

A Countervailing Constitutional Argument against *Citizens United v Federal Election Commission 2010*: The right to Confidence and Republican Government

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Introduction:

The United States Supreme Court decision in *Citizens United v Federal Election Commission* (2010) held that it was facially unconstitutional to restrict corporations and unions from using their general treasury funds to finance independent expenditures on political speech that could be influential in the election or defeat of a candidate. Although the *Citizens United* decision provides a constitutional argument for why the state should not be involved with regulating speech in the political marketplace, the decision also conflicts with constitutional principles involving the electorates' confidence in governing institutions and its subsequent connection to republican government. A right outlined in Article IV, Section 4 of the Constitution. This alternative constitutional question deserves greater consideration than it was given in the majority opinion, because the electorates' confidence in governing institutions is necessary to preserve the ideals of republican government. The decision in *Citizens United*, however, gives little credence to the idea of what republican democracy entails in the context of the state role in campaign finance.

The decision laid out in the majority opinion, by Justice Kennedy, provides the opportunity for organizations with the ability to aggregate wealth to further increase their advantage in accessing the political marketplace. The decision threatens fundamental principles undermining legitimacy in deliberative processes that are crucial to American democracy. The legitimacy of deliberation in the electoral process can be questioned, because this decision undermines the ability of citizens to control the direction of public issues at the expense of institutionalized advantages afforded to certain actors due to their standing in the economic marketplace. The majority opinion hinges on defining corporate rights through natural personhood theory, allowing justification for why unions and corporations share the same first

amendment rights as individuals in the political marketplace. The Court fails to recognize the value of deliberative principles that are inherent in the ideals of republican government that were written into the Constitution.

When addressing the constitutionality of bans on independent expenditures for corporations and unions the Supreme Court should have considered the foundational principle of confidence in governing institutions. The preamble to the Bill of Rights outlines that, “The Conventions of a number of the States, having at the time of their adopting powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institutions.” It is important to note that the preamble to the Bill of Rights was not initially adopted by the framers, and does not carry constitutional weight. However the mere existence of the preamble shows that it is important when considering what principles the Constitution grew out of, and the concept of confidence in government directly relates to republican government, which is a right in the Constitution. The principle of confidence in the Government is entirely ignored in the majority opinion.

I will establish the connection between republican government and confidence in government by looking at republican democratic theory, as well as analyzing data that reveals declining confidence in American governing institutions existed prior to *Citizens United*. Once it is established that there is a lack of confidence among the electorate, I will analyze differences in power and participation among the electorate to further expose the conflict between the majority opinion and the constitutional right to republican government. By establishing the role of voting as a political institution in this context it is possible to critique the

Supreme Court decision. Finally, by exposing flaws in the Court's ruling, it is possible to consider deliberative methods that could work to enhance republican democracy rather than undermine it.

Principles of republican government in the context of campaign finance regulation

The idea of confidence in governance is crucial to understanding why the Supreme Court decision can be criticized in the context of Article IV, Section 4 of the Constitution. The preamble to the Bill of Rights outlines that the document exists to provide a safeguard that would extend public confidence in the Government, meaning that our institutions operate in an effective manner with regards to republican democratic ideals. I argue that the government does have a constitutional right and interest in the regulation of unions and corporations independent expenditures, because without regulation republican principles are not met. Pettit (1997) defines the republican tradition as freedom as non-domination. Pettit furthers this definition by claiming that another individual, or group can subjugate an individual, or group, to the extent that they have the capacity to interfere on an arbitrary basis in certain choices that the other is in a position to make (52). Arbitrary interference is defined as, "An act is perpetrated on an arbitrary basis, we can say, if it is subject just to the arbitrium, the decision or judgment of the agent" (55). Arbitrary interference relates directly to campaign finance regulations in the context of *Citizens United*, because when unions and corporations have the ability to bankroll campaigns voters become subject to their interference. This stands in direct conflict with the definition of republicanism as freedom as non-domination and therefore conflicts with Article IV, Section 4 of the Constitution.

