATO Institute in Support of Appellant. 2008 U.S. Briefs 205, 1, 4 (2009). The brief notes that Stare Decisis under the Common Law reflects the “common law’s declaratory view of precedents, which are not law themselves, but evidence of law.” *Id.* at 4.
sacrosanct.”\textsuperscript{106} The brief concluded that “because stare decisis does not require preserving or extending precedents that misstate the law, it does not shield either \textit{Austin} or \textit{McConnell} from being reexamined and overturned [because] those decisions were fundamentally erroneous and untrue to the core principles of the First Amendment.”\textsuperscript{107} It is quite obvious that the crux of the CATO Institute’s argument was based on stare decisis and when it is appropriate to overrule precedent.

Not surprisingly, the United States Solicitor General at the time, Elena Kagan, argued for the appellee, the Federal Election Commission, that \textit{Austin} was not an aberration; they argued that it was a “core principle of campaign finance law, and” - thus should be “entitled to full-stare decisis effect.”\textsuperscript{108} The appellee further argued that such stare decisis effect was warranted, given that Congress had for over a century treated corporations differently than natural persons.\textsuperscript{109} Additionally, the appellee noted, over forty years before \textit{Austin} was decided, Congress had made a judgment that corporate expenditures during an election posed “distinctive and serious concerns.”\textsuperscript{110} Hence, according to the appellee, to overturn \textit{Austin}, the Court would be overturning well-established and well-settled law and not adhering to the principle of stare decisis.

Senators John McCain and Russell Feingold, the original co-sponsors of the BCRA, argued in their amicus brief on behalf of the appellee that, “the Court [ought to] treat its

\textsuperscript{106} \textit{Id.} at 6, citing \textit{Patterson v. McClean Credit Union}, 491 U.S. 164, 172 (1989).
\textsuperscript{107} \textit{Id.} at 12.
\textsuperscript{109} \textit{Id.} at 5.
\textsuperscript{110} \textit{Id.}

Further, they argued, “\textit{Austin} and \textit{McConnell} (and their antecedents) are vital cornerstones of modern campaign finance regulation and have engendered much reliance. Overruling them would severely jolt our political system…” \footnote{Id. at 2. The brief further states that \textit{Austin} and \textit{McConnell} were correctly decided, given the government’s interest in preventing “actual or apparent corruption of the electoral process and protecting shareholders.” Id. at 12-13. Thus, overruling either of those cases would disregard principles of stare decisis and overturn a correctly decided case (in the view of the appellees). Id. at 5-7.}

Thus, their arguments centered on deference to precedent and not upsetting well-established law.

Judging from the briefs of both the parties and the amicus briefs, both sides were asking the Court to abandon or not abandon the principle of stare decisis. This was due to the belief by both parties and their amicus briefs that the previous cases were either correctly or incorrectly decided. Neither side argued that the precedents were incompatible with the original meaning or original intent of the First Amendment. In essence, neither side spent a significant amount of time asking for the Court to examine the correctness of the precedents under an originalist interpretation of the constitution. Granted, the CATO Institute’s brief referenced the Federalist Papers once, but only when determining the composition and meaning of the word “jurisdiction.” \footnote{Id. at 4, citing \textit{The Federalist} No. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 2003).} Perhaps the respective parties felt that their best chance of success lied with arguing whether the principle of stare decisis required the precedents in question to be followed or overturned. Additionally, perhaps they believed that advocating for an originalist constitutional interpretation did not advance their argument; they might have felt that it would have weakened it, or even been a losing argument. Whatever the reason, both parties shied away
from using originalism, conceivably believing that another method of constitutional interpretation would lead to a more desirable result.

VII. The Decision: *Citizens United v. Federal Election Commission*

The ultimate outcome of *Citizens United* declared parts of BCRA unconstitutional, the Court holding that no limitations can be placed on campaign expenditures by corporations, labor unions, or independent groups or individuals. The Court held, “[t]he government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” Though both the briefs of the parties and the amicus briefs filed largely avoided using originalism to argue their respective cases, both the majority opinion and the dissenting opinion spent much time using originalism to reach their conclusions. For example, Justice Kennedy opined, “There is simply no support for the view that the First Amendment, *as originally understood* (emphasis added), would permit the suppression of political speech by media corporations . . . The framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less *First Amendment* protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.

Even though Justice Kennedy uses originalism, he later articulates a balancing test in order to overturn a precedent, thus implying that he would not overturn a precedent simply for the sake of reaching an originalist result. “The relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake,
and of course whether the decision was well reasoned.”  

118 This balancing test has been posited by numerous academics and judges.  

119 First, Justice Kennedy concluded that the precedent relied on by the government in this case, Austin, was not well reasoned.  

120 Additionally, Justice Kennedy stated that even though legislatures enacted bans relying “on corporate expenditures believing that those bans were constitutional”…it is not a “compelling interest for stare decisis.”  

