
**THE INCORPORATION OF DEMOCRACY: JUSTICE
KENNEDY’S PHILOSOPHY OF POLITICAL
PARTICIPATION IN *CITIZENS UNITED***

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INTRODUCTION

In 1822, James Madison stated, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”¹ “Knowledge,” Madison continued, “will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”² From its founding, the American Republic has always depended for its subsistence on an informed and politically active citizenry. Modern “conceptions of the voter as a rational, independent sovereign, and of the campaign as a civic forum for informing and

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¹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON, 1819-1836, at 103 (Gaillard Hunt ed., 1910).

² *Id.*

persuading an intelligent and critical public” only accentuate the importance of a vibrant and diverse political dialogue.³ Yet “[b]y raising the bar” and framing electoral politics as a disciplined discussion of both candidates and policy, we intensify the need for a forum that ensures a robust debate.⁴ In our legal tradition, the First Amendment⁵ serves to protect the rights and abilities of citizens as participants in this discourse.⁶

On January 21, 2010, the Supreme Court decided *Citizens United v. Federal Election Commission*,⁷ a case with sweeping implications for campaign finance law as well as the very electoral process itself. *Citizens United* invalidated several key provisions of the Bipartisan Campaign Reform Act⁸ (BCRA) and reinterpreted almost a century of First Amendment jurisprudence to rule that the political speech of corporations cannot be prohibited or regulated in a manner different from that of individual citizens.⁹ This decision also struck down scores of state election and campaign finance laws, generating much confusion and prompting politicians on both the state and federal levels quickly to cobble together new legislation.

Citizens United is intriguing for a host of reasons, but this Note focuses particularly on the theory of democracy underpinning the majority opinion. Written by Justice Kennedy, the five to four decision can be understood as a maturation of Justice Kennedy’s jurisprudence regarding electoral politics. The current trend of the Court with regard to campaign finance reform legislation seems clear: As the Court has shifted to the right, the Justices have become increasingly hostile to laws and regulations that restrict the ability of corporations and other organizations to contribute to and influence the political debate in this country. At the center of this shift sits Justice Anthony Kennedy, the perennial swing vote and the jurist upon whom most cases depend.

Campaign finance reform legislation likely will continue to face a skeptical Court long into the foreseeable future. This observation, however, made by many scholars and media outlets, only identifies a general trend regarding a specific area of the law. More useful is a method of divining when and where the Court will draw the line between specific types of laws. *Citizens United*

³ JAMES A. GARDNER, WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS 36 (2009).

⁴ *Id.*

⁵ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁶ See *Virginia v. Black*, 538 U.S. 343, 365 (2003) (“[L]awful political speech [is] at the core of what the First Amendment is designed to protect.”).

⁷ 130 S. Ct. 876 (2010).

⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 U.S.C. and 47 U.S.C.).

⁹ *Citizens United*, 130 S. Ct. at 913.

may be better understood – and the permissible parameters of new legislation better defined – by analyzing the fundamental theory of democracy and political participation that underlies the decision.

This Note aims to read *Citizens United* in the context of Justice Kennedy's unique approach to democratic governance in the hope of discerning the boundaries and contours of the Court's new doctrine. I suggest that the case should be viewed as an attempt to provide protection to a collective (in this case, incorporated) group in order to safeguard the liberty of the individuals who comprise it. Though seemingly paradoxical, this Note argues that Justice Kennedy intended to protect the First Amendment rights of individuals who have organized to communicate their views more successfully by safeguarding the rights of the organizations they form. In doing so, Justice Kennedy recognized formal collective expression as the most efficacious conduit of modern political participation, encouraging "incorporation" for the purposes of political activity. Such an analysis may lead to more helpful predictions of Justice Kennedy's position in future cases by identifying the way in which he believes the political process ought to operate vis-à-vis politically active groups and the State. The prognosis for new laws is arguably unclear when one attempts to define the relevant legal doctrines without examining the principles undergirding Justice Kennedy's larger philosophical approach. This Note suggests that predictions about future legislation should be grounded in an understanding of his theory of democracy and proper modes of political participation.

I. A BRIEF HISTORY OF CORPORATIONS AND CAMPAIGN FINANCE REGULATION

The issue of campaign finance has been a perennial challenge for lawmakers and courts alike.¹⁰ The regulation and supervision of campaign monies implicate the fundamental tension between liberal self-expression, protected by the First Amendment, and the significant public interest in ensuring that elections are transparent events that fairly express the will of the people. Yet the text of the Constitution says nothing about the financing of elections, and the principles on which the current system is built are derived largely from statutes and case law. This section provides a brief overview of the history of campaign finance regulation in order to locate *Citizens United* in its proper temporal and doctrinal context.

A number of different statutes comprise the modern campaign finance regime. Congressional forays into the campaign finance arena began in the late nineteenth century. The first federal law regulating campaigns, an 1867 Naval Appropriations rider prohibiting the solicitation of campaign

¹⁰ See generally DONALD A. GROSS & ROBERT K. GOIDEL, THE STATES OF CAMPAIGN FINANCE REFORM (2003); DAVID MCKAY ET AL., CONTROVERSIES IN AMERICAN POLITICS & SOCIETY 44-54 (2002); MELVIN I. UROFSKY, MONEY & FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS (2005).

contributions from naval servicemen, was codified in the Pendleton Civil Service Reform Act of 1883 and extended to all members of the newly constituted civil service.¹¹ The first federal law designed to regulate corporate financing of campaigns, the Tillman Act, was passed in 1907.¹² This was soon followed by the Publicity Act¹³ and by subsequent amendments to both laws. The modern era of campaign finance regulation began in 1972 when Congress enacted the Federal Election Campaign Act (FECA).¹⁴ This law imposed more rigid disclosure rules for candidates for federal office and added additional reporting requirements for political parties and political action committees (PACs).¹⁵ The original FECA statute, however, did not establish any actual limits on contributions by individuals, political parties, or PACs.¹⁶ Moreover, FECA did not imbue any central administrative authority with the duty or power to enforce campaign finance laws.¹⁷ In 1974, the Watergate scandal generated renewed interest in the workings of government – including the rules governing the financing of political campaigns.¹⁸ This resurgence in public concern culminated in the political will to strengthen campaign finance regulations. Congress passed new amendments to the FECA over the veto of President Ford, creating the Federal Election Commission (FEC) and, for the first time, placing limits on campaign contributions in federal elections.¹⁹

In 1976 the Supreme Court addressed campaign finance in *Buckley v. Valeo*,²⁰ upholding the FECA's disclosure and reporting provisions, public financing framework, and limits on individual contributions.²¹ *Buckley* also held, however, that the limitations on independent expenditures by campaigns, candidates, individuals, and other groups – as opposed to direct contributions to candidates – were unconstitutional under the First Amendment.²² While the

¹¹ Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).

¹² Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)).

¹³ Publicity Act of 1910, ch. 392, 36 Stat. 822, *repealed* by Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431 *et seq.*).

¹⁴ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431 *et seq.*).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Mark Stencel, *Watergate Reforms*, WASH. POST, June 13, 1997, <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm>.

¹⁹ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 *et seq.*).

²⁰ 424 U.S. 1 (1976). While *Buckley* dealt only with federal elections, the Court later extended the logic of the decision to state elections in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 382 (2000).

²¹ *Buckley*, 424 U.S. at 143.

²² *Id.* at 19-20, 143.

Court did not consider contribution limits substantially burdensome, it did view the regulation of independent expenditures as an impermissible impediment to free speech.²³ Following the decision in *Buckley*, Congress amended the FECA to limit the scope of PAC fundraising by corporations and labor organizations and to repeal expenditure limits for candidates who did not receive public funding.²⁴

Corporate political participation had begun in earnest in the 1850s, largely in response to the “Pennsylvania Idea” – a political strategy to extort campaign contributions from corporations with threats of unfriendly legislation.²⁵ By 1978, in *First National Bank of Boston v. Bellotti*,²⁶ the Court addressed this subject as well. In *Bellotti*, the Court considered a law passed by the Massachusetts legislature that was widely understood as prohibiting financial institutions from spending money to affect the vote on a proposed constitutional amendment.²⁷ Framing the inquiry as whether the legislature had “abridge[d] expression that the First Amendment was meant to protect,” the Court invalidated the law and stated that government may not proscribe topics of discussion or disapprove of certain classes of speakers.²⁸

The decision was not uncontroversial. In dissent, Justice White lamented the Court’s “failure to realize that the state regulatory interests . . . are themselves derived from the First Amendment.”²⁹ Arguing that the special advantages state corporate law conferred on businesses justified special rules limiting their political involvement, Justice White wrote that such restrictions were necessary to “prevent[] institutions which have been permitted to amass wealth as a result of special advantages . . . from using that wealth to acquire an unfair advantage in the political process.”³⁰ The majority in *Austin v.*

²³ *Id.* at 19-20.

²⁴ Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended in scattered sections of 2 U.S.C.). Prior to the 1976 amendments, the FEC permitted corporations to use treasury money to establish, operate, and solicit contributions to a PAC. Corporations and their PACs could obtain these contributions from employees as well as stockholders. *See* Establishment of Political Action Committee and Employee Political Giving Program by Corporations, FEC Advisory Op. 1975-23 (Nov. 24, 1975). The amendments, however, restricted who could be solicited and how the solicitations could be made, and they placed a single contribution limit on all PACs established by the entity.