Pettit (1997) also examines how the institution of voting fits into the context of the republic. He claims that the right to vote is essential to the republic, not simply as a right to participation, but rather that it is necessary for promoting the enjoyment of freedom as non-domination (8). Given this conceptual development of the right to vote and how it is viewed under a republican government it becomes easier to see how the decision in *Citizens United* conflicts with the institutional role of voting. Corporations and unions have been given the right to interference that allows for arbitrary domination during political campaigns. Candidates for office are forced to acquire viewpoints and policy preferences that align with these groups, which subsequently limits voter choice in elections. This is problematic because state power can only be non-arbitrary when those with power consider not their own personal-welfare or world-view, but rather the welfare and world-view of the public (56). Candidates for office who must follow the policy preferences of corporations and unions with aggregated wealth advantage do so in order to win election (or re-election), and it is likely that this will prevent them from addressing the needs of all individuals in the electorate. They are simply looking out for their personal-welfare. By electing these candidates into office it must be questioned whether or not the republican government guaranteed under the Constitution is being met, and if individuals are truly enjoying freedom as non-domination.

Understanding the conditions of domination and non-arbitrary power in the context of republican governance makes it possible to consider what the role of the state should be when considering campaign finance regulations. Pettit (1997) explains that the operational test that determines if state action is inappropriate under republican tradition is whether or not the interference is factional or sectional in character (56). Therefore the Court's decision allowing

corporations and unions to use general treasury funds to finance independent expenditures is anti-republican because it is sectional along economic lines. It also perpetuates a political framework that promotes arbitrary state power because politicians are going to give preference to the groups that can keep them in office rather than listen to the citizenry. Pettit claims that the only way to test for sectional or factional interests and ideas is to include every interest and idea from all corners of society, and when dissent exists appropriate remedies be made (56). The *Citizens United* decision makes this virtually impossible, because individuals cannot economically compete in the same arena with corporations and unions during campaigns. A logical challenge to this point would be to claim that any individual can choose to speak in association or a group, but this is an unrealistic expectation due to constraints in human and social capital among many individuals. Pettit (1997) addresses this issue as well, claiming that pursuing non-domination through a decentralized process such as purely relying on individuals to organize themselves will not alleviate many imbalances of power (92-93). In this situation, the state may pursue action to protect individuals, which in the case of *Citizens United* was through campaign finance regulations blocking unions and corporations from independent expenditures.

Now that I have explained the basic principles of republicanism in the context of campaign finance and *Citizens United* it is necessary to analyze public opinion and voting trends in the United States. Republican government is supposed to operate in the interests of all citizens, and as mentioned before the institution of voting is at the core of freedom as non-domination. The Supreme Court may contest that republican government ideals include listening to people even if they speak as a group, as Justice Scalia argues in a concurrence, but I challenge

that notion in the context of campaign finance law. The right to vote cannot be exercised by a corporation or union, and therefore it is problematic to allow their economic clout to create arbitrary interference in the process. Politicians will not listen to the demands of their constituents in this environment, and this is a damaging phenomenon to the institution of voting. I will analyze public opinion data that reveals disturbing trends in the public's confidence and trust in the government to expose how the electorate views the responsiveness of the government to their needs compared to special interests. I will juxtapose this with voter turnout data to build a framework that shows the electorate is not enjoying freedom as non-domination as espoused in republican government tradition. Although the relationships are merely corollary they suggest that an underlying disconnect exists between the government and the people. The data will show that this is at least partly driven by the power of special interests over politicians, which is what makes the *Citizens United* decision that much more problematic.