121 Finally, Austin was decided less than twenty years before Citizens United; thus, the antiquity of the precedent was not so tremendous. In fact, Justice Kennedy notes in his opinion that in deciding Austin, the Court contravened its earlier precedents.  

122 There are those who have articulated, however, that the Court’s reasoning was far too sweeping in its reasoning in Citizens United. For example, Jeffrey Rosen notes that not only were Austin and McConnell overturned, but so were four other Supreme Court decisions.  

123 In summary, it is fairly evident that Justice Kennedy’s majority opinion applied originalism while using a balancing test in determining whether to overturned precedent. Though some argue that too many precedents were overruled, there was certainly at least an attempt by Justice Kennedy to weigh the value of precedents.

Chief Justice Roberts wrote a separate concurring opinion in which he explains that, “the text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or a union. What makes this case difficult is the need to confront our prior decision in Austin.”  

124 Justice Roberts further elaborates on this issue regarding the weight of precedents, “Fidelity to precedent - - the policy of stare decisis – is
vital to the proper exercise of the judicial function...[s]tare decisis is ‘the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’”125 The policy of stare decisis, however, is not an “exorable command.”126 He further notes that if it were such a command, “segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.”127 Ultimately, “[w]hen considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions decided against the importance of having them decided right.”128 In this specific case, Justice Roberts felt that reaffirming Austin on the basis of stare decisis would not have been correct, in large part because doing so would require, “radically reconceptualizing its reasoning. [Since] stare decisis is a doctrine of preservation, not transformation, [it] provides no justification for making new mistakes.”129 In essence, while Justice Roberts begins his inquiry by examining the “text and purpose of the First Amendment,”130 he spends a tremendous amount of time balancing that inquiry with the policy of stare decisis. Thus, as indicated in his confirmation hearings, he believes in the importance of precedents and seemingly would not overrule precedent simply for the sake of reaching an originalist result. It is worth noting that Justice Roberts may have spent so much time in his concurring opinion addressing the principle of stare decisis because both parties relied on them heavily in their respective briefs.131

127 Id.
128 Id.
129 Id. at 924.
130 See footnote #128.
131 See footnote #109, 112, and 115.
The dissent had numerous criticisms of the majority’s view in the case. There were even marked disagreements with whether the majority reached the correct view using originalism as the means of constitutional interpretation.\textsuperscript{132} Justice Stevens wrote,

“To the extent that the Framers’ views are discernable and relevant to the disposition of the case, they would appear to cut strongly against the majority’s position. This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, but also because they held very different views about the nature of the First Amendment right and the role of corporations in society.”\textsuperscript{133}

Around the time of the ratification of the First Amendment, “[c]orporations were created, supervised, and conceptualized as quasi-public entities, ‘designed to serve a social function for the state.’”\textsuperscript{134} In fact, the legislature determined whether to grant corporations a charter and “only a handful of business corporations were issued charters during the colonial period.”\textsuperscript{135}

Justice Stevens also takes issue with the majority’s assertion that, “the First Amendment was certainly not understood to condone the suppression of political speech in society’s [media sources].”\textsuperscript{136} He notes that this conclusion is rather uncertain, given that many historians “believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to prevent publications that were deemed contrary to the public welfare.”\textsuperscript{137}

Justice Stevens ultimately concludes that it cannot be certain, “how a law such as BCRA § 203 meshes with the original meaning of the First Amendment…I believe the Constitution would have been understood then…to permit reasonable restrictions on corporate electioneering.”\textsuperscript{138}

\begin{footnotes}
\footnotetext{132}{Citizens United v. FEC, at 948.}
\footnotetext{133}{Id.}
\footnotetext{134}{Id. at 949, citing Handlin & Handlin, Origin of the American Business Corporation, 5 J. Econ. Hist. 1, 22 (1945).}
\footnotetext{135}{Dodd, E. American Business Corporations Until 1860. p. 197 (1954).}
\footnotetext{136}{Citizens United v. FEC, at 950.}
\footnotetext{137}{Id., citing Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).}
\footnotetext{138}{Id.}
\end{footnotes}
have never embraced originalism in the slightest, dedicated such a substantial amount of his
dissenting opinion to defending the Constitutionality of BCRA § 203 on originalist grounds.

