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CITIZENS UNITED, LIBERTY, AND JOHN STUART MILL

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The First Amendment, adopted to safeguard human liberty and autonomy, was construed by the U.S. Supreme Court in its 2008 Citizens United *decision in a way that undermines those important foundational values. This turn in First Amendment jurisprudence represents a radical departure from the Anglo-American free expression tradition in law, as well as in political philosophy, represented prominently by John Stuart Mill, the author of* On Liberty. *Although the decision is nominally premised on the interests of citizens to avoid discrimination based on speaker identity, to hear others' uncensored expressions of ideas, to access political information that will enable them to participate effectively in democratic government, and to be protected when they engage in political dissent, the blow that the decision deals to campaign finance reform produces effects that instead undermine human liberty and self-government.*

INTRODUCTION

A recent U.S. Supreme Court decision, *Citizens United v. Federal Election Commission*, overturned a limitation on corporate campaign expenditures, explaining that "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'"[1] The Court justified its decision by relying on the importance of protecting individual liberty, and in particular, free speech, from government interference.[2] That free speech is an essential component of a well-functioning democracy enjoys a long and exalted history, both in political philosophy and in Constitutional jurisprudence. One of the best known defenses of its significance can be found in John Stuart

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1. 558 U.S. 310, 327 (2010) (citing Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964))).

2. *Id.* at 372.

Mill's venerated treatise, *On Liberty*. There, he claims that no society is free that does not respect the "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological," including the freedom to express and publish such opinions.[3]

The Court's description of the First Amendment's purpose is strikingly similar to Mill's defense of the principle of liberty:

> [The First Amendment] is designed and intended to remove governmental constraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[4]

In *Citizens United*, the Court held itself out as advancing the Anglo-American free speech tradition represented by Mill, reflected in past American jurisprudence. I aim to demonstrate that, to the contrary, *Citizens United* reveals that the legal conception of free speech, and legal justification for protecting it from government restrictions, have been severely distorted. Consequently, the First Amendment's free speech clause has become antithetical to human autonomy and well-being. Recent Court decisions have undermined the liberal tradition of free expression that Mill champions. Mill represents this tradition well because of his advocacy for liberty and free expression, and his principle (the principle of liberty) for restricting the moral authority of government to limit individual freedoms. Mill feared the encroachment on individual liberties of democratic government no less than autocratic government. As I will argue, however, the more serious threat to individual autonomy today is not government, but wealthy and powerful business corporations. In a painfully ironic twist, the Court has handed these corporations a formidable tool for constraining the autonomy of human individuals.

I begin by providing a brief overview of *Citizens United* and the campaign finance reform measure it struck down, identifying the four justificatory reasons relevant to my argument that the Court provides for its decision. Then, I evaluate each reason from Mill's standpoint, concluding that Mill would be unlikely to regard any of the Court's four appeals to individual liberty as supporting the decision.

I. *Citizens United*: An Overview

In *Citizens United*, the U.S. Supreme Court entertained a challenge to § 203 of the Bipartisan Campaign Reform Act ("BCRA"), also known as the McCain-Feingold Act. Section 203 forbids corporations and unions to spend funds from their general treasury to advocate expressly for the election or defeat of a particular candidate for federal office,

3. John Stuart Mill, *On Liberty*, *in* 18 The Collected Works of John Stuart Mill in 33 Vols. 213, 225 (John M. Robson ed., 1977).

4. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014) (plurality opinion) (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

using broadcast, cable or satellite media, within thirty days of a primary election. In a 1990 case, *Austin v. Michigan Chamber of Commerce*,[5] the Court upheld a state campaign finance provision with essentially the same restriction, finding that "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" frustrate a compelling government interest in preventing corruption and the appearance of corruption, an interest that was recognized in *Buckley v. Valeo*[6] in 1976.

Buckley was the first decision that found campaign finance restrictions to violate the First Amendment, construing the *independent expenditure of money* advocating the election or defeat of a particular candidate to be a form of political speech that could not be restricted.[7] An expenditure is independent in the sense that it is not spent by, coordinated with, or spent at the direction of the candidate on her own campaign. The Court also found a limit on the amount of money a candidate can spend on, or contribute to, her campaign to be an unconstitutional burden on free speech.[8] *Buckley* did recognize, however, a sufficiently important government interest in preventing corruption and the appearance of corruption, which could otherwise undermine public confidence in representative democracy "to a disastrous extent."[9] To protect this interest, *Buckley* found it justifiable for the government to limit the amounts of direct contributions by individuals and groups to candidates' political campaigns, recognizing that enormous direct contributions could lead to, or look like, bribery.[10]

Thus, *Buckley* forbade legislative restriction of independent expenditures, but *Austin* more recently upheld Michigan's restriction, which applies only to corporate expenditures from general treasury funds. The rationale for treating corporations differently involves the peculiarity of a corporation as a speaker. Corporations are specifically permitted by statute to form political action committees ("PACs") and to solicit voluntary contributions to the PAC from shareholders/members and employees who support its political messages. PACs can legally engage in campaign activities, and regulators consider it proper for them to do so. However, when a corporation contributes money from its general treasury, it spends corporate money to advance political messages that shareholders/members and employees might oppose. Even the managers or officers who write checks from the general treasury have a fiduciary responsibility to spend corporate money only to advance corporate, not personal, interests.[11] Commercial interests translate into certain political interests, and these are advanced by cor-

5. 494 U.S. 652, 660 (1990).

6. 424 U.S. 1, 45 (1976).

7. *Id.* at 51.

8. *Id.* at 52.

9. *Id.* at 27 (quoting CSC v. Letter Carriers, 413 U.S. 548, 565 (1973)).

10. *Id.* at 25.

11. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 467 (2010) (Stevens, J., dissenting).

porate independent expenditures from general treasury funds.[12] Political messages conveyed using corporate money may not represent the views of *any* human beings.[13]

Moreover, as *Austin* had pointed out, corporations are granted special legal advantages. Their liability is limited, they are given perpetual life, and they are permitted to accumulate and distribute assets in an exclusively advantageous fashion. This allows them to concentrate wealth in ways not enjoyed by natural persons.[14] Thus, corporations receive an unfair advantage in a political marketplace where money counts as constitutionally protected speech, and where it strongly influences political outcomes.[15]

Declining to treat corporations differently from natural persons with respect to political speech, *Citizens United* overruled *Austin*. In doing so, it provided four justifications for its decision that are relevant to my argument. The first two involve what I call *liberty rights*; the second two, *effective democracy concerns*.

1. Speaker identity non-discrimination. According to the Court, the First Amendment forbids the government to restrict speech based on the speaker's identity or characteristics. Unmoved by the dissent's argument that the First Amendment was intended to protect human speakers,[16] the Court buttresses its claim with the second justification.