²⁵ This strategy was developed and promoted primarily by U.S. Senator Simon Cameron of Pennsylvania. For a provocative discussion of corporate political participation, see MARK GREEN, *SELLING OUT: HOW BIG CORPORATE MONEY BUYS ELECTIONS, RAMS THROUGH LEGISLATION, AND BETRAYS OUR DEMOCRACY* 35 (2002).

²⁶ 435 U.S. 765 (1978).

²⁷ *Id.* at 767-68. This law was apparently prompted by concern over the perceived insurmountable political influence of banks on the issue in question.

²⁸ *Id.* at 776-95.

²⁹ *Id.* at 803-04 (White, J., dissenting).

³⁰ *Id.* at 809.

Michigan Chamber of Commerce,³¹ the primary case overruled in *Citizens United*,³² would later echo these arguments. Technically, *Austin* did little more than hold that the Michigan Chamber of Commerce did not qualify for an exemption from the limits on expenditures by corporations.³³ Unlike earlier cases, however, the Court placed a stronger emphasis on remedying the “corrosive effect” of corporate wealth on the political process, upholding under strict scrutiny a ban on independent expenditures by corporations.³⁴

In 2002, Congress radically revised the FECA framework with the passage of the BCRA. The new law imposed a ban on “soft money”³⁵ contributions to political parties, regulated electioneering communications, limited participation by corporations and labor unions, and attempted to compensate for self-funding by independently wealthy candidates.³⁶ Following the passage of the BCRA, the Court reviewed the statutory framework in *McConnell v. Federal Election Commission*.³⁷ Applying a “less rigorous standard of review” to the ban on soft money,³⁸ the Court drew on *Austin* to recognize that special access to legislators could form the basis for a cognizable corruption interest.³⁹ In terms of political activity by corporations and labor organizations, the Court also approved prohibitions against using general treasury funds to sponsor any electioneering communication within the meaning of the BCRA.⁴⁰ These organizations were, however, still explicitly permitted to spend unlimited funds from separate, segregated PACs.⁴¹ Ultimately the Court ruled that the BCRA was an appropriate response to a pervasive problem that required comprehensive regulation, finding that the BCRA was supported by the government’s legitimate interest in “preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’”⁴² Against this legal background, the Court decided *Citizens United*.

³¹ 494 U.S. 652, 658-60 (1990).

³² 130 S. Ct. 876, 913 (2010).

³³ *Austin*, 494 U.S. at 661-62.

³⁴ *Id.* at 666.

³⁵ “Soft money” is traditionally viewed as contributions given to political parties rather than candidates for purposes unrelated to a specific election such as party building or voter registration. Soft money contributions have come under fire as a somewhat transparent way to circumvent contribution limits to candidates.

³⁶ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 U.S.C. and 47 U.S.C.).

³⁷ 540 U.S. 93, 114 (2003).

³⁸ *Id.* at 136 n.39.

³⁹ *Id.* at 205.

⁴⁰ *Id.* at 204-06.

⁴¹ *Id.* at 204.

⁴² *Id.* at 136 (quoting *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982)).

II. THE DECISION IN *CITIZENS UNITED*

The generally accepted upshot of *Citizens United* is that corporations and labor unions⁴³ may now use their general treasury money to fund unlimited electioneering communications. Doctrinally, the Court's opinion largely rests on three pillars for support. First, the majority relied on a broad reading of the First Amendment principles discussed in *Bellotti*.⁴⁴ Second, the Court expressed an inability to avoid the conflicting guidance from *Austin* and *McConnell*.⁴⁵ Finally, the Court identified the need to curtail possible unconstitutional practices that impinged on the vital First Amendment interests at stake in the political process.⁴⁶ Even taken together, however, these factors do not compel the result in *Citizens United*. This section explores the most salient points of contradiction between the majority and the dissent to show that an explanation of *Citizens United* that neglects ideology fails to capture fully the motivation behind the case. Specifically, the case reflects Justice Kennedy's personal view of the most desirable modes of political participation in modern American democracy.

A. *A Ban on Speech?*

One of the most significant points of contention between the majority and the dissent was whether the restrictions of the BCRA actually constituted a ban on speech.⁴⁷ While recognizing that corporations remained free under the BCRA to establish a "separate segregated fund"⁴⁸ for the purposes of "express advocacy or electioneering communications,"⁴⁹ Justice Kennedy refused to view the restrictions of the BCRA as anything other than "an

⁴³ This Note focuses primarily on the impact of *Citizens United* in relation to non-profit and for-profit corporate political activity. While some of the same arguments might apply to political advocacy by labor unions, the substantial body of law governing these organizations renders them significantly more representational in form than corporations. Some examples include the National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169), the Labor-Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197), and the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. § 401 *et seq.*). By regulating the internal affairs of labor unions, these laws arguably make the organizations more responsive to individual members' concerns – in essence, making the union more democratic and mitigating First Amendment concerns. *But see* Michael J. Nelson, Comment, *Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 GEO. MASON L. REV. 527, 528 (2000). A thorough treatment of the implications of *Citizens United* in the context of labor law is beyond the scope of this Note.

⁴⁴ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 900 (2010).

⁴⁵ *Id.* at 893-94, 903.

⁴⁶ *Id.* at 891.

⁴⁷ *See id.* at 897, 942.

⁴⁸ *Id.* at 887 (quoting 2 U.S.C. § 441b(b)(2) (2006)).

⁴⁹ *Id.*

outright ban, backed by criminal sanctions.”⁵⁰ Assuming, as one must, that Justice Kennedy did not simply succumb to hyperbole, it is important to discern why he viewed the blackout provisions of the BCRA as a ban on political speech. Certainly these provisions are not readily understood as a blanket prohibition in the unforgiving sense Justice Kennedy urged. As Justice Stevens pointed out in his dissent, “[n]either Citizens United’s nor any other corporation’s speech has been ‘banned.’ All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period [before a primary election].”⁵¹ Moreover, in addition to excepting the use of segregated corporate funds, the blackout provisions of the BCRA did not apply to PACs,⁵² any genuine issue advocacy,⁵³ printed material,⁵⁴ or even arguably to material published on the Internet.⁵⁵ Yet Justice Kennedy insisted that the blackout period was “a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.”⁵⁶ These empirical contradictions suggest the majority’s perceived deprivation of rights under the First Amendment is based not on practical considerations but on more abstract principles. As the gravamen of Justice Kennedy’s opinion, it is vital to understand the source of his argument on this issue.

B. *Rights of Corporations*

Like many of his prior decisions, *Citizens United* adheres to Justice Kennedy’s views that “[a] fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not,” and “the government cannot impose silence on a free people.”⁵⁷ In *Citizens United*, Justice Kennedy appeared to extend this principle to corporations. Arguing that “[s]peech is an essential mechanism of democracy,” he wrote for the majority that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”⁵⁸ The fact that the speech in question did

⁵⁰ *Id.* at 897.

⁵¹ *Id.* at 929 (Stevens, J., concurring in part and dissenting in part) (citation omitted).

⁵² 2 U.S.C. § 441b(2)(C).

⁵³ *Citizens United*, 130 S. Ct. at 943 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 207 (2003)).

⁵⁴ *Id.* at 943 & n.31 (Stevens, J., concurring in part and dissenting in part) (citing 2 U.S.C. § 434(f)(3)(A)(i)).

⁵⁵ *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 2 U.S.C. § 434(f)(3)(A)(i)) (arguing that “the terms ‘broadcast, cable, [and] satellite’” cast serious doubt on the statute’s applicability to information found on websites); *see also* 11 C.F.R. § 100.155 (2010) (excluding uncompensated Internet activity from the definition of an expenditure).

⁵⁶ *Citizens United*, 130 S. Ct. at 897.

⁵⁷ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992).

⁵⁸ *Citizens United*, 130 S. Ct. at 898.

not originate from an actual person did not alter Justice Kennedy's analysis. Rather, he stretched the principle of *Bellotti* to its broadest reading, asserting that "[u]nder the rationale of [our] precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'"⁵⁹

Using this notion as his starting point, Justice Kennedy declared, "The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"⁶⁰ Though *Bellotti* arguably provides some measure of support for this conclusion, *Citizens United* greatly expanded the protections offered to corporate speakers beyond what they had previously enjoyed. In dissent, Justice Stevens argued that corporate political speech should indeed be treated differently, as the "conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case."⁶¹ Other scholars have made similar points, detailing opposing precedents and principles that Justice Kennedy's sweeping statements obscured.⁶² At the very least, Justice Stevens suggested, the Court should not have used a case involving a *non-profit* corporation to change the law regarding *for-profit* corporations.⁶³ Justice Kennedy's opinion for the majority only obliquely responds to this argument, focusing instead on general principles of freedom from content regulation and expressing an unwillingness to preempt "[r]apid changes in technology – and the creative dynamic inherent in the concept of free expression" that might "restrict[] political speech in certain media or by certain speakers."⁶⁴

Finally, Justice Kennedy dismissed any suggestion that corporate speech presented any greater danger of corruption than individual speech.⁶⁵ In prior cases, the Court had consistently emphasized that only the public's interest in preventing "corruption and the appearance of corruption" is sufficient to justify the burden placed on the exercise of free speech.⁶⁶ Yet the Court's

⁵⁹ *Id.* at 900 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

⁶⁰ *Id.* (citing *Bellotti*, 435 U.S. at 776).

⁶¹ *Id.* at 930 (Stevens, J., concurring in part and dissenting in part).