The decline of confidence among the electorate: Trends and Relationships

There is evidence that a lack of confidence in our governing institutions is a reality, and that it has been in decline for over three decades. To analyze long-term trends in government confidence I decided to look at data in the ANES Guide to Public Opinion and Electoral Behavior from the American National Election Studies (www.electionstudies.org) as well as the iPoll database run by The Roper Center for Public Opinion Research. Capturing public confidence through public opinion research can seem ambiguous due to the multi-faceted concept of public confidence. I address this problem by utilizing data from multiple public opinion polls and sources over time. By corroborating the similarities from these varying sources I will show that confidence has declined and therefore undermined the right to republican

government. Some of the data also provides additional information that helps identify what has driven this decline, further grounding why this countervailing argument to *Citizens United* is worth considering.

In *By Popular Demand* (2000), Gastil provides data from the General Social Survey that shows an erosion of confidence in Congress. In 1974, seventeen percent of respondents expressed a “great deal of confidence” in Congress. In 1994 the percentage of respondents falling into this category fell to eight percent. A reversed trend is found at the opposing end of the spectrum where in 1974 twenty-one percent of respondents had “hardly any confidence” in Congress, and in 1994 this had risen to thirty-nine percent. Gastil further explains these trends by providing data on perceptions of public officials and their interest in the average person’s problems. In 1974, sixty four percent of respondents felt that public officials were not responsive, and the figure was ten percent higher by 1994 (63). This data reveals a disconnection between public officials and whom they represent, and it is problematic to republican democracy if three fourths of individuals believe that their public officials do not care enough about the average person’s problems. Based on the findings reported by Gastil, there has clearly been an erosion of confidence, and the key takeaway is the strong sentiment that politicians were not responsive to individuals. This phenomenon suggests that arbitrary interference is perpetuating whether or not politicians are listening to their constituents.

In *Locating Consensus for Democracy* (1998), Alan Kay also reveals survey data with similar evidence. Thirty seven percent of respondents strongly agreed that, “the Government is run for the benefit of special interests, not to benefit most Americans,” what is even more concerning is that the total percent of respondents who agreed even slightly with this statement

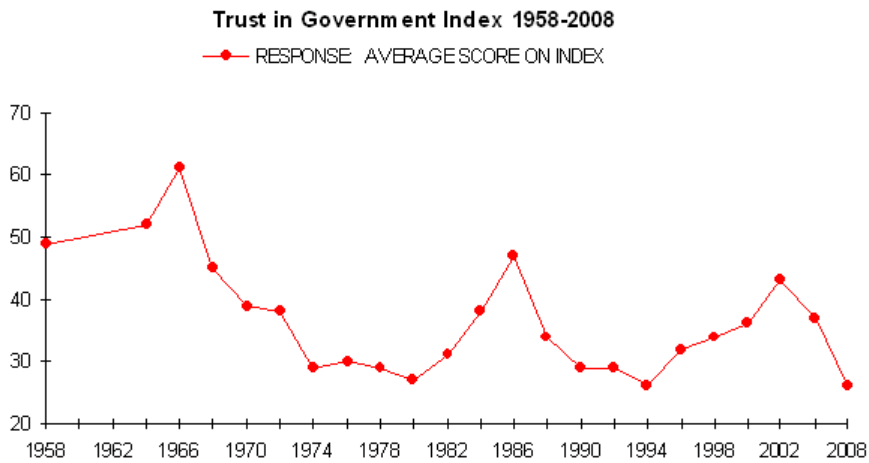
was seventy percent. The data also reveals that thirty percent of respondents strongly agreed, “Government leaders are out of touch. They don’t know or care about what’s going on in the rest of America,” and the total percent of those who agreed was sixty percent. Table 1 shows more data from Kay (1998) that bolsters the argument that our current democratic system is not as responsive as it could be to its citizens. The survey data from Kay (1998) and Gastil (2000) provide insight into the trend that confidence in government has declined over recent decades, and that there is a public narrative that the government is more responsive to special interests than individuals. The data provides evidence that arbitrary interference and domination from special interests over politicians is viewed as problematic among the electorate. However this data only provides a partial framework to work with, because it is only as current at 1995.