2. Listener's right to hear. When there is any doubt, explains the Court, restrictions on political speech should be disfavored because society is harmed when "deprived of an uninhibited marketplace of ideas."[17] That is, the Court relies on the public's right to hear political ideas, not just the right of corporations to express them.

3. Access to information for political decision-making. The Court regards itself as protecting citizens' access to information by enabling corporations to tap general treasury funds for independent expenditures on election advocacy. Otherwise, in its view, fewer issues can be discussed in less depth, and fewer people can be reached for the exchange of ideas. A free exchange is essential to democracy if government officials are to be held accountable to the people, the citizenry is to be able to make informed political choices, and the people are to be able to engage in enlightened self-government.[18]

4. Protection for political dissenters. It is dangerous, the Court maintains, for the government to be permitted to discriminate among speakers because this can be used to silence content toward which the government is hostile:

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12. *See id.* at 394–95, 454–55 (Stevens, J., dissenting).

13. *Id.* at 438 (Stevens, J., dissenting).

14. *Id.* (Stevens, J., dissenting) (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–60 (1990)).

15. *See Citizens United*, 558 U.S. at 439–40 (Stevens, J., dissenting).

16. *Id.* at 394 (Stevens, J., dissenting).

17. *Id.* at 335 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)); *see also id.* at 354.

18. *Id.* at 339–40.

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.[19]

Thus, the Court ties this last justification to its very first justification.

A related development further erodes attempts to regulate campaign finance by pronouncing another provision of BCRA an unconstitutional infringement on liberty interests. In *McCutcheon v. Federal Election Commission*,[20] the Court struck down the aggregate limit (the total amount any one person can contribute to all candidates or committees during an election cycle), finding it an unconstitutional restraint on speech.[21] *McCutcheon* did not deny that preventing corruption and the appearance of corruption are compelling government interests, but found the aggregate limit unnecessary to safeguard those interests, which the Court believed were already adequately protected by base limits (limits on how much a donor may contribute to any one candidate or committee).[22] It disregarded Congressional findings that sophisticated mechanisms are used for circumventing base limits, as well as the dissent's protest of the apparent divergence from *Buckley*, which had regarded the aggregate limit as constitutionally acceptable because a donor would still be permitted to volunteer, or speak in other ways than through monetary contributions, to an unlimited degree.[23] *McCutcheon* rejected *Buckley*'s conclusion because, the Court noted, a person has only a limited amount of time to spend volunteering and speaking in person about candidates and campaign issues, so she should be permitted to support candidates through spending, which does not require additional time. This recognizes that while everyone's time is limited, some have large amounts of money to spend.[24] *McCutcheon* therefore transferred even more political power to big donors, including corporations, to advance their interests.[25]

19. *Id.* at 340–41.

20. *See generally* 134 S. Ct. 1434 (2014) (plurality opinion). Although *McCutcheon* is a plurality decision, it is likely to be influential.

21. *Id.* at 1442.

22. *Id.*

23. *Id.* at 1448; *see also id.* at 1465 (Breyer, J., dissenting).

24. *Id.* at 1448–49.

25. The Constitutional rights of corporations seem to be expanding, and not just within the campaign finance realm. Many for-profit corporations, as corporate persons, have recently been granted the First Amendment right to free religious exercise. *See* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

II. Four Justifications for *Citizens United* and Why Mill Would Reject Them

Now I will demonstrate how, from a Millian viewpoint, *Citizens United* undermines those values that the Court cites to justify it. In particular, *Citizen United*'s augmentation of corporate power diminishes individual autonomy, human welfare, and social progress by chilling political expression and undermining the sort of democratic government that is conducive to high aggregate utility.

A. *Speaker Identity Non-Discrimination*

The *Citizens United* Court's first justification rests on the premise that there is no legitimate reason for the government to discriminate between corporate and human speakers. However, the government may restrict political speech, consistent with the First Amendment, if it has a compelling interest in doing so and the regulation at issue is the least restrictive means of protecting that interest.

There are several reasons that the government interest in regulating corporate expression financed by general treasury expenditures is more compelling than its interest in regulating the political speech of human beings. I will mention three. First, the sole motive that a business corporation has for engaging in political speech is market advantage leading to profit. Neither public welfare nor human self-interest is represented by this speech, except coincidentally. In fact, as I explain below, there are good reasons to believe that policies facilitating corporate profit tend to undermine human welfare. Second, as the *Citizens United* dissent urges, corporations are legislatively granted advantages that permit them unfairly to influence the political process. Third, the analysis in *Citizens United* ignores the idea that society should be governed for the benefit of the human, not corporate, members of it.

Moreover, Mill's principle of liberty is inapplicable to corporations because they are not subjects of experience. Mill endorses as his basic moral criterion the principle of utility, a version of the Greatest Aggregate Happiness Principle: "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."[26] Mill qualifies this principle in three ways relevant to understanding who has moral standing under it. First, the happiness of each human being affected by a moral decision is considered equally in the utilitarian assessment.[27] Second, as a rule utilitarian, Mill believes that we should follow general policies or rules that tend to promote aggregate happiness, rather than trying to promote maximal happiness with each particular action on each occasion.[28] And third, Mill's conception of pleasure includes not only sensual pleasure, but also "pleasures of the intellect, of the feelings and imagination, and of the moral sentiments," which are even more valuable, as those who have

26. John Stuart Mill, *Utilitarianism*, *in* 10 The Collected Works of John Stuart Mill in 33 Vols., *supra* note 3, at 203, 209–10.

27. *Id.* at 213–14, 218–19.

28. *Id.* at 220, 224–25.

become competently acquainted with the various kinds of pleasures can attest.[29]

Because only sentient beings can experience pleasure and pain, only their interests count for Mill in figuring aggregate net utility, and thus in determining whether a class of actions is right based on the tendency of its outcomes. Mill seems to regard corporations as strategies for organizing capital, not as "persons" with indispensable liberty rights.[30] Since businesses are not sentient, they have no direct moral standing. Although the utility of sentient individuals can be affected by their relationships to corporations, these effects are considered parts of the person's experience when assessing her utility. In fact, corporations affect the utility of individual humans in the same way many other things (features of the natural environment, for example) do, but entities without experiences do not have *direct* moral standing simply because they affect human experience positively or negatively. They have indirect moral standing. Thus, corporations and other voluntary associations of people have moral rights derived from the principle of utility when, and only when, recognizing such rights produces a higher net balance of aggregate utility than not recognizing them. However, voluntary associations of people, including corporations, have no moral rights protected by the principle of liberty.