⁶² See, e.g., Randall P. Bezanson, *No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649, 653 (2011) ("The difficulty with this basic analysis is that other prior cases also conflicted with the Court's central conclusion on corporate speech. These include *Buckley*, which quite expressly rested on the need for an individual 'speaker,' and which said nothing about the limitations imposed by the 1974 amendment of the Federal Election Campaign Act's differential treatment of corporate and organizational speech that could not be traced to an individual speaker." (citation omitted)).

⁶³ *Citizens United*, 130 S. Ct. at 929-30 (Stevens, J., concurring in part and dissenting in part).

⁶⁴ *Id.* at 912-13.

⁶⁵ *Id.* at 909.

⁶⁶ Thomas F. Burke, *The Concept of Corruption in Campaign Finance Reform Law*, in *THE CONSTITUTION AND CAMPAIGN FINANCE REFORM* 263 (Frederick G. Slabach ed., 2d ed.

treatment of this interest has been far from uniform,⁶⁷ and cases generally have oscillated between a focus on quid pro quo corruption and a less coherent “distortion” interest that takes into account relative economic discrepancies between speakers.⁶⁸ Though this distortion interest found its fullest and most robust articulation in *Austin*, a review of the Court’s earlier decisions reveals an extremely flexible standard that arguably takes implicit account of the philosophical concerns underpinning the explicit distortion interest. Justice Stevens emphasized this point in his dissent.⁶⁹ Justice Kennedy, however, never acknowledged the effect of the distortion interest or responded to this argument – he merely declared that it was not a concern.⁷⁰

Citizens United profoundly reconfigured the legal – and likely the political – playing field with respect to campaign finance legislation.⁷¹ Though the Supreme Court dealt only with provisions of the federal BCRA, the broad and sweeping import of the opinion resulted in a cascade of challenges to state campaign finance laws as well.⁷² While legislators and commentators from across the political spectrum have defended the need for new laws that restrict

2006).

⁶⁷ *Id.* at 274.

⁶⁸ *Id.*

⁶⁹ *Citizens United*, 130 S. Ct. at 957-60 (Stevens, J., concurring in part and dissenting in part).

⁷⁰ *Id.* at 909.

⁷¹ See, e.g., Gail Russell Chaddock, *Outside Groups Dominate 2010 Campaign Spending*, CHRISTIAN SCI. MONITOR (Oct. 31, 2010), <http://www.csmonitor.com/USA/Elections/2010/1031/Outside-groups-dominate-2010-campaign-spending>; Danielle Kurtzleben, *2010 Sets Campaign Spending Records*, U.S. NEWS & WORLD REP. (Jan. 7, 2011), <http://www.usnews.com/news/articles/2011/01/07/2010-set-campaign-spending-records>.

⁷² The number of state campaign finance laws invalidated by *Citizens United* is quite substantial. Immediately following the decision, *The New York Times* reported that at least twenty-four states had laws that were called into question. Ian Urbina, *Consequences for State Laws in Court Ruling*, N.Y. TIMES, Jan. 23, 2010, at A1. Regulations, state statutes, and even state constitutional provisions have been invalidated since *Citizens United*. See, e.g., LONG BEACH, CAL., MUN. CODE § 2.01.130 (1994), *invalidated by* Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 699 (9th Cir. 2010); COLO. CONST., art. XXVIII, §§ 3(4), 6(2), *ruled unconstitutional by* *In re Interrogatories Propounded By Ritter*, 227 P.3d 892, 894 (Colo. 2010); CONN. GEN. STAT. § 9-610 (2010), *invalidated by* Green Party of Conn. v. Garfield, 616 F.3d 189, 193 (2d Cir. 2010); MICH. COMP. LAWS ANN. § 169.254 (West 2010), *enforcement enjoined by* Mich. Chamber of Commerce v. Land, 725 F. Supp. 2d 665, 699 (W.D. Mich. 2010); MINN. STAT. ANN. § 211B.15(3) (West 2010), *invalidated by* Minn. Chamber of Commerce v. Gaertner, 710 F. Supp. 2d 868, 873 (D. Minn. 2010); OHIO REV. CODE ANN. § 102.03(A)(4) (West 2010), *invalidated by* Brinkman v. Budish, 692 F. Supp. 2d 855, 858 (S.D. Ohio 2010); TENN. CODE ANN. § 2-19-132 (2009), *found unconstitutional by* Constitutionality of Tenn. Code Ann. § 2-19-132, Op. No. 10-30 (Op. Att’y Gen. of Tenn., Mar. 11, 2010).

corporate spending in elections,⁷³ much of what has been proposed does not differ substantively from the framework that existed prior to *Citizens United*. Proposed laws tend to scale back regulation or focus on disclosure and disclaimer regulations – the only approach explicitly sanctioned by the Court.⁷⁴ This demonstrates understandable confusion on the part of legislators with respect to what they may or may not proscribe under the new doctrine announced in *Citizens United*.

Similarly, most research following the decision has focused on the Court's expansion of First Amendment protections for corporations, its questionable treatment of appellate procedure, and its possible political motivations.⁷⁵ Much future scholarship about this case may be expected to focus strictly on the legal and jurisprudential bases of the decision, as such inquiries are often the most direct route to conclusions about the Court, the Constitution, and future dispositions. I argue, however, that attempting to discern how the principal author of the opinion, Justice Kennedy, thinks about democracy – how he actually conceptualizes the operation of the political system in the United States – will provide much better guidance in the long run.

III. THE ROLE OF JUSTICE KENNEDY

Justice Kennedy has repeatedly disavowed any general theory of judicial interpretation, yet many scholars have sought to make sense of his jurisprudence as a uniform philosophy.⁷⁶ This Note takes a slightly different approach, focusing on consistent ideological themes rather than on the regular application of legal doctrines. As the recurrent swing vote between the Court's liberal and conservative wings, Justice Kennedy's vote is consistently the deciding factor in most difficult five to four opinions.⁷⁷ In light of the recent

⁷³ See, e.g., Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1; Press Release, Office of House Representative Nancy Pelosi, Pelosi: Supreme Court Decision Could Allow Special Interests to Drown Out Voices of Average Americans (Jan. 21, 2010), available at <http://pelosi.house.gov/news/press-releases/2010/01/releases-Jan10-sc.shtml>; Press Release, Office of Senator Charles Schumer, Senate Democrats Unveil Legislation to Limit Fallout from Supreme Court Ruling that Allows Unlimited Special-Interest Spending on Elections – Announce Plan for Senate Passage by July 4 (Apr. 29, 2010), available at http://schumer.senate.gov/new_website/record_print.cfm?id=324343.

⁷⁴ See, e.g., H.R. 5175, 111th Cong. (2d Sess. 2010) (seeking to strengthen disclosure and disclaimer requirements).

⁷⁵ See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., Comment, *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83-85 (2010); Kathleen M. Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144 (2010).

⁷⁶ FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 1-3 (2009).

⁷⁷ Justice Kennedy is in the majority more than any other Justice of the Court. See *The Statistics*, 124 HARV. L. REV. 411, 413 (2010).

retirements of more senior Justices, this influence is only likely to grow.⁷⁸ While it is important to examine the explicit doctrines espoused by Justice Kennedy, much also is gained by delving into the theoretical underpinnings of his jurisprudence. Justice Kennedy's personal conceptions of the structure and meaning of liberty, democracy, and discourse powerfully influence his decisions in some of the Court's most controversial cases. *Citizens United* is no exception.

A. *Justice Kennedy and the First Amendment*

Justice Kennedy has often advocated expansive, staunch First Amendment protections.⁷⁹ This stance goes a long way toward explaining his stubborn insistence in *Citizens United* that the limited blackout provisions of the BCRA constituted an "outright ban" on speech.⁸⁰ In general, most academics argue that Justice Kennedy's approach to First Amendment jurisprudence can be classified as "libertarian."⁸¹ Yet this does little to clarify Justice Kennedy's views beyond a simple aversion to government intervention in free speech cases.⁸²

Moreover, it is impossible to classify Justice Kennedy's position as that of an absolutist or an adherent to any single philosophy – which would be the most analytically useful scenario. Most scholars have tended to default to the assumption that Justice Kennedy espouses a strong libertarian ideology but fails to apply it consistently when actually deciding cases.⁸³ A closer reading of Justice Kennedy's writings, however, casts doubt on the assertion that pure libertarianism is the dominant legal philosophy to which he subscribes. That said, one can see evidence of several themes that inform libertarian discourse, many of which can also be found in Justice Kennedy's opinions.

Modern libertarian ideology finds its roots in twentieth century theories of classical liberalism.⁸⁴ Although politically and philosophically complex, in

⁷⁸ See Lyle Denniston, *The "Kennedy Court," Only More So*, SCOTUSBLOG (Apr. 9, 2010, 6:49 PM), <http://www.scotusblog.com/2010/04/the-kennedy-court-only-more-so/>.

⁷⁹ Justice Kennedy is often the "most likely to strike government action for violating freedom of speech and association." COLUCCI, *supra* note 76, at 75. Indeed, he has been a member of every majority to find a federal statute unconstitutional under the First Amendment guarantee of free speech. *Id.*

⁸⁰ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 897 (2010).

⁸¹ HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 54 (2009).

⁸² See *id.* at 54-55. Compare, e.g., Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas* 14 (Bos. Univ. Sch. of Law, Working Paper No. 03-13, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=422564, with Stephen O'Hanlon, *Justice Kennedy's Short-Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology*, 7 CARDOZO PUB. L., POL'Y & ETHICS J. 1, 26-28 (2008).