In response to Justice Stevens’ dissenting opinion, Justice Scalia wrote a concurring
opinion. He advocated an original meaning version of originalism and wrote, “[o]f course the
Framers’ personal affection or dissatisfaction for corporations is relevant only insofar as it can be
thought to be reflected in the understood meaning of the text they enacted.”139 He noted that
corporations were more commonplace in the 18th century than Justice Stevens asserted and that
various organizations – including corporations – enjoyed certain First Amendment rights,
including the right of free speech.140 Additionally, he posited that the right of free speech, under
an original meaning interpretation of the First Amendment, applies to individuals and the right of
individuals in association with “other individual persons.”141 Such widespread use of
originalism by Justice Scalia is to be expected; he has labeled himself an originalist and so have
legal scholars.142

Though the justices were split five-to-four in Citizens United, they seemed to be
somewhat unified on one specific point: using originalism to reach their desired results. Justices
Kennedy, Roberts, Scalia, and Stevens all used originalism in their respective opinions. While
Justices Roberts and Scalia have subscribed to using originalism in some capacity, Justices
Kennedy and Stevens could hardly be said to have done the same. Thus, it is rather interesting
that originalism was used across the spectrum of the Supreme Court in order to reach a favorable
result in the case. Though Justice Kennedy’s majority opinion is currently controlling on this

139 Id. at 924.
140 Id. at 926.
141 Id. at 928. He later concludes that the First Amendment, as originally understood, protects “speech” and may
not be limited to certain speakers of that speech regardless of association. Id. at 929.
142 See footnote #53.
issue, Justice Stevens’ opinion sought to discredit Justice Kennedy’s opinion on originalist grounds. Hence, it is worth noting that had Justice Stevens’ opinion been the majority opinion, it would have upheld the law on originalist grounds, just as the opposite opinion would have struck down the law on originalist grounds.

**Conclusion**

The Court’s decision in Citizens United is a dramatic reversal from the precedents of both Austin and McConnell. The decision cast aside the holdings of those previous two cases and held that the BCRA did not in fact adequately meet the compelling interest standard. Additionally, the Court found that the jurisprudence before Austin held corporate speech to be constitutionally permissible, stating that “the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.” Thus, it seems that the Supreme Court would be extremely reluctant to find a sufficient governmental interest restricting speech of corporations or labor unions. In essence, by overruling Austin, the Court found “no basis for allowing the Government to limit corporate independent expenditures.” The Court also overruled the part of the McConnell decision that upheld BCRA § 203’s “restrictions on corporate independent expenditures.”

The long, winding road that originalism has traveled has led to a point where judges – both liberal and conservative – have used it as a method of constitutional interpretation. Those who have used it include both liberal and conservative members of the United States Supreme Court. So why have members of the judiciary, at least in certain instances, embraced originalism? Perhaps they have followed Keith Whittington, who called originalism the only
method of constitutional interpretation that could, “limit the power of judges, justify judicial
review, and safeguard the structures, forms, and procedures of the constitutional project.” If
these members of the judicial branch do desire to limit the power of the judiciary, then perhaps
they feel using originalism is the best method for doing so.

There has been support for the theory that judges often find ways to interpret the
constitution to suit their personal political beliefs. One conservative scholar, Lino Graglia,
argued over twenty years ago,

“Minimum intellectual integrity requires acceptance of the fundamental facts that the Constitution
has had little or nothing to do with the "constitutional" decisions of the Supreme Court in the past
three decades. Those decisions did not turn on any genuine issue of constitutional interpretation,
but are simply the results of the policy preferences of a majority of the Court that made them.”

In addition, liberal scholar Mark Tushnet argued that those who end up serving as federal judges adopt
views of constitutional interpretation that fit with their own political predispositions. Thus, if both
Graglia and Tushnet are correct, judges will use methods of constitutional interpretation to reach results
that fit best with their own beliefs.

Interestingly, even though the Court’s most liberal member at the time, Justice Stevens,
wrote the dissenting opinion Citizens United that relied on originalism, this was not the first time
that a liberal member on the Court used originalism in crafting their opinion.

“For example, Justice David Souter turned to history in response to originalist opinions by Scalia,
Thomas, and Kennedy. Concurring in Lee v. Weisman (1992), he responded to Scalia’s
originalist claim that the First Amendment permitted government accommodation of religion by

University Press. Baltimore, Maryland p. 191 (2005), citing Whittington, Keith. Constitutional Interpretation:
144 Graglia, Lino. "Constitutional Theory": The Attempted Justification for the Supreme Court’s Liberal Political
arguing that the original intent of the establishment clause of the First Amendment was to ensure strict separation of church and state."

Hence, nearly eighteen years before Citizens United was decided, a liberal justice wrote an opinion that relied on originalism. Therefore, at the very least, it can be asserted that there have been instances where both liberal and conservative justices have used originalism in their opinion to achieve the result they so desire. If that is the case, would a judge or justice use other methods of constitutional interpretation to achieve result that they so desire? Ultimately, at the very least, it can be said that originalism has become a legitimate method of constitutional interpretation with which to be reckoned; both liberals and conservatives use it to reach results favorable to them.

\[146\] Id. at 209. In Lee v. Weisman, the Court held that including clerical members who offer prayers as part of the official school graduation ceremony is not consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts. Lee v. Weisman 505 U.S. 577, 580, 586 (1992)