Mill argues in *On Liberty* that individual people have liberty rights entitling them to a sphere of action free from government interference. The purpose of Mill's principle of liberty is to delineate "the nature and limits of the power which can be legitimately exercised by society over the individual."[31] Mill explains:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[32]

This principle is best understood as jurisdictional. When a class of individual actions falls within society's purview, the overall net utility generated by exercising social power to limit individual liberty, compared with the overall net utility of not doing so, is calculated, and coercive social power is exercised when, and only when, and to the extent that, coercive social regulation of the class of actions produces the greatest overall net utility. When a class of individual actions is outside society's jurisdiction, however, these actions absolutely may not be coercively interfered with, even if society intends to compel individuals to perform actions that would, if done willingly and without compulsion, produce the greatest overall net utility.

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29. *Id.* at 210–12.

30. John Stuart Mill, *Principles of Political Economy*, *in* 3 THE COLLECTED WORKS OF JOHN STUART MILL IN 33 VOLS., *supra* note 3, at 897–901.

31. Mill, *supra* note 3, at 217.

32. *Id.* at 223.

Mill regards the principle of liberty as a "mediate axiom"[33] of the principle of utility, because liberty is essential to human well-being. That is, greatest aggregate utility cannot be achieved unless people are guaranteed a *right* to non-interference within the zone protected by the principle of liberty. Thus, the principle of liberty is necessary to secure "utility in the largest sense, grounded on the permanent interests of man as a progressive being."[34] A person suffers an injustice whenever a right—such as the right to liberty—is violated.

The reason against over-regulating businesses, according to Mill, is not *justice* but *utility*. Because "trade is a social act[,] [w]hoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society."[35] Mill approves of trade regulations whenever and only when aggregate benefits outweigh aggregate costs.[36] By contrast, Mill argues, government regulation of individual action cannot be accomplished with moral justification simply by weighing costs and benefits, since the principle of liberty limits government authority over every human being. Without the principle of liberty's constraint on social authority over the individual, aggregate utility in society cannot be maximized.[37] So Mill recognizes an important reason to treat individual human speakers and corporate speakers differently: while the former are sentient, have direct moral standing, and bear rights secured by the principle of liberty, none of this is true of the latter. Because the rights of associations are governed solely by the principle of utility and not by the principle of liberty, the constraints on corporate liberty imposed by campaign finance regulations can be permitted based on a direct utility calculation in cases that would be foreclosed by the principle of liberty if individual persons sought to speak instead. So while individual owners, investors, and employees of commercial, trade and other organizations all have rights protected by the principle of liberty, the organizations themselves do not.

Another reason Mill would distinguish between human and corporate speakers derives from concerns about tyrannical social power. Mill argues that fully realized human beings, by nature, are unique, creative, and expressive. Institutional structures that transform humans into instruments of production deform human character.[38] Unfortunately,

33. JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 289 (Samuel Freeman ed., 2007).

34. Mill, *supra* note 3, at 213, 224.

35. *Id.* at 293.

36. *Id.* at 292–93.

37. Even if Mill did believe that corporations could be subjects of pleasant and painful experiences, he would disagree that financial contributions to political campaigns are equivalent to "speech" within the purview of the principle of liberty. Contributing to political campaigns is not mere speech but political participation. As Mill notes when he distinguishes between publishing an opinion that corn dealers are starvers of the poor, and shouting this same opinion in a mob gathered at a corn dealer's house, "no one pretends that actions should be as free as opinions." *Id.* at 260.

38. *Id.* at 262–65, 310.

custom and public opinion tend to wear down individuality, creativity, and expressiveness, assimilating individuals into a mass of "collective mediocrity."[39] Unjustified social interference into an individual's proper sphere of action inhibits not only individual autonomy, self-development, and creativity, but retards social progress by vitiating potential innovators. For Mill, individuality is not only a "principal ingredient" of *individual* well-being, but the different "experiments in living" that people, given the freedom, engage in impel social progress.[40]

Institutional forces that convert individuals into mediocre masses include government, organized religion, and coercive majority opinion. These forces impose penalties on those who refuse to conform to their rules, often based on personal preferences.[41] Such coercion, which all three of these forces exert, is illegitimate according to Mill's principle of liberty.

Mill regards government, even democratic government, as a potential threat to individual liberty because of its power. Hobbes claimed that a rational person will voluntarily submit to the authority of government to receive protection from others, who otherwise would infringe her interests. This necessity arises, for Hobbes, from rough equality among all human beings in intellectual and moral powers.[42] An individual, however, is no match for an immense power such as government, which makes Mill wary.[43]

Mill also recognizes that government is not the only source of undue infringement of individual liberty. Private entities, especially when leveraging institutional rules favoring them, can be as well. Thus, absence of government intervention from private interactions does not always leave the parties involved freer to pursue their own objectives. In some instances, government forbearance results in the exploitation or abuse of the weaker party by the stronger. There, the less powerful party would be free to pursue her objectives only if government power were exercised to restrain the stronger private party from infringing the less powerful private party's proper sphere of action.

Mill's understanding of the need for government to protect the vulnerable from private abuses is evidenced by his advocacy for the reform of marriage laws that place married women at the mercy of their husbands. When the government, respecting "family privacy," refuses to intervene in marital relations, this provides husbands with legal cover to harm wives with impunity. To many in Mill's time, it appeared that such matters were between private parties who had entered voluntarily into a marriage contract. But since the government defined the institu-

39. *Id.* at 268.

40. *Id.* at 260–61.

41. *Id.* at 268–74.

42. *See* Thomas Hobbes, Leviathan 174–82 (Floating Press 2009) (1651).

43. *See, e.g.*, Mill, *supra* note 3, at 306–07 ("The . . . most cogent reason for restricting the interference of government, is the great evil of adding unnecessarily to its power."); Mill, *supra* note 30, at 939–40.

tion of marriage, and gave husbands power over wives, Mill argues that it may not stand by while husbands violate wives' moral rights.[44]

The employment context has a similar structure. Suppose the state establishes and maintains an economy in which non-owning laborers work for non-laboring owners, and then refuses to intervene when the employer's stronger bargaining position permits it to secure an unfair deal. While the state does not thereby infringe the employee's rights, it creates a regime in which the employer, a private party, can do so. In defense of laws setting a maximum number of work hours, Mill remarks,

> There are matters in which the interference of law is required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment: they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law.[45]

Workers judge that they would benefit from labor regulation, and some measure must be taken to overcome the collective action problem that otherwise would exist. In Mill's example, defectors from a voluntary agreement to work only nine hours per day would have advantages in the market and thus a reason to defect. If everyone defected and worked ten hours, then everyone would be expected to work ten hours, even though everyone would prefer to work only nine. A mechanism that enforces adherence to the agreement makes it possible for all workers to get what they prefer (in this case a nine-hour day) without fear of suffering market disadvantages.[46] Thus, the only way to give effect to workers' choice is to prohibit employers from trying to undermine workers' choice using employers' unequal bargaining power to persuade workers to defect.