⁸³ KNOWLES, *supra* note 81, at 87.

⁸⁴ *Id.* at 20.

general libertarianism emphasizes three major themes: individual sovereignty, bounded liberty, and limited government.⁸⁵ Individual sovereignty refers to the belief that “[f]or libertarians, the basic unit of social analysis is the individual.”⁸⁶ Moreover, these “[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights).”⁸⁷ This is counterbalanced by the recognition that individual liberty is necessarily limited in some cases, albeit only to the extent that others may freely exercise their liberty as well.⁸⁸ Finally, though libertarians recognize a government’s role in ensuring this balance of rights, their distrust of governmental motives and suspicion of excessive restriction calls for a delimited sphere in which a state may act – a government with limited power over its people.⁸⁹

While these axioms are common to most modern libertarian theories, like most political philosophies there are divergent trends that further refine these general precepts in different ways. Two of the most salient threads here are the “consequentialist” and “pluralist” theories of libertarianism.⁹⁰ As the name suggests, consequentialist theorists focus primarily on the positive outcomes to be obtained by preferring and maintaining a limited government. As a result, much of consequentialist libertarianism is comparative, with frequent analogies to and reliance upon free markets and economic theory.⁹¹ Pluralist libertarianism, on the other hand, is a recognition that society is composed of many dissimilar individuals and therefore should not be subject to a single “overarching moral identity.”⁹² Thus, pluralist libertarians would deny the government the prerogative to impose a single conception of morality – in essence incorporating under the mantle of “individual sovereignty” the right to define for oneself the principles by which one will abide.

Some aspects of Justice Kennedy’s jurisprudence strongly reflect the pluralistic libertarian tradition, but there are many instances in which he relinquishes libertarian principles for pragmatic solutions. It may instead be more accurate – and more helpful – to view Justice Kennedy’s libertarian bent as a manifestation of his deeper belief in individuality and personal dignity.

⁸⁵ *Id.* at 20-26.

⁸⁶ DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 95 (1997).

⁸⁷ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974).

⁸⁸ *Id.* at 29 (“The rights of others determine the constraints upon your actions.”).

⁸⁹ BOAZ, *supra* note 86, at 2-3 (“In the libertarian view, all human relationships should be voluntary; the only actions that should be forbidden by law are those that involve the initiation of force against those who have not themselves used force . . .”).

⁹⁰ KNOWLES, *supra* note 81, at 30-33.

⁹¹ *Id.* at 30 (explaining that consequentialist libertarians emphasize “the positive consequences of limited government,” utilizing law and economics to argue that “markets are inherently efficient tools for allocating goods in society”); *see also* BOAZ, *supra* note 86, at 148.

⁹² KNOWLES, *supra* note 81, at 32; *see also* BOAZ, *supra* note 86, at 105-06; Randy E. Barnett, *The Moral Foundations of Modern Libertarianism*, in *VARIETIES OF CONSERVATISM IN AMERICA* 51-74 (Peter Berkowitz ed., 2004).

This view is often consonant with libertarian pluralism but is more than a bare rejection of governmental intrusion into pure individual sovereignty. In a First Amendment context, Justice Kennedy is particularly skeptical of governmental regulation of speech. In *Sable Communications of California, Inc. v. Federal Communications Commission*,⁹³ he joined the majority in overturning a federal ban on sexually explicit telephone services.⁹⁴ Likewise, in *United States v. Playboy Entertainment Group, Inc.*,⁹⁵ he delivered the majority opinion invalidating a federal statutory provision requiring cable operators to scramble sexually explicit channels or alternatively to limit such programming to certain hours of the day.⁹⁶ Explicating his views in *International Society for Krishna Consciousness, Inc. v. Lee*,⁹⁷ Justice Kennedy stated, “A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not. . . . The right of speech . . . comes not from a Supreme Court dictum but from the constitutional recognition that the government cannot impose silence on a free people.”⁹⁸ Writing for the majority in another case, he argued, “The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”⁹⁹

Justice Kennedy’s suspicion of governmental regulation of speech, however, stems more from a perceived need for unfettered speech to realize fully individual freedom and autonomy rather than a desire for so-called “small government.”¹⁰⁰ Several of Justice Kennedy’s cases reveal a willingness to depart from his libertarian stance in circumstances where governmental regulation seems to advance, rather than retard, individual expression. In *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*,¹⁰¹ he joined the majority to overturn parts of the Cable Television Consumer Protection and Competition Act of 1992,¹⁰² which allowed the FCC to require cable owners to prohibit sexually explicit programming content.¹⁰³ Justice Kennedy would have gone further, however,

⁹³ 492 U.S. 115 (1989).

⁹⁴ *Id.* at 116-17.

⁹⁵ 529 U.S. 803 (2000).

⁹⁶ *Id.* at 806-07.

⁹⁷ 505 U.S. 672 (1992).

⁹⁸ *Id.* at 696 (Kennedy, J., concurring).

⁹⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

¹⁰⁰ For example, Justice Kennedy joined the majority opinion in *Gonzales v. Raich*, 545 U.S. 1, 3 (2005), a case that upheld federal prohibitions on the sale of medical marijuana and showed considerable deference to federal regulatory power under the Commerce Clause.

¹⁰¹ 518 U.S. 727 (1996).

¹⁰² *Id.* at 781 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁰³ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(a)-(c), 106 Stat. 1460, 1486 (codified at 47 U.S.C. § 532(h), (j) (2006)).

and invalidated the permissive section of the Act¹⁰⁴ permitting cable owners to “prohibit[] programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.”¹⁰⁵ Unlike the majority, Justice Kennedy did not appear concerned with the private interests of the cable owners¹⁰⁶ but rather focused on speakers’ ability to access an expressive medium.¹⁰⁷ In his view, the cable owners’ interests were subordinated to the larger need to provide a path for content.¹⁰⁸

Conversely, Justice Kennedy is willing to endorse government regulation when it does in fact facilitate free expression. *Burson v. Freeman*,¹⁰⁹ for example, presented Justice Kennedy with a particularly difficult problem that required him to balance the right to vote unencumbered against the right of a political activist to exercise her rights under the First Amendment. In *Burson*, the Court upheld Tennessee statutes that prohibited the solicitation of votes and the display of campaign materials within one hundred feet of a polling place on the day of an election.¹¹⁰ Though recognizing that he himself had “questioned the validity of the Court’s recent First Amendment precedents suggesting that a State may restrict speech based on its content in the pursuit of a compelling interest,”¹¹¹ Justice Kennedy clarified and cabined his broad rhetoric in an earlier case:

The same use of the compelling-interest test [that I opposed] is adopted today, not to justify or condemn a category of suppression but to determine the accuracy of the justification the State gives for its law. The outcome of that analysis is that the justification for the speech restriction is to protect another constitutional right.¹¹²

Distinguishing his own precedent, Justice Kennedy went on to draw an extremely fine distinction between *Burson* and his prior opinion in *Simon &*

¹⁰⁴ *Id.* § 10(a).

¹⁰⁵ *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 734, 780 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting the Cable Television and Consumer Protection Act §10(a)).

¹⁰⁶ *Id.* at 747 (plurality opinion) (“Justice Kennedy’s focus on categorical analysis forces him to disregard the cable system operators’ interests.”).

¹⁰⁷ *Id.* at 783 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁰⁸ *Id.* at 796 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others.”).

¹⁰⁹ 504 U.S. 191 (1992).

¹¹⁰ *Id.* at 195.

¹¹¹ *Id.* at 211 (Kennedy, J., concurring).

¹¹² *Id.* at 213.

Schuster, Inc. v. Members of the New York State Crime Victims Board,¹¹³ in which he had spoken in absolutist terms about the prohibitions of the First Amendment:

As I noted in *Simon & Schuster*, there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. That principle can apply here without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote. Voting is one of the most fundamental and cherished liberties in our democratic system of government. The State is not using this justification to suppress legitimate expression.¹¹⁴

Thus, governmental efforts in defense of speech may sometimes win Justice Kennedy's approval. Given his acceptance of the balancing approach in this and other areas, one might have expected Justice Kennedy to be receptive to the equalizing argument proffered by Justice Stevens in his dissent in *Citizens United* – namely, that disadvantaged voices need support relative to more powerful speakers in order to contribute to the political debate.¹¹⁵ However, his vote to rehear and ultimately overrule *Austin* clearly signaled his repudiation of that position. On one level, this stance is contradictory. After all, if the underlying concern in protecting speech is to ensure a vibrant marketplace of ideas in which all potential speakers may participate,¹¹⁶ it seems necessary to address structural obstacles that restrict speech from certain classes of speakers.¹¹⁷

Justice Kennedy, however, is prevented from arriving at this conclusion by his personal view of the First Amendment. In response to questioning during his confirmation hearing, then-Judge Kennedy articulated his belief that the

¹¹³ 502 U.S. 105 (1991).

¹¹⁴ *Burson*, 504 U.S. at 213-14 (Kennedy, J., concurring) (citation omitted); *see also Simon & Schuster*, 502 U.S. at 128 (“Among the questions we cannot avoid the necessity of deciding are . . . whether some other constitutional right is impaired . . .”).

¹¹⁵ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 961-64 (2010).

¹¹⁶ *See id.* at 906 (“*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.” (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008))).