Statement	Strongly Agree (%)	Total Who Agree (%)
Government leaders tell us what they think will get them elected, not what they are really thinking	61	88
Government leaders say and do anything to get elected, then do whatever they want.	55	79
Politicians work for themselves and their own careers, not the people they represent.	41	73
The Government is run for the benefit of special interests, not to benefit most Americans.	37	70
Government leaders are out of touch. They don’t know or care about what’s going on in the rest of America	30	60

Source: Alan F. Kay, *Locating Consensus for Democracy* (1998, 2).

The American National Election Study (ANES) has released various measures capturing public trust in government. The ANES data is useful because it collects data every two years making it easy to analyze trends over time for many survey questions. Graph 1 shows the average score on the Trust in Government Index, a one hundred-point scale that averages out responses to a series of questions about trust in government. It has been conducted every two

years from 1958-2008. A score closer to 100 indicates a higher level of trust, while 0 shows low level trust in the government. The graph reveals a similar trend to the findings of Gastil and Kay, while also indicating that the decline in trust began in the 1960s.

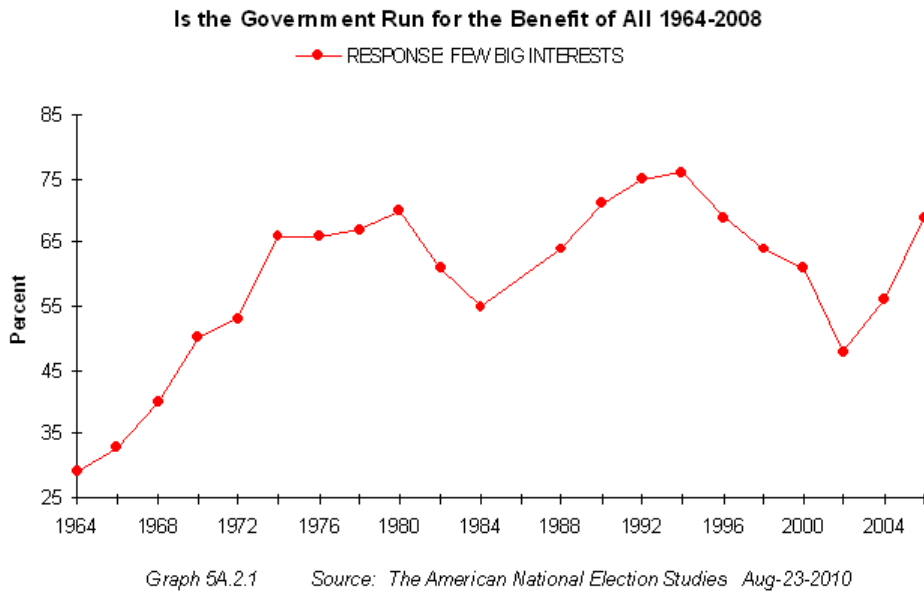


Graph 5A.5.1 Source: *The American National Election Studies* Aug-23-2010

Graph 1: Trust in Government Index 1958-2008.

It is possible to identify driving forces of this decline by parsing out some of the questions that make up the Trust in Government Index. One question, “Would you say the government is pretty much run by a few big □ interests looking out for themselves or that it is run for the □ benefit of all the people?” has been asked from 1968 onward. This question reveals a reciprocal trend to the decline in trust; meaning that an increasing number of individuals responded that it is run by a few big interests. In 2008, sixty-nine percent of respondents answered “few big interests” compared with just twenty-nine percent answering “for the benefit of all.” This is a stark contrast to 1968 when the response was virtually the opposite (twenty-nine