Similar reasoning should apply to corporate political spending. As we saw above, the state grants special privileges to corporations, enhancing their ability to concentrate wealth. They can then leverage that wealth in the political marketplace to obtain outcomes impossible for any but perhaps a handful of the wealthiest human beings. Thus, state rules granting special rights to corporations provide them with an unfair political advantage over the vast majority of human citizens. Mill would therefore likely regard the state as responsible to prevent abuses that private corporations can exert over private individuals in the political arena. These abuses are made possible by the state's own rules, as in the cases of marriage and employment practices of Mill's day.

Corporations today can threaten individual autonomy and self-development, as well as social progress, at least to the same degree as government, organized religion, and majority opinion. In a large, diverse society such as the United States, a person who wishes to throw off the yoke of institutional religion or public opinion can, to a greater

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44. Mill, *supra* note 3, at 301–02; John Stuart Mill, *The Subjection of Women*, *in* 21 THE COLLECTED WORKS OF JOHN STUART MILL IN 33 VOLS. 213, *supra* note 3, at 259, 323–40.

45. Mill, *supra* note 30, at 956.

46. *Id.* at 956–58.

extent than in Mill's day, do so by changing where one lives, whom one associates with, and so forth. But corporations influence the basic structure of society as much as government does, and recent U.S. Supreme Court decisions seem to imply that there are few Constitutional checks on them. Corporations might therefore present a greater threat to individual freedom and well-being than even government does, while also threatening the existence of democratic government itself.

Citizens United takes the position that there is nothing wrong in allowing the entities that spend the most money, operating through voters and legislators, to determine laws and policies.[47] Because the Court postulates that the First Amendment prohibits regulation of speech based on the speaker's identity, the government may not limit political spending based on a speaker's opportunity to accumulate wealth. When the government tries to level the electoral playing field, remarks the Court, it must make impermissible judgments concerning which "strengths" are allowed to play a role in the outcome of an election. Voters are supposed to determine this for themselves.[48] Moreover, the Court is indignant at the government's attempt to "muffle the voices that best represent the most significant segments of the economy."[49]

The *Citizens United* Court maintains that preventing "any 'undue influence' generated by a speaker's 'large expenditures' would be outweighed 'by the loss for democratic processes resulting from the restrictions upon free and full public discussion,'"[50] such that allowing undue influence would be the lesser evil. The Court repeats its judgment in *Buckley* that the government has no legitimate interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections."[51] And finally, "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: 'favoritism and influence are not . . . avoidable in representative politics.'"[52] Although *Citizens United* claims that "[t]he First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion,'"[53] as a practical matter considerable wealth *is* required to run for office, to get one's point of view heard by the public or lawmakers, or to participate in any other significant way in government.

Unlike the Court, Mill is troubled by correlations between political influence and wealth.[54] Moreover, Mill would prioritize the speech of natural persons over corporations, especially in the domains of political debate and decision-making. Since corporations are not sentient, they

47. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

48. *Id.* at 349–51.

49. *Id.* at 354 (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 257–58 (2003)).

50. *Id.* at 343–44 (quoting United States v. Congress of Indus. Orgs., 335 U.S. 106, 143 (1948) (Rutledge, J., concurring)).

51. *Id.* at 350 (quoting Buckley v. Valeo, 424 U.S. 1, 48 (1976)).

52. *Id.* at 359 (quoting *McConnell*, 540 U.S. at 297).

53. *Id.* at 350 (citing *Buckley*, 424 U.S. at 49).

54. John Stuart Mill, *Autobiography*, *in* 1 THE COLLECTED WORKS OF JOHN STUART MILL IN 33 VOLS., *supra* note 3, at 1, 272–75.

have no moral rights protected by the principle of liberty, but only those derived directly from the principle of utility. Because they are powerful without effective checks, threatening to unduly constrain individual liberty, autonomy, and self-development, measures must be taken to restrict corporations' power to be compatible with high aggregate utility. There are good reasons, from a Millian standpoint, to discriminate among the speech of natural persons and the so-called 'speech' of corporations.

Thus, the government has a compelling reason to restrict corporate expenditures on electioneering communications, even though the political expression of human individuals is not restricted in the same way. The Court's judgment to the contrary is mistaken. Discrimination between human and corporate speakers is justified by a compelling state interest, is constitutionally permissible, and is both compatible with, and necessary for, the robust protection of individual liberties for which Mill advocates.

B. *Listener's Right to Hear*

The Court's second reason for invalidating the campaign spending restriction is the listener's right to hear political messages that any speaker wishes to express. This right prohibits the government from placing obstacles in the way of the messages of any speaker, corporate or otherwise, because the listener has a right to discern for herself which messages are credible and important. This may seem like a view with which Mill would be sympathetic. Freedom of expression occupies a special role for Mill in enabling autonomy and self-development, as well as producing an informed and educated society. What, if anything, do human beings want to hear from corporate speakers? Corporate speakers, remember, are expressing viewpoints that are not necessarily held by any human beings. What purposes might corporations have in addressing humans? Two common purposes are to sell products or services (commercial advertisements) and to convince humans to support political positions that serve business corporations' commercial interests (political advertisements). First, consider commercial advertising.

Some people appreciate some commercial advertising for its entertainment value. There are advertisements on the internet that receive many views because they are popular among audiences, and Super Bowl audiences eagerly anticipate the high-budget commercials that debut during this expensive time slot. Generally, however, people find advertisements intrusive and annoying. Technology has been developed to skip over television advertising, and counter-technology is always in development to try to get advertising before unwilling viewers. People tend to prefer advertising that they actively seek ("pull" advertising), such as the internet videos and web pages they can visit if they choose to obtain more information about a product (or to be entertained by an ad). Advertisements that slow down web pages, social media applications, and highway traffic, and that distract viewers from their tasks ("push" advertising), are ones that audiences wish to avoid.

Given a choice, most viewers of commercial "push" advertising would, on most occasions, prefer to avoid it.

Thus, consumer autonomy would be expanded if individual people could avoid advertising they wish to avoid, and easily find advertising information they seek. Everyone is a consumer, and only a minority would have their utility negatively affected as owners or investors in businesses that could not use push advertising strategies. These utility losses might be offset, in many cases, by utility gains the same people have as consumers, or as beings in the world otherwise irritated and distracted by push advertising. Nor does Mill's principle of liberty come into play, since commercial advertising falls in the domain of trade, which is governed by Mill's principle of utility alone. Though it goes beyond the scope of this article, it seems likely that pull, but not push, advertising would be protected by Mill's principle of utility.