¹¹⁷ Furthermore, it is not enough to assert that such concerns are properly the province of the legislative branch, as many of these impediments are the direct result of judicial intervention. *See, e.g.*, *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986) (excepting certain non-profit corporations from coverage under FECA); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) (extending the holding in *Buckley* to political committees); *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (drawing a distinction between “contributions” and “independent expenditures”). More fundamentally, where constitutional rights are at issue, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

First Amendment rested on “its own foundation.”¹¹⁸ Criticizing other jurists’ reliance on additional constitutional provisions in free speech cases – especially their resort to the Equal Protection Clause – Judge Kennedy made clear his view that the stern proscription of the First Amendment was sufficient, on its own, to form a basis for these decisions.¹¹⁹ While Justice Kennedy’s judicial philosophy – like those of other members of the judiciary – has evolved during his time on the Court, his view that the First Amendment is enforceable in and of itself has remained remarkably stable. For example, in *Simon & Schuster* Justice Kennedy rejected the majority’s analysis in its entirety:

In my view it is both unnecessary and incorrect to ask whether the State can show that the statute “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” That test or formulation derives from our equal protection jurisprudence and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech¹²⁰

Thus, the only balancing of interests countenanced by Justice Kennedy in the realm of free speech is that admitted by the “text of the First Amendment and well-settled principles protecting speech.”¹²¹

B. *Justice Kennedy and Campaign Finance Reform*

In general, Justice Kennedy has also been suspicious of campaign finance regulation.¹²² One scholar has summarized Justice Kennedy’s distaste for campaign finance laws in the following way:

[For Justice Kennedy,] [r]estrictions on campaign donations and campaign speech . . . constitute content-based restrictions of free speech and association. In Kennedy’s view, government attempts to regulate campaign speech rarely promote democracy or prevent the perception of corruption. More often, they distort the free flow of information in the political system, mask the true motivations behind regulations of speech, and serve in practice as censorship of speech essential to democracy. The system of campaign finance legislated by Congress and approved by the Court distorts and censors political speech by prohibiting and restricting

¹¹⁸ See KNOWLES, *supra* note 81, at 53.

¹¹⁹ *Id.* at 53-54.

¹²⁰ *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (citations omitted).

¹²¹ *Id.* at 128.

¹²² COLUCCI, *supra* note 76, at 81 (arguing that Justice Kennedy’s view of the First Amendment “leads him to strike most legislation involving limits on campaign finance and campaign speech”).

certain speakers and messages. Such policies have the effect of insulating the actions of elected officials from meaningful scrutiny and challenge.¹²³

This appraisal is borne out by Justice Kennedy's approach in cases before the Court concerning campaign finance. In *Austin*, Justice Kennedy castigated the majority as "validat[ing] not one censorship of speech but two."¹²⁴ Decrying the Court's approval of restrictions on corporate spending, he declared that "[b]y permitting the statute to stand, the Court upholds a direct restriction on the independent expenditure of funds for political speech for the first time in its history."¹²⁵

Justice Kennedy renewed his criticism in *Nixon v. Shrink Missouri Government PAC*,¹²⁶ accusing the Court of being "indifferent" to the "lasting consequences [of its decision] for political speech in the course of elections, the speech upon which democracy depends."¹²⁷ Justice Kennedy's sharpest attack, however, came in his dissenting opinion in *McConnell*. Observing that "[t]he First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech," he declared that "[t]he civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it."¹²⁸ He went on to suggest that "concerted speech not only has become more effective than a single voice but also has become the natural preference and efficacious choice for many Americans."¹²⁹ The majority's opinion, he argued, "suppress[ed] both spontaneous and concerted speech, leav[ing] us less free than before."¹³⁰ Justice Kennedy's opinion in *Citizens United* rearticulates this antagonism toward regulation of campaign finance.

IV. JUSTICE KENNEDY'S THEORY OF POLITICAL PARTICIPATION IN *CITIZENS UNITED*

The majority opinion in *Citizens United* trumpets a distinct vision of the electoral process and the modes of democratic participation in the United States. Far from demonstrating judicial minimalism, Justice Kennedy's broad and bold language espouses a normative view of the First Amendment and the political process. Moreover, his conclusory observations and assertions belie important assumptions that are informed by his own theory of liberty, democracy, and deliberative discourse. Thus, Justice Kennedy's opinion in *Citizens United* may be viewed as more than simply the most recent evolution

¹²³ *Id.*

¹²⁴ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting).

¹²⁵ *Id.*

¹²⁶ 528 U.S. 377 (2000).

¹²⁷ *Id.* at 405 (Kennedy, J., dissenting).

¹²⁸ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹²⁹ *Id.*

¹³⁰ *Id.*

in First Amendment jurisprudence; it promotes a model of political debate and dialogue that springs from his own personal ideological and philosophical inclinations.

A. *Individual Liberty*

Justice Kennedy's jurisprudence generally displays an ever-present, overarching concern for the individual.¹³¹ Indeed, he has asserted that the "Constitution embodie[s] the idea of limited government, of a fundamental law binding on the people, binding on the majority, binding on the government, all for the benefit of the individual."¹³² For Justice Kennedy, this belief transcends even the actual text of the Constitution. Shortly before he was nominated to the Supreme Court by President Reagan, Judge Kennedy delivered an address to the Ninth Circuit Judicial Conference in which he described and emphasized the difference between the "Constitution" – as embodied in the positive, written law of our founding document – and "constitutional" law, which is comprised of "our ethical culture, our shared beliefs, our common vision."¹³³ Justice Kennedy invokes this intangible body of legal concepts as a complement to the naked words of the Constitution, and in this substrate he finds the legal grounding for his deference to "the concepts of individuality and liberty and dignity that those who drafted the Constitution understood."¹³⁴ Evidence of his continued reliance on this larger body of law can be found in several of Justice Kennedy's cases.¹³⁵ Unsurprisingly, in the

¹³¹ The discussion here concerns only Justice Kennedy's views on individuality and dignity in the context of the First Amendment. Indeed, his jurisprudence in other areas of the law suggests that other factors may control his analysis in different contexts. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."); *Nguyen v. INS*, 533 U.S. 53, 70 (2001) (denying that "the statute under consideration must be capable of achieving its ultimate objective in every instance" in the context of "gender-based classification equal protection cases").

¹³² Justice Anthony M. Kennedy, *The Constitution and the Spirit of Freedom*, in 1 THE GAUER DISTINGUISHED LECTURE IN LAW AND PUBLIC POLICY 1, 10 (1990).

¹³³ *See* KNOWLES, *supra* note 81, at 170.

¹³⁴ *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 170 (1987) [hereinafter *Nomination Hearings*] (statement of Anthony M. Kennedy).

¹³⁵ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("[T]here are other spheres of our lives and existence . . . where the State should not be a dominant presence. . . . The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."); *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (endorsing an analysis based on "our traditions, precedents, and historical understanding of the Constitution and its meaning"); *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who

First Amendment context his decisions have depended largely on the degree to which individuals can freely express themselves or pursue undertakings consistent with personal self-development. In *Lee v. Weisman*,¹³⁶ for example, Justice Kennedy stated that the “Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment.”¹³⁷ Similarly, in *Ashcroft v. Free Speech Coalition*¹³⁸ he emphasized that “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.”¹³⁹ Justice Kennedy thus displays a consistent concern for individual expressive capacities.

Additionally, Justice Kennedy is aware of the disparity of power that exists between the individual and larger entities. He has previously observed that “it is naive to think that an individual alone and in sole reliance on his own resources can counterbalance the power of great modern states.”¹⁴⁰ This implies that Justice Kennedy believes something more than individual activism is sometimes needed to promote a political message effectively. Therefore, it seems more in keeping with Justice Kennedy’s personal philosophy to suggest that he views private associations as an expedient way to secure individual liberties in the current political climate.¹⁴¹ Such a reading offers a way to resolve the seeming paradox between his focus on individual autonomy and his deference to collective activity in *Citizens United*. While certainly in tension – the weight of the collective may, in some cases, overwhelm the strength of the

seek its assistance.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”).

¹³⁶ 505 U.S. 577 (1992).

¹³⁷ *Id.* at 591; *see also* *Bd. of Educ. v. Mergens*, 496 U.S. 226, 261 (1990) (“[N]o constitutional violation occurs if the school’s action is based upon a recognition of . . . permissible ways for a student to further *his or her own personal enrichment*.” (emphasis added)).

¹³⁸ 535 U.S. 234 (2002).

¹³⁹ *Id.* at 253.

¹⁴⁰ Kennedy, *supra* note 132, at 18.