Most importantly for our purposes is that commercial advertising must be sufficiently truthful to produce positive utility; otherwise it is not justified by Mill's philosophy. False advertising threatens to reduce aggregate utility by undermining the ability to make informed choices. While Mill opposes suppression of opinions that the government deems false, since the government is neither infallible nor has authority to determine what is true, advertising claims pose significantly different considerations. First, commercial advertising claims are not advanced as opinions about truth, nor do they function in society as such. They are expertly engineered with the aim of selling products for financial gain.[55] Second, commercial advertising claims generally can be verified by empirical evidence. Their veracity is not nearly as difficult to judge as claims about politics, religion, morality, and so forth. While the government is not infallible in determining which advertising claims are true, it is at least more impartial than the companies who seek to profit from their advertisements, and the well-being of the public—to which businesses may be indifferent—is the government's proper objective. And, since trade is a social act, businesses engaged in trade are not protected by the principle of liberty.

Mill speaks of "the existence of classes of persons with an interest opposed to what is considered as the public weal, and whose mode of living is grounded on the counteraction of it."[56] Mill's examples are pimps, those who run gambling establishments, and sellers of liquor. He says that individual liberty to fornicate, gamble, and drink is protected by the principle of liberty, and that the government lacks authority to prohibit these actions. "The interest, however, of these dealers in promoting intemperance is a real evil, and justifies the State in imposing restrictions and requiring guarantees which, but for that justification, would be infringements of legitimate liberty" of the patrons.[57] Mill therefore believes that the state is morally authorized to intervene to prevent businesses, motivated by profit, from enticing people to

55. *See, e.g.*, CHARLES DUHIGG, THE POWER OF HABIT 182–212 (2012).
56. Mill, *supra* note 3, at 296.
57. *Id.* at 297.

make imprudent decisions. Besides, Mill specifically recognizes that society has a legitimate role in preventing "fraud."[58] Thus, Mill would support the legal prohibition of false advertising claims on utility grounds, despite his general opposition to government suppression of claims that it deems false.

United States law recognizes the importance of truthful advertising by regulating commercial advertising claims and holding businesses accountable for their content. By contrast, in political advertising, corporations and individuals can get away with misleading and sometimes untrue advertisements they broadcast and publish on the quite serious subject of political elections. Even claims that are debunked tend to live on in public discourse and continue to serve as the basis of political decision-making for many. The speakers who make intentionally misleading statements are not held accountable. Because political advertisers obtain results favorable to them by prevarication or fabrication, there is no incentive to tell the truth. And, it becomes extremely difficult for citizens to weigh the conflicting disinformation they receive, even if they are intelligent and diligent. Political decisions are treated as less important than consumer choices, since social institutions guarantee consumers the means to avoid lies and manipulation to a far greater extent than they provide voters with the same. Mill held that consumers should be protected against fraud on utilitarian grounds. He believed that the state is morally authorized to prevent businesses from enticing people to make imprudent decisions to increase business revenues. He favored social institutions that promote government transparency and that collect accurate, easy-to-access information.[59] He also opposed private funding of election campaigns, reluctantly accepting money from supporters out of necessity given the political practices of his time, while making it clear to them that as a member of parliament he would not favor their preferences in return and would still vote his own conscience.[60] Mill would almost surely oppose the current political advertising practices in the United States.

Many political advertisements are false or misleading. The public regards the negative campaign advertising and personal attacks that run for months in the media as a nuisance. How can deregulation of corporate political expenditures be necessary to protect listeners' rights to hear what corporations have to say? The Court's claim to this effect is result-oriented fiction.

As we have seen, from a Millian standpoint, *Citizens United* is counterproductive to the two liberty rights justifications the Court offers for its decision. Constitutional distinction among natural and corporate speakers is permitted, and as I will argue, would enhance rather than detract from human liberty. A listener's right to hear corporate political speech is fiction, comparable to a laborer's right to work for less than a minimum wage set by the government.

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58. *See, e.g.*, *id.* at 292–93.
59. *Id.* at 308–09.
60. Mill, *supra* note 54, at 272–75.

C. *Access to Information for Political Decision-Making*

Another justification the Court offers in *Citizens United* is that people have a right to information for effective political decision-making. This justification is closely related to the justification previously discussed, the speaker's right to hear others' views. It functions differently in the Court's effective democracy argument than in its liberty rights argument, however. The latter concerns the exercise of individual autonomy, whereas the former concerns utilitarian social benefits that flow to each person in a well-run democracy. Moreover, as a liberty right, the right to hear speech encompasses every type of protected speech content, whereas access to information for political decision-making specifically pertains to political speech, which is more rigorously protected under the First Amendment than other forms of speech.

As the *Citizens United* Court and Mill both agree, a free marketplace of ideas is essential to an effective democracy. Citizens must have access to the information they need to make informed political decisions. So does allowing corporations to spend as much as they want, whenever they want, advance this interest? There is ample evidence that it instead undermines the efficacy of citizens' decision-making processes, both in specific instances, and as a matter of general policy and practice. I will briefly discuss two specific instances in which citizen decision-making has been undermined by corporate spending. These instances involve gun control legislation and Genetically Modified Organism ("GMO") labeling laws.

First, consider gun control legislation. The National Rifle Association ("NRA") is a 501(c)(3) corporation, which is a nonprofit, tax-exempt charitable or educational organization, largely funded by the firearms industry,[61] whose mission is to defend the rights of Americans to "acquire, possess . . . and enjoy the right to use arms."[62] It opposes virtually all regulation of gun ownership, transfer, and use, no matter how modest, despite wide public support, even among NRA members, for many gun control measures. It is stunningly successful: gun control legislation nearly always meets defeat, even after the most hideous of tragedies, including the murder of twenty children and six adults in an elementary school. A "We the People" petition filed after this incident called for stricter gun control measures,[63] but the People were no

61. Walter Hickey, *How the Gun Industry Funnels Tens of Millions of Dollars to the NRA*, BUS. INSIDER (Jan. 16, 2013, 1:25 PM), http://www.businessinsider.com/gun-industry-funds-nra-2013-1; Peter Cohan, *The NRA Industrial Complex*, FORBES (July 23, 2012, 9:23 AM), http://www.forbes.com/sites/petercohan/2012/07/23/the-nra-industrial-complex.

62. The NRA's mission statement is available at *National Rifle Association of America*, GUIDESTAR, http://www.guidestar.org/organizations/53-0116130/national-rifle-association-america.aspx#mission (last visited July 11, 2014).

63. Mary Bruce, *Petition Calls on White House to Address Gun Control*, ABC NEWS (Dec. 14, 2012), http://abcnews.go.com/blogs/politics/2012/12/petition-calls-for-white-house-to-address-gun-control.

match for the NRA.[64] Besides its huge war chest, the NRA also rates U.S. Senators and members of Congress, as well as state legislators, by how consistently they oppose gun regulation.[65] Legislators whose constituencies are enthusiastic about guns fear a low rating by the NRA, which they often believe could lose them the next election.[66] The NRA is even said to be the cause of President Obama's nominee for Surgeon General, Vivek Murthy, withdrawing himself from consideration. Murthy was opposed by the NRA because he remarked that guns pose certain public health risks, and shortly after being contacted by the NRA, many senators said they would not confirm Murthy.[67]

The NRA's political power undermines the *democratic self-government* of the American people, who support many gun control measures the enactment of which they are unable to accomplish.[68] The human members of society are not, therefore, able to govern themselves democratically. They cannot collectively prevent bodily violence against themselves, so they cannot ensure their own *personal security*. Security and liberty are the two essentials of well-being without which people cannot live the happiest possible kind of life.[69] Thus, people's self-development is undermined as well as their autonomy. And finally, and ironically, their *right to speak freely and truthfully* on issues of important

64. Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES (Apr. 17, 2013), http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all&_r=0.

65. *See, e.g.*, *Rating Group: National Rifle Association: 2012 Candidate Positions on Gun Rights*, PROJECT VOTE SMART, https://votesmart.org/interest-group/1034/rating/8741#.VwMXFHoYOwg (last visited July 11, 2014); Bob Price, *NRA Releases Coveted Endorsements and Grades for Texas State Races*, BREITBART (Jan. 29, 2014), http://www.breitbart.com/Big-Government/2014/01/29/NRA-Releases-Coveted-Endorsements-and-Grades-For-Texas-State-Races; *How the N.R.A. Rates Lawmakers*, N. Y. TIMES (Dec. 19, 2012), http://www.nytimes.com/interactive/2012/12/19/us/politics/nra.html?_r=0. For a glimpse into how the public perceives ratings and/or NRA influence as influencing lawmakers, *see, e.g.*, Bruce Rogers, *NRA Winning the Influence Battle over Gun Control*, FORBES (Feb. 1, 2013, 5:08 PM), http://www.forbes.com/sites/brucerogers/2013/02/01/nra-winning-the-influence-battle-over-gun-control; J.C. Hagan, Letter to the Editor, *Fear of the NRA Pressures Missouri Legislators*, ST. LOUIS POST-DISPATCH (Feb. 24, 2014), http://www.stltoday.com/news/opinion/mailbag/letters-to-the-editor/fear-of-the-nra-pressures-missouri-legislators/article_aeace048-bcd6-5c05-993b-16e9f0680f2b.html.

66. If even a minority of Americans oppose gun control so strongly that they are willing to vote based on this single issue, ensuring the defeat of legislators who support gun control, why is this not simply the democratic process at work? The NRA's influence depends more on inaccurate perceptions of its power than an actual correlation between the candidates it endorses and political outcomes. *E.g.*, Tom Ashbrook, *On Point: Gun Control*, 90.9 WBUR (Dec. 17, 2012, 10:00 AM), http://onpoint.wbur.org/2012/12/17/gun-control.

67. Paul Waldman, *Vivek Murthy, the NRA and the Politics of Fear*, WASH. POST (Mar. 18, 2014), http://www.washingtonpost.com/blogs/plum-line/wp/2014/03/18/vivek-murthy-the-nra-and-the-politics-of-fear.

68. *See, e.g.*, Seth Cline, *Strong Majority of Americans, NRA Members Back Gun Control*, U.S. NEWS (Jan. 28, 2013, 2:05 PM), http://www.usnews.com/news/articles/2013/01/28/strong-majority-of-americans-nra-members-back-gun-control; *Guns*, GALLUP, http://www.gallup.com/poll/1645/guns.aspx (last visited July 13, 2014); *Guns*, POLLINGREPORT.COM, http://www.pollingreport.com/guns.htm (last visited July 13, 2014).

69. Mill, *supra* note 26, at 250–51 ("[S]ecurity no human being can possibly do without . . . .").

public concern is circumscribed, as Dr. Murthy can attest. Fear of the NRA chills important public health research. Centers for Disease Control ("CDC") researchers abandoned studying the health effects of gun use in the 1990s after the NRA complained to Congress that the CDC was using the results of its research as "propaganda" for gun control measures, and Congress cut the CDC's funding in response. Researchers fear that simply reporting the results of studies involving gun injuries or deaths will be construed by Congress as advocating for gun control, which Congress has prohibited the CDC from doing.[70]

GMO labeling laws serve as a second example of how corporate expenditures undermine citizen self-government. In 2012, California placed on its ballot a proposed law (Proposition 37) requiring the labeling of genetically engineered foods as such. At the end of September, sixty-five to seventy-five percent of likely voters supported the measure, most of them because "people have a right to know what is in their food."[71] However, the measure was defeated by a narrow margin.[72] Monsanto, DuPont, and many other "Big Food" companies spent millions of dollars in advertising to kill the measure,[73] and consumer and environmental groups[74] were no match for them. Charitably interpreted, the measure's defeat could show that *Citizens United* was rightly decided, for here corporations engaged the citizenry in valuable political debate, informing them of real dangers of the measure and placing them in a position to make a better, more informed political decision. But that interpretation is not supported by the evidence.

An economist and graduate student at Oklahoma State University studied public perceptions of the GMO labeling measure, and reported that:

> California voters were highly uninformed about the use of genetic engineering in general and about Prop 37 in particular. . . . When asked what percentage of corn, soybean, and wheat acres were planted with GE varieties in the United States, respondents indicated, on average, 48%, 47%, and 45% respectively (the reality is 88%, 93%, and 0%).

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70. *Republicans Block CDC Research on Gun Violence*, TAKEAWAY (June 30, 2015), http://www.thetakeaway.org/story/gop-rejects-gun-violence-research.

71. JAYSON L. LUSK & BRANDON MCFADDEN, VOTER'S INTENTIONS ON PROPOSITION 37 REQUIRING MANDATORY LABELING OF GENETICALLY ENGINEERED FOODS IN CALIFORNIA 1 (2012), http://agecon.okstate.edu/faculty/publications/4369.pdf; Marc Lifsher, *Poll Finds Prop. 37 Is Likely to Pass*, L.A. TIMES (Sept. 27, 2012), http://articles.latimes.com/2012/sep/27/business/la-fi-prop37-times-poll-20120927.

72. Lauren Lloyd, *California Votes No on Prop 37, GMO Foods Will Not Be Labeled*, LAIST (Nov. 7, 2012, 9:15 AM), http://laist.com/2012/11/07/california_votes_no_on_prop_37.php.

73. Amy Westervelt, *Monsanto, DuPont Spending Millions to Oppose California's GMO Labeling Law*, FORBES (Aug. 22, 2012, 10:00 PM), http://www.forbes.com/sites/amywestervelt/2012/08/22/monsanto-dupont-spending-millions-to-oppose-californias-gmo-labeling-law.

74. California Right to Know is a coalition of consumer and environmental groups that produced the *YES Prop 37* ad. *See* YES ON 37, http://www.carighttoknow.org (last visited Feb. 21, 2016).