¹⁴¹ There is something to be said for this view. In a world of increasing political and informational complexity, collective action in pursuit of political interests may sometimes offer advantages over individual activism. For example, pooling resources and organizing interested members of the public can overcome significant information and collective action costs. *See* ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 226-29 (1957); Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 755 (2000) (suggesting that political theory should acknowledge that citizens may act as “political consumers” when “inevitable collective action problems block effective individual agency”). Moreover, collective political activity may, in some cases, provide a way for citizens to compensate for the fact that “rational [individuals] will be politically informed to different degrees” because of “the division of labor and the presence of uncertainty” in society. DOWNS, *supra*, at 237.

individual – these notions are reconcilable if one recognizes that, for Justice Kennedy, the most effective conduit for *individual* expression is *collective* activity. The “[c]ollective right, then, has its principle, its reason for existing, its lawfulness, in individual right; and the common force cannot rationally have any other end, or any other mission, than that of the isolated forces for which it is substituted.”¹⁴²

In his dissent in *Austin*, Justice Kennedy declared, “It is a distinctive part of the American character for individuals to join associations to enrich the public dialogue,”¹⁴³ and his opinion in *Citizens United* reaffirms this view.¹⁴⁴ Justice Kennedy has also claimed, “[C]oncerted speech not only has become more effective than a single voice but also has become the natural preference and efficacious choice for many Americans.”¹⁴⁵ Clearly, Justice Kennedy highly regards collective expression. Conversely, several sections of Justice Kennedy’s *Citizens United* opinion suggest his intent to make associational action more conducive of individual expression. For example, when rejecting an invitation to rule on narrower grounds, Justice Kennedy argued, “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”¹⁴⁶ At first blush, this statement seems to convey animus toward regulation of speech in general, but it must be read in the proper context. *Citizens United* left intact requirements that corporate speakers comply with the disclosure and disclaimer provisions of the BCRA.¹⁴⁷ Additionally, the FEC still retains the power and prerogative to regulate a broad range of election-related activity through complex administrative procedures.¹⁴⁸ It is thus highly unlikely that *Citizens United* appreciably reduced the need for legal counsel in matters concerning political activity; more likely the demand for campaign finance attorneys will only increase in response.

Realistically, then, Justice Kennedy’s statement is more a declaration of principle than an observation of fact, and the concerns underlying the specific burdens he cited gain greater significance when viewed in terms of the

¹⁴² FRÉDÉRIC BASTIAT, *THE LAW 2* (Ludwig von Mises Inst. trans., 2007) (1850).

¹⁴³ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting).

¹⁴⁴ See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 917 (2010).

¹⁴⁵ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹⁴⁶ *Citizens United*, 130 S. Ct. at 889.

¹⁴⁷ See *id.* at 913-17 (upholding §§ 201 and 311 of the BCRA).

¹⁴⁸ The FEC has shown no signs of scaling back investigatory efforts in controversial cases in the wake of *Citizens United*. See, e.g., Dan Eggen, *FEC Finds Errors in Palin Political-Action Committee’s Quarterly Filing*, WASH. POST, Nov. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111204853.html>; Sharon Theimer, *Commission Dismisses its Complaint Against Ensign*, WASH. POST, Nov. 20, 2010, at A5.

distinction between individuals and groups. Organizations may typically be assumed to possess more resources than individual members and, except in the case of small grassroots groups,¹⁴⁹ can likely shoulder the cost of the obstacles Justice Kennedy derides.¹⁵⁰ Individuals, however, may not be able to overcome this burden without reliance on the advantages that come with association. Justice Kennedy seemed to make this distinction even as he defended the rights of Citizens United as a corporation.¹⁵¹ Therefore, it is perhaps better to understand his criticism of these obstacles not as an attack on the requirements the BCRA imposed on associations but as a rejection of impediments that compel individuals to rely ever more on the larger ability of organized groups to absorb costs. Such reliance likely reduces the power of individual members to express themselves through the mouth of the organization.¹⁵²

Additionally, despite Justice Kennedy's spacious language concerning the equivalence of individual and corporate speakers in *Citizens United*, he does view collective groups – and specifically corporations – as fundamentally different from actual persons. Most recently, for example, in *Federal Communications Commission v. AT&T Inc.*,¹⁵³ Justice Kennedy joined the Court in declaring that protection under the Freedom of Information Act (FOIA) “against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.”¹⁵⁴ AT&T had taken the logical position that “the

¹⁴⁹ The Court has observed that “[d]etailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear.” Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 254 (1986).

¹⁵⁰ Justice Stevens pointed out, for example, that “[i]n fact, no one has argued that *Austin*’s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked [the Court] to overrule it.” *Citizens United*, 130 S. Ct. at 941 (Stevens, J., concurring in part and dissenting in part). Certainly the burdens lamented by Justice Kennedy, such as attorneys’ fees and court costs, were not prohibitive in the case of Citizens United. See *id.* at 887 (stating that Citizens United has an annual budget of \$12 million).

¹⁵¹ Justice Kennedy’s concern that the BCRA provision was an example of “[p]roliferous laws [that] chill speech” was explicitly targeted at “[p]eople ‘of common intelligence’” and not, as one might expect, at the resources of the average organization. *Id.* at 889 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

¹⁵² For example, while any use of organizational resources certainly requires some reliance on other members for approval, actions that entail incurring substantial additional costs – such as those that may expose the organization to liability and government enforcement – are likely to be met with more suspicion and hostility by other members of the group. Interestingly, this logic would seem to hold even for groups that possess significant resources, as more capital often implies more stakeholders and therefore more potential veto gates.

¹⁵³ 131 S. Ct. 1177 (2011).

¹⁵⁴ *Id.* at 1185. As a technical matter, the Court did not address whether corporations

word 'personal' . . . incorporates the statutory definition of the word 'person.'"¹⁵⁵ Since the Administrative Procedure Act defines "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency,"¹⁵⁶ AT&T argued that it could invoke FOIA Exemption 7(C), which excludes disclosures that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁵⁷ In a rather brief opinion, a unanimous Court rejected this notion as absurd.¹⁵⁸ The crucial question is where – and more importantly, why – Justice Kennedy chooses to draw this distinction.

During his confirmation hearings, Judge Kennedy stated that the First Amendment is meant to "ensure[] the dialogue that is necessary for the continuance of the democratic process."¹⁵⁹ Like his conviction that the principles underlying free speech are sufficient bases to resolve cases without resort to other constitutional provisions, this belief has remained a pillar of his evolving judicial philosophy.¹⁶⁰ This view implies that the First Amendment countenances flexibility in the face of questionable speech in order to maximize diversity of ideas. The important inquiry, of course, becomes what sort of "dialogue" Justice Kennedy envisions. Given his consistent deference to individuality, personal expression, and self-development, Justice Kennedy likely views the permissible scope of the dialogue as very wide-ranging indeed. In *Citizens United* he found this concept sufficiently broad to encompass unbounded political speech by corporate entities. In terms of Justice Kennedy's theory of political participation in a democracy, it is helpful to dissect the reasons he offers for why corporate speech should be considered part of the "dialogue" that the First Amendment "ensures."

have "personal privacy" in a constitutional sense. However, it is difficult to see how the Court's logic will not have repercussions outside of this statutory context – especially since the context in this case was disclosure of private information. *Id.* at 1184 ("[T]his case does not call upon us to pass on the scope of a corporation's 'privacy' interests as a matter of constitutional or common law.").

¹⁵⁵ *Id.* at 1181.

¹⁵⁶ Administrative Procedure Act, 5 U.S.C. § 551(2) (2006).

¹⁵⁷ *Id.* § 552(b)(7)(C).

¹⁵⁸ Indeed, the glib language used by the Court indicates just how farfetched it viewed AT&T's argument. After rejecting the corporation's assertion that it was entitled to protection under FOIA, Chief Justice Roberts closed with, "We [the Court] trust that AT&T will not take it personally." 131 S. Ct. at 1185.

¹⁵⁹ *Nomination Hearings*, *supra* note 134, at 111.

¹⁶⁰ *See, e.g.,* *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000) ("It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society."); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 781 (1996) (Kennedy, J., concurring in part and dissenting in part) ("When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.").

B. *The Incorporation of Democracy*

In *California Democratic Party v. Jones*,¹⁶¹ Justice Kennedy stated, “In a free society the State is directed by political doctrine, not the other way around.”¹⁶² He has also drawn a distinction between the government and its citizens, asserting that “[t]he civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.”¹⁶³ These sentiments likely derive support from Justice Kennedy’s view that the success or failure of a political community ideally is policed only through the exercise of personal responsibility that stems from civic virtue. A defining purpose of the Constitution, Justice Kennedy has declared, is to safeguard the “private sphere” from government encroachment.¹⁶⁴ He argues that “the Framers’ early purpose [was] to preserve and protect from official dominance or intervention” that “broad range of human activity that comprises our national life, including all of the creative social and cultural endeavors that flourish outside the governmental sector.”¹⁶⁵ Justice Kennedy envisions a political dichotomy – a “private sphere” separate from the government sector in which “the people . . . shape and explore without assistance, sponsorship or control by the government.”¹⁶⁶ This belief frames democracy as a standalone enterprise and likely forms the basis for Justice Kennedy’s rejection of the Court’s “anti-distortion rationale” in *Austin*.¹⁶⁷ The private sphere, he argues, “has the distinct right and the urgent responsibility to explore and to define its own philosophic purposes and its own proper role in determining the mission of our people.”¹⁶⁸ According to Justice Kennedy, this must be accomplished without the guidance or intervention of the government if the Constitution’s promise of individual freedom is to be preserved.¹⁶⁹

Justice Kennedy has also exhibited a predilection for concerted private action on several other occasions. Citing Alexis de Tocqueville, he has observed with approval that “group action in the private sphere was one of the distinguishing features of American society” and bemoaned the “Court’s

¹⁶¹ 530 U.S. 567 (2000).

¹⁶² *Id.* at 590 (Kennedy, J., concurring).

¹⁶³ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹⁶⁴ Kennedy, *supra* note 132, at 3.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 16-17.

¹⁶⁷ *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 703-07 (1990) (Kennedy, J., dissenting).

¹⁶⁸ Kennedy, *supra* note 132, at 17.

¹⁶⁹ Indeed, Justice Kennedy suggested that the statute at issue in *Austin* was unconstitutional because it is “inappropriate and unnecessary . . . to assert governmental power in the private realm as the people go about the exercise of freedom in their own way.” *Id.*

misunderstanding” on this point.¹⁷⁰ Arguing that “[p]olitical philosophers since Aristotle have taught that men and women best fulfill their own potential when they engage in collective action,”¹⁷¹ he has emphasized that “[i]t is a distinctive part of the American character for individuals to join associations to enrich the public dialogue.”¹⁷² According to Justice Kennedy, “[i]f there is to be real opportunity for autonomy and individual expression, it often must be within the context of groups or institutions, not through individual actions, however courageous.”¹⁷³

Though Justice Kennedy favors collective action as a mode of expression, he does not regard all forms of association as equally protective of liberty. To Justice Kennedy, state-sponsored (or state-favored) organizations are always inherently suspect because “a state [is] always ready to co-opt private initiatives and talents for its own perpetuation.”¹⁷⁴ Thus, “[g]roups and institutions in the private realm must have a real part in shaping society or they will be seen as irrelevant, as indistinguishable from the allurements of the state.”¹⁷⁵ Corporations are surely examples of purely private actors with the capability to “shape society.” Yet it is not readily apparent how compatible corporate political participation is with Justice Kennedy’s idealistic view of the private sphere.

Justice Kennedy unquestionably has great respect for private actors – both individual and collective – and advocates strenuously for their protection against governmental intrusion. Still, a common thread seems to underlie Justice Kennedy’s conception of the private sphere; protection is most warranted by private action that is both civically oriented and civically informed. This may, in fact, be the nature of private action in many instances. It is certainly true, after all, that private actors from small business owners to multinational corporations have a vested interest in a healthy economic environment. Such a concern is civically beneficial even if motivated purely by self-interest because the general public often reaps the advantages of private economic success. This happens, for example, directly through taxation and indirectly through the expanded prosperity, happiness, and contentment of individual citizens. In a free market environment, however, private action will not always inure to the benefit of the public. In such cases, the private sphere may not exhibit the fundamental civic virtue Justice Kennedy extols.

Some scholars have suggested that Justice Kennedy seeks to protect individual expression above and beyond any possible benefit to society.¹⁷⁶

¹⁷⁰ Kennedy, *supra* note 132, at 18 (citing ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 106 (P. Bradley ed., 1948)).

¹⁷¹ *Id.* at 21.

¹⁷² *Austin*, 494 U.S. at 710 (Kennedy, J., dissenting).

¹⁷³ Kennedy, *supra* note 132, at 18.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ KNOWLES, *supra* note 81, at 62.

Notably, Professor David Strauss has argued that this is the correct course for the Court to take with respect to the First Amendment, because it would prevent the government from acting as a censor or inhibiting the minds and passions of the citizenry.¹⁷⁷ Justice Kennedy's view, however, seems more in line with the position taken by Justice Brandeis in *Whitney v. California*.¹⁷⁸ In a marked departure from traditional libertarian thought, Justice Kennedy does not proclaim that freedom is the sole end of a legitimate society.¹⁷⁹ He does not view freedom or liberty as monolithic concepts or goals in and of themselves. Rather, he argues that these virtues were enshrined in the Constitution so that Americans might "find the insight and power to contribute to civilization in its largest sense."¹⁸⁰ In the case of free speech, "[t]he Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed," not simply to protect all expression from infringement.¹⁸¹

This view of liberty is malleable enough to allow for encouragement of particular freedoms calculated to advance society toward this "mission."¹⁸² It is neither fair nor accurate to cast Justice Kennedy simply as a libertarian, an opponent of regulation, a blind defender of free expression, or a proponent of shrinking government. Justice Kennedy's conception of liberty leaves ample room for authoritative government action that advances the *purpose* of individual autonomy. The belief that "[o]ur constitutional order imposes on each of us the responsibility to use the freedom given to us in the private sphere to fulfill all of our human capacities and hopes," frees Justice Kennedy to prefer those interests and rights that have proven most successful at securing those goals.¹⁸³ The palpable influence – economic or otherwise – and effectiveness of formally incorporated interest groups in our society likely encourages Justice Kennedy to conclude that the purpose of the constitutional guarantee of individual autonomy is best achieved through those means. Such a determination militates in favor of protecting collective expression even at the risk of disadvantaging individual speakers and likely forms the ideological basis of the decision in *Citizens United*.

¹⁷⁷ See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991).

¹⁷⁸ 274 U.S. 357 (1927). Justice Brandeis famously characterized the underlying purposes of the First Amendment as a search for truth that would benefit the public as a whole. *Id.* at 375 (Brandeis, J., concurring).

¹⁷⁹ Kennedy, *supra* note 132, at 23.

¹⁸⁰ *Id.*

¹⁸¹ *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

¹⁸² Kennedy, *supra* note 132, at 23.

¹⁸³ *Id.* at 24.

V. IMPLICATIONS FOR CAMPAIGN FINANCE LAWS

To make predictions about the viability and constitutionality of future campaign finance regulatory regimes, it is useful – even necessary – to understand the motivations and ideology that drive Justice Kennedy in cases concerning the nature of political participation in a democracy. Though notoriously difficult to identify a unifying theory that underlies a specific jurisprudential approach, the observations in this Note suggest recurrent themes that may illuminate elements of Justice Kennedy's philosophy in cases of this type. First, as other scholars have observed, Justice Kennedy often exhibits a strong libertarian bent that leads him to scrutinize carefully – and often strike down – governmental measures that have the potential to infringe individual expressive activity. This tendency, however, is tempered by Justice Kennedy's profound and unwavering commitment to personal dignity, autonomy, and pluralism, thereby complicating otherwise straightforward decisions that concern governmental efforts to accommodate conflicting constitutional rights. Thus, the lodestar of his approach seems to be encouraging expressive capacity rather than limiting governmental regulation.

Second, Justice Kennedy's demonstrated fondness for empirically justifying the Court's decisions motivates him to look outward at how political expression has evolved, informing his conclusion about how individuals engage in effective political discourse. Paradoxically, his observation that collective action and expression afford more opportunities than individual undertakings appears to have led Justice Kennedy to conclude that protections for *collective* action are necessary for the preservation of *individual* liberties. It is not always clear how this tension can be resolved, nor is it obvious how Justice Kennedy will approach this problem in subsequent cases.

Third, while Justice Kennedy reliably seeks to safeguard individual autonomy as measured by a capacity for self-expression and preservation of personal dignity, it appears that he values individual liberty in an instrumental, rather than absolute, sense. For Justice Kennedy, individual liberty seems to serve the public purpose of advancing society toward a more egalitarian, utopian existence. This conception of progress is nuanced, however, as it does not presuppose what it seeks to achieve. Rather, Justice Kennedy seeks to allow individual citizens to decide for themselves who and what they want to be.¹⁸⁴ Protecting individual liberty, then, is not an end in and of itself, but a means to achieve a greater public good. In furtherance of this goal, Justice Kennedy sometimes seems willing to moderate libertarian ideals by approving laws that may restrict individual capacities.

In *Citizens United*, these themes combine to herald what I term the "incorporation of democracy." To protect the liberty of the individual by safeguarding the rights of the collective, Justice Kennedy sought to provide breathing space to the First Amendment rights of individuals who have

¹⁸⁴ This, of course, is only to the extent that any actor is capable of successfully subordinating his or her personal predilections.

organized in order to communicate their views more efficiently and effectively. His perception of the need for such a buffer likely stems from his belief in the need for collective action to influence and oppose the actions of the more powerful State. Yet, in seeking to provide judicial protection to this mode of political engagement, *Citizens United* may extend too far. Increasing protection for collective entities without accommodating the significant power disparity between large groups and individuals skews the balance of power between these groups in favor of collective expression. After all, if collective expression is to be preferred to individual action because of its greater efficacy, one must acknowledge a difference in the relative ability of these two approaches to affect the political debate. Justice Kennedy's attempt to promote individual expression generally may thus have the perverse effect of strengthening only the voices of already dominant speakers.

A. *Legislative Impact*

In the wake of the public response to *Citizens United*, members of the Democratic Party in both the U.S. House of Representatives and the U.S. Senate introduced legislation to mitigate the effect of the Court's ruling.¹⁸⁵ This bill, known as the "Democracy is Strengthened by Casting Light on Spending in Elections" (DISCLOSE) Act,¹⁸⁶ passed in the House¹⁸⁷ before stalling in the Senate.¹⁸⁸ Given recent political trends, the viability of legislation like the DISCLOSE Act is now very much in doubt; still there remains the interesting threshold question of whether the Court would permit this new attempt at regulation. As in *Citizens United*, the answer would likely depend on Justice Kennedy.

In essence, the DISCLOSE Act sought to strengthen the disclosure requirements that pertain to corporate political spending activity.¹⁸⁹ On their

¹⁸⁵ *Dems Move to Blunt Citizens United*, POLITICO (Apr. 24, 2010, 11:47 PM), <http://www.politico.com/news/stories/0410/36303.html>.

¹⁸⁶ H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010).

¹⁸⁷ Sam Stein, *DISCLOSE Act: House Passes Major Campaign Finance Legislation*, HUFFINGTON POST (June 24, 2010, 4:47 PM), http://www.huffingtonpost.com/2010/06/24/disclose-act-house-passes_n_624698.html.

¹⁸⁸ Jessica Rettig, *Senate Republicans Block DISCLOSE Act*, U.S. NEWS & WORLD REP. (July 27, 2010), <http://www.usnews.com/news/articles/2010/07/27/senate-republicans-block-disclose-act>.