The researchers also found that

> After watching the "YES Prop 37" commercial, the percentage of voters indicating an intention to vote YES was 77.3%, almost identical to the vote indicated prior to watching the commercial. However, after watching a "NO Prop 37" commercial, only 59.5% indicated an intention to vote YES on Prop 37. Thus, at least among the two commercials we considered, the "NO Prop 37" video was much more effective.[75]

What this seems to suggest is not that corporate advertising provides more information so that the voter can become more informed, but rather that most people have become accustomed to making political decisions based on the cherry-picked, manipulated information that biased sources place in front of them. Without these commercials people might find, or demand, more reliable ways of obtaining political information.

Some accept "interest group politics" as an unobjectionable feature of the American political landscape. On this view, a political position prevails when, roughly, the product of the number of its supporters, multiplied by the strength of support of each, exceeds that of its opponents. In the Prop 37 case, the outcome would suggest that the consumer and environmental groups who supported Prop 37 had weaker combined support than food manufacturers. But this is a misleading picture. Organizing people around a cause is costly and time-consuming even when people are eager to participate. Additionally, busy people with many responsibilities and concerns must be convinced to devote time and money to *this* cause, instead of another, even if they care about its success. Corporations are already organized around a cause and are practiced at marshaling resources to achieve their aims. The playing field is unequal even before considering corporate legal advantages that facilitate wealth accumulation. In California, the Prop 37 corporate advertisements were more effective than consumer and environmental group advertisements because corporations successfully funneled their pre-existing resources to market research, crafting more convincing ads. Corporate interests achieved their objective even though, or perhaps because, voter beliefs remained highly inaccurate. Higher spending determined the policy but did not make available to voters more accurate or complete information.[76]

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75. Lusk & McFadden, *supra* note 71, at 1.

76. Washington State's experience was similar to California's. The Elway Poll, I-522: Support for Food Labeling Initiative Swings Negative 41 Points Since September (2013), https://www.documentcloud.org/documents/808500-elway-poll.html; *see also Washington Voters Rejecting GMO Labeling Law*, King 5 News (Nov. 6, 2013, 9:29 AM), http://legacy.king5.com/story/news/politics/2014/08/05/13345368/. Vermont has become the first state to pass a GMO labeling law. *See, e.g.*, Niraj Chokshi, *Vermont Just Passed the Nation's First GMO Food Labeling Law. Now It Prepares to Get Sued*, Wash. Post (May 9, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/29/how-vermont-plans-to-defend-the-nations-first-gmo-law. Connecticut and Maine also have passed GMO labeling laws that will not "trigger" until other states also enact GMO labeling laws. Pamela Prah, *Many States Weigh GMO Labels*, Pew Charitable Trs. (Mar. 13, 2014), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/03/13/many-states-

Thus, allowing corporations to spend as much as they want whenever they want does not appear to enhance citizens' ability to make informed political decisions. The amount of money spent on a viewpoint does not reflect that viewpoint's merit *or* breadth or strength of support. Ideas, not dollars, should compete in the political marketplace. Huge corporate expenditures for political campaigns reduce not only the quality of citizens' political decisions, but also the quality of government functioning.[77] And these commercial interests have little to do with, and often undermine, human interests.

Mill would regard as important that campaign finance restrictions are not paternalistic. Censorship of what the public may hear is not the issue. Corporate domination of the political process deprives people of opportunities to hone critical capacities that Mill values and nullifies the dignity of governing ourselves. It makes self-government not a cooperative community enterprise, but more like buying a household appliance. It concedes all the important policy decisions to others. One might say: the problem here is not corporate influence, but popular indifference to politics and government. When such indifference, or lack of self-efficacy, is so widespread however, there is good reason not to place all of the blame on the people who are indifferent. Much of the problem is caused by the institutional structures that discourage and even disgust potential voters. Mill maintains that social institutions, and especially electoral institutions, have an indispensable role in facilitating behavior that conduces to high aggregate utility.[78]

Whether voters' indifference, poor education, or underdeveloped reasoning skills are what lead to ineffective political participation, Mill prefers for institutions to take citizens as they are while continuing to provide them better opportunities to educate and develop themselves. Mill would favor organizing institutions to optimize voter behavior given the circumstances, instead of supporting institutions that make the degree and quality of political participation even worse. Consider Mill's stance on democratic government. He fears the potential for undereducated, working class people to seek whatever they regard as in their self-interest at the expense of the general good. What is in the common interest is usually ascertainable only by those adequately edu-

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weigh-gmo-labels. For Maine, "at least five contiguous states" including Maine must pass such laws; "[t]he Connecticut law will take effect once a combination of Northeastern states with at least 20 million residents endorses similar legislation." *Id.* The point of these laws is to avoid being singled out for lawsuits by the food industry. *Id.*

77. *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE GILDED AGE 261–62 (2008). Bartels analyzes Senate votes, and demonstrates that U.S. Senators' responsiveness to low income people is *negative*, while their responsiveness to high income people is much greater than their responsiveness to middle income people. *Id.* As he remarks, "the modern Senate comes a good deal closer to equal representation of *incomes* than to equal representation of *citizens*." *Id.* So "favoritism" and "influence" appear closely related to the amount of money a person—artificial or natural—has at its disposal. *See generally id.* at 252–82. And because of all the advantages that corporations are granted, there are, no doubt, many more artificial persons who can buy favoritism and influence than natural ones. *Id.*

78. John Stuart Mill, *Considerations on Representative Government*, *in* 19 THE COLLECTED WORKS OF JOHN STUART MILL IN 33 VOLS., *supra* note 3, at 371, 390–93.

cated. Mill believes it necessary, partly for this reason, to have significant checks on majority power. The future of society, on Mill's view, depends on the working classes becoming better educated so they will be able to make informed and socially responsible decisions.[79] Meanwhile, well-designed electoral and judicial institutions can maintain a balance of political power that will accrue to the benefit of all members of society. Undereducated working class people might prioritize material gains for themselves, but demands for such things could be moderated by those with better judgment and more knowledge. Mill views the institutional structure of democracy as crucial in ensuring that democratic government lives up to its potential. When people vote for whichever cause or candidate expends the most advertising funds, this practice displaces potential better practices for obtaining information to make voting decisions.

When there are collective action problems, the government has a critical role in providing mechanisms for people to effectuate their choices (providing they will not thereby be empowered to harm others unjustifiably). Modern election practices in the United States, conversely, discourage participation, undermine the average voter's sense of political efficacy, and disgust many citizens, who consequently withdraw from political participation. Given the state of election practices, withdrawal may be both rational and excusable rather than a sign of political indifference. The urgent need to reform poorly structured political institutions is not alleviated, but is intensified, by the equally compelling need to improve citizens' civic education and skills. Thus, campaign finance restrictions are not paternalistic, but instead necessary to effectuate people's legitimate political choices, and it is likely that Mill would support them.

D. *Protection for Political Dissenters*

We are left with the Court's fourth and final reason for its decision in *Citizens United*: the importance of protecting political dissenters. Because it is an effective democracy justification, protection for political dissenters specifically pertains to political speech. How do campaign reform measures of the sort struck down in *Citizens United* affect the ability of individuals to express political dissent?

The Court places much emphasis on the Constitutional imperative to prevent the government from intruding on citizens' First Amendment rights to hear what corporations have to say. Historically, the model that the Court uses applies when the government oversteps its bounds and interferes with the freedom of a human individual to receive and evaluate information. Police and state-tolerated mob brutality directed toward civil rights protestors, and arrests of students protesting the Vietnam War in the 1960s, are examples of this kind of government overreach. Attempts were made to keep these speakers' messages from the voting public. The First Amendment was intended

79. Mill, *supra* note 30, at 763–65.

to protect those who protest against government actions and policies, as the Court maintains.

The rights and interests of numerical minorities can easily be disregarded by tyrannical majorities and by a powerful government. Mill's *On Liberty*, like many provisions of the Constitution, is intended to protect minorities from this danger. To be a dissenter, one must dissent from what current law or social policy is or against what the majority favors.

Identifying dissenters requires recognizing the established or majority view to which it is adverse. Thus, in the narrow context of *Citizens United*, there is a sense in which corporations may be understood as dissenters. They dissent from provisions established by BCRA. As discussed earlier, Mill would not recognize corporations as entities with moral rights protected by the principle of liberty, but the human individuals affected by their participation in corporations (investors, trustees, managers, etc.) can be recognized as dissenters from campaign reform, if indeed they are such. Human dissenters enjoy the protection of Mill's principle of liberty, which forbids government to silence or censor opinions providing that the means of expression do not harm *other* people without the consent of those other people.

Since corporations cannot claim the protection of the principle of liberty, how they should be socially regulated is determined directly by the principle of utility. From the perspective of a benevolent spectator trying to assess the utility of various sorts of social rules, it does not appear that much utility would be lost by implementing campaign finance rules such as BCRA § 203, restricting the donation of funds from corporate treasuries to political campaigns. Few would be affected and none would be restricted in the way that people find most painful, i.e., unduly burdened in a quest to live a life of one's own choosing. Coercive regulation of personal relationships (including family), choice of occupation, residential neighborhood, how to spend one's leisure time, which talents to develop, etc., are the sorts of regulation to which people reasonably object. However, business regulation does not prevent a person from living the life she prefers. It affects a small domain of life, and there are other ways to achieve the same basic objectives: in the case of BCRA, one can (e.g.) make a personal donation, or establish a political action committee, which can contribute to political campaigns. This is how individuals' "freedom to unite[ ] for any purpose not involving harm to others"[80] is given effect in the American electoral system.

In *Citizens United* we do not find a politically powerless group whose rights are in danger of being trampled, but powerful artificial entities serving the interests of a wealthy and powerful minority of human beings, undermining the democratic rights and interests of a disempowered numerical majority. Protection for political dissenters, in a broader sense than opposition to a single established policy, law, or majority preference, is a guarantee that less powerful entities can

80. Mill, *supra* note 3, at 226.

express themselves, organize, and communicate with the like-minded, rather than being threatened or silenced by more socially powerful entities. As noted earlier, the most socially powerful entities used to be the State, churches, and public opinion; now private industry, a significant portion of which is comprised of large corporations, is more powerful than any church or the court of public opinion, and is arguably as powerful as the State. The notion of protecting dissenters arises from the recognition that dissenters are vulnerable and in need of protection from more powerful social forces and that they may have something socially important to say (as civil rights and Vietnam War protesters did). However, in the United States, corporations appear far from vulnerable. Ordinary human citizens, who are more numerous and are the bearers of stringent moral rights to liberty, are more vulnerable to harm by corporations than corporations are vulnerable to harm by other social actors.

Presently in the United States the campaign reform measures reviewed in *Citizens United*, had they been upheld, would not have jeopardized the ability of any person to express her political views. Suppose, while BCRA § 203 was still in place, the CEO of Umbrella Corporation wished to express her view that campaign finance reform is misguided. BCRA § 203 would not have impeded her efforts in any way. If she wished to oppose a candidate based on the candidate's support for campaign finance reform, she would have had many ways of reaching the public with her message. She could even use funds from Umbrella's treasury, if she were authorized to do so, prior to the abeyance period (beginning thirty days before a primary election or caucus, or sixty days before a general election). If she wanted to keep broadcasting opposition to the candidate during the abeyance period, she could establish a PAC and keep broadcasting her message using PAC funds. She could volunteer to work on the campaign of the candidate she hopes will win, campaign door-to-door, make telephone calls, host a fundraiser, recruit or pay people to stand on street corners with signs, etc.

To answer the question we began with, then: the campaign finance measure struck down in *Citizens United* would not have impeded anyone's ability to express political dissent. BCRA § 203 does not prevent any individual person from expressing her political view in any way. Although the heightened protection afforded by the principle of liberty does not apply to corporations, business corporations are not in any danger of having their political views silenced, since they are economically and politically powerful. Instead, corporations are the ones likely to be harming and silencing human persons if government is not permitted to intervene with reasonable, narrowly drawn campaign finance reform measures, such as BCRA § 203. In this context, the claim that BCRA § 203 poses a grave threat to individual rights is disingenuous.

Conclusion

The First Amendment, which was adopted to safeguard human liberty, autonomy, and happiness, has been construed by the U.S.

Supreme Court in a way that undermines these important foundational values instead. First, contrary to the Court's assertion, there are significant reasons to distinguish between human individuals and business corporations as speakers for First Amendment purposes. Business corporations are artificial entities invented to serve human interests; they do not have experiences or views of their own, and any rights they have are contingent on the positive impact that bestowal of such rights has on aggregate utility. Left to pursue profits without effective institutional constraints, they undermine the human interests they were created to serve. Second, the Court's claim that deregulation of corporate political expenditures is necessary to protect listeners' rights to hear what corporations have to say is as absurd as the claim that employment regulations make employees worse off because they deprive them of opportunities to work more hours for less pay in more dangerous conditions. Third, unrestrained corporate spending does not provide the public with more useful political information than they would have in its absence. In fact, if the marketplace of ideas were not teeming with the false and misleading statements generated by the political practices that currently exist, alternative institutions could emerge to provide more useful and reliable information. Human beings might regain a sense of political efficacy and improve collective well-being through broad and diverse participation in government. And fourth, corporations are too powerful to be in danger of being silenced by government, and they do not deserve protection as political dissenters.