¹⁸⁹ Specifically, the relevant portions of the Act contained provisions to prohibit independent expenditures and payments for electioneering communications by government contractors if the value of their contract is at least \$10 million; proscribe contributions to any political party, political action committee, candidate, or person for any political purpose by recipients of assistance under the Troubled Asset Program of the Emergency Economic Stabilization Act of 2008; extend the ban on contributions and expenditures by foreign nationals to foreign-owned or controlled corporations; require corporation officials to file a

face, many of these requirements fit within the safe harbor of disclosure regulation that the Court left intact in *Citizens United*. It would be a mistake, however, to assume that merely because the Act contained new disclosure measures that the Court – and particularly Justice Kennedy – would uphold it against a constitutional challenge. In fact, the provisions of the DISCLOSE Act would have placed new restrictions on both organizations and individuals that could run afoul of Justice Kennedy's vision of the First Amendment. In particular, it seems likely that he would be inclined to invalidate § 212, which mandates that corporation officials file a certification with the FEC before undertaking any political activity.¹⁹⁰ This is strikingly evocative of Justice Kennedy's assertion in *Citizens United* that “[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.”¹⁹¹ While a certification under § 212 is legally different from a declaratory ruling, Justice Kennedy would probably view the distinction with skepticism.

More fundamentally, the overall purpose of § 212 probably contravenes the deeper rationale behind Justice Kennedy's ruling in *Citizens United*. This section generally required that corporations and other organizations comply with special rules for the use of general treasury funds for campaign-related activity.¹⁹² This would directly implicate Justice Kennedy's opposition to additional restrictions being placed on collective resources. Despite the beneficial result of promoting transparency with respect to organizations' assets, increased oversight and disclosure of fund transfers within private accounts diffuses authority within an organization and implicates more actors whose approval is required for action. These additional obstacles would likely

certification with the FEC before undertaking any political activity; require any person making independent expenditures exceeding \$10,000 to fulfill additional disclosure obligations within twenty-four hours of making such expenditures; compel corporations, labor organizations, tax-exempt charitable organizations, and political organizations other than political committees to disclose additional information in reports on independent expenditures of at least \$10,000; prescribe special rules for the use of general treasury funds for campaign-related activity; mandate that organizations disclose to shareholders, members, and donors relevant information concerning disbursements for campaign-related activity; and require additional information to be included in certain radio or television electioneering communications. S. 3628, 111th Cong. §§ 101(a), 101(b), 102, 212, 201(b), 211, 212, 301, 214 (2010).

¹⁹⁰ Additionally, Justice Kennedy would likely take issue with § 201(b), which would require any person making independent expenditures greater than \$10,000 to fulfill additional disclosure obligations within twenty-four hours because it places a significant, time-sensitive burden on individuals who attempt to engage in protected political speech. *Id.* § 201(b).

¹⁹¹ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010).

¹⁹² Arguably, this portion of the DISCLOSE Act would be found unconstitutional as a transparent attempt to regulate, under the aegis of disclosure, what the Court in *Citizens United* stated Congress could not regulate through prohibition.

decrease the efficiency with which an individual could promulgate a message within, and by virtue of, the collective structure of an organization; thus, the advantage of incorporating or organizing in order to participate effectively in the democratic process would be correspondingly reduced. While ostensibly within the letter of what Congress may legally require in the name of disclosure, a more nuanced consideration of the ideological thrust of Justice Kennedy's position suggests that such a provision is likely to offend his constitutional sensibilities.

B. *Judicial Impact*

While Congress has stalled with respect to campaign finance, the lower courts have forged ahead. One recent example is *Sampson v. Buescher*,¹⁹³ where the Tenth Circuit held that a Colorado disclosure law was unconstitutional as applied to expenditures made by small groups in relation to ballot initiatives.¹⁹⁴ The court found that the Supreme Court had never approved the use of disclosure requirements for ballot initiatives and cited *Citizens United* to argue that “[d]etailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of records, impose administrative costs that many small entities may be unable to bear.”¹⁹⁵ This decision minimizes the public's interest in the free flow of information that is essential to responsibly shaping political discourse – an important limiting factor at the core of Justice Kennedy's theory of the First Amendment. It is far from clear that he anticipated such a result at the time *Citizens United* was decided.

Perhaps the most significant ramification traceable to judicial action, however, has been the birth of so-called “Super PACs.” On March 26, 2010, the D.C. Circuit decided *SpeechNow.org v. Federal Election Commission*,¹⁹⁶ which drew on *Citizens United* to hold that organizations intending to make only independent expenditures are exempt from federal contribution limits.¹⁹⁷ By forgoing direct contributions to candidates, a PAC may now avoid these limitations entirely and engage in more flexible fundraising campaigns, gaining “super” status. Many groups have taken advantage of this change, creating Super PACs with electioneering capabilities that outstrip their predecessors.¹⁹⁸ The flexibility and financial muscle inherent in these new organizations are evidenced by Super PACs' increasing relevance in elections. In fact, according to the Center for Responsive Politics, barely

¹⁹³ 625 F.3d 1247 (10th Cir. 2010).

¹⁹⁴ *Id.* at 1261.

¹⁹⁵ *Id.* at 1255 (quoting *Citizens United*, 130 S. Ct. at 897-98).

¹⁹⁶ 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 553 (2010).

¹⁹⁷ *Id.* at 694.

¹⁹⁸ *Super PACs*, CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/pacs/superpacs.php?cycle=2012> (last visited Sept. 15, 2011).

more than a year after the Court announced its decision in *Citizens United*, 149 groups have organized as Super PACs and have reported total expenditures of \$2,571,437 in the 2012 cycle.¹⁹⁹

In reaching its decision, the court in *SpeechNow.org* also addressed the government's interest in preventing corruption through limits on contributions to Super PACs.²⁰⁰ Citing the broad protections established regarding independent expenditures in *Citizens United*, the D.C. Circuit failed to find any legitimate government interest in regulating these contributions.²⁰¹ Though even Justice Kennedy said only that "influence over or access to elected officials does not mean that those officials are corrupt"²⁰² – itself a looser rendition of the Court's prior understanding – *SpeechNow.org* expanded this notion even further, declaring that "[t]he Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'"²⁰³ Since *Citizens United* eliminates all possibilities of improper influence save that of quid pro quo corruption,²⁰⁴ the holding of *SpeechNow.org* arguably immunizes the entire class of independent expenditure-only PACs from allegations of misconduct.²⁰⁵ At the very least, the case sets an extremely high bar for actions claiming improper financial dealings without indicating what kind of evidence might be sufficient to sustain a challenge.²⁰⁶

CONCLUSION

Citizens United does not merely level the playing field between comparable speakers or protect otherwise indistinguishable free speech rights. Rather, it

¹⁹⁹ *Id.* (data accurate as of Sept. 29, 2011).

²⁰⁰ *SpeechNow.org*, 599 F.3d at 694-95.

²⁰¹ *Id.* at 695.

²⁰² *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 910 (2010).

²⁰³ *SpeechNow.org*, 599 F.3d at 694-95.

²⁰⁴ *See id.* at 694 (citing *Citizens United*, 130 S. Ct. at 910).

²⁰⁵ *Id.* ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.").

²⁰⁶ This observation is even more disconcerting when one recalls the progression preceding the D.C. Circuit's conclusion. Justice Kennedy drew on *Buckley v. Valeo* for the proposition that the government's interest in regulating elections should be confined to cases of quid pro quo corruption. *See* 130 S. Ct. at 909-10. But the *Buckley* Court's view of quid pro quo complications was much broader than Justice Kennedy's. 424 U.S. 1, 27 (1975) ("Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." (emphasis added)). Writing for the court in *SpeechNow.org*, Chief Judge Sentelle narrowed this interest even further, declaring that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group." *SpeechNow.org*, 599 F.3d at 695 (emphasis added).

provides very real and valuable advantages to those with the ability to organize formally in pursuit of political goals. Though positive when viewed from the perspective of collective organizations, the benefits of this approach are called into question when one recognizes that individuals without the capacity or resources to oppose a well-funded political machine have lost one of the few advantages that previously mitigated this fundamental power disparity.

Justice Kennedy clearly views this quandary from a different perspective in *Citizens United*. Of course, while Justice Kennedy's serendipitous status as the swing vote on the current Court allows him to pursue his own vision of the First Amendment, jurisprudence cannot be treated as a personal project subject to singular control. Interpretation and extrapolation by other judges and courts may extend – and perhaps already have extended – the implications of Justice Kennedy's philosophy of political participation in a democracy far beyond what he might have intended. As derivative decisions open new doors, developments like the rise of novel political organizations raise important questions about the future loci of power and influence in electioneering. With essentially unlimited resources and fewer restrictions, these new political animals complicate candidates' attempts to juggle ideological independence and political viability. At the same time, the Court's exceedingly narrow view of corruption encourages unprecedented access and patronage.

Moreover, as courts unpack the principles laid down in *Citizens United*, many remaining regulations may be undercut or rendered obsolete. Because the rule of law is a communal undertaking in the United States, Justice Kennedy's attempt to advance the rights of individuals through safeguards designed to encourage expression through incorporation may ultimately backfire. While there is much to be said for the potential benefits of incentives for collective action, especially where individual autonomy and preference are preserved, it remains to be seen if the Court's incorporation of democracy will advance or retard the virtues our Constitution was designed to protect.