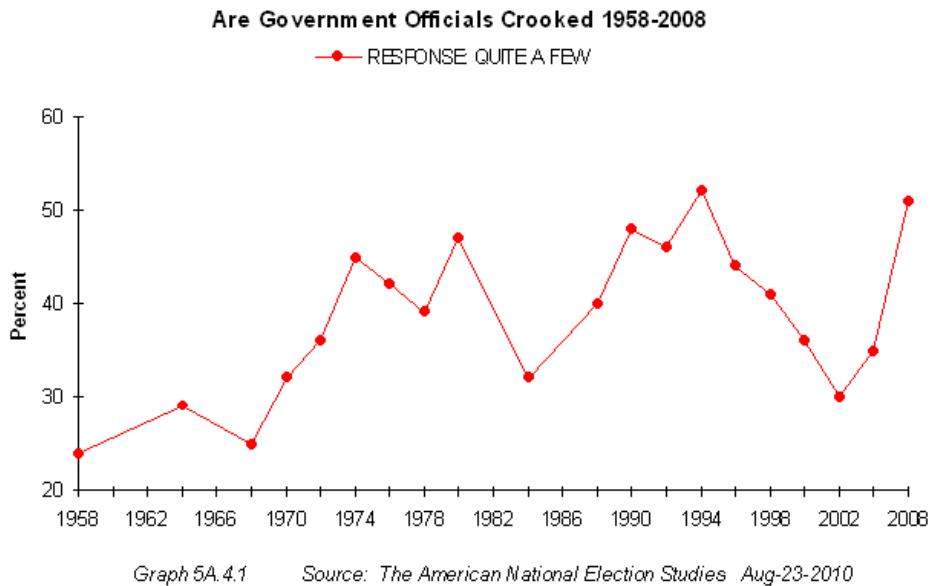
percent said a few big interests, and sixty-four percent said for the benefit of all). Graph 2 provides a more detailed account for the evolution of public opinion on special interests.



Graph 2: Percent of respondents who answered “few big interests”

There is further evidence that the public perceives the government as influenced by arbitrary interference from powerful interests found in the ANES question asking respondents, "Do you think that quite a few of the people running the government are (1958-1972: a little) crooked, not very many are, or do you think hardly any of them are crooked (1958-1972: at all)?" In 2008, fifty-one percent of respondents answered “quite a few” compared to forty-two percent responding “not at all.” The difference in responses here is not as drastic as it was in the responses on whether or not the government is run for the benefit of all, but it still reveals there is a tension between how the government functions and individuals in society. The fact that over half of respondents agreed with the statement that our politicians are crooked is a cause for concern that political institutions are not meeting the standards sought by the definition of republican government. The overall trend to this survey question is similar to the data in Graph

2, although there seems to be more nuances in responses. Graph 3 shows the trends for respondents answering “quite a few.”



Graph 3: Percent of respondents who answered “quite a few”

Given what is seen in Graphs 2 and Graphs 3 there is evidence that a relationship exists between perceptions of crookedness and perceptions on the role of special interests in the government.

A correlation analysis of the variables in Graphs 2 and 3 finds $r=.33$, a weak positive association between these two survey questions. Although weak, this association is important given the inverse relationship between the trends of declining confidence and the increase in opinions that government officials are crooked and the government is run by a few big interests. The inverse relationship shows that contention exists between government responsiveness and individuals, and that special interests play a role in facilitating part of this relationship. It is important to note that the data presented so far was compiled prior to the *Citizens United* decision. Utilizing historical survey data allows for the creation of a framework that highlights the decline of confidence well before the decision and is an essential element to addressing why

the Supreme Court decision was constitutionally flawed in the context of Article IV, Section 4 that guarantees the right to a republican form of government. It is problematic that the Supreme Court would hand down a decision that provides special interests an even greater opportunity to exert arbitrary interference onto governing institutions. The *Citizens United* decision increases corporate and union power by extending their influence into elections, which they cannot participate in (they cannot cast ballots), while undermining freedom as non-domination for individuals. With this pre-*Citizens United* framework established I will look at how the decision has been acknowledged by the electorate.

Public Opinion post *Citizens United*: Money in politics and confidence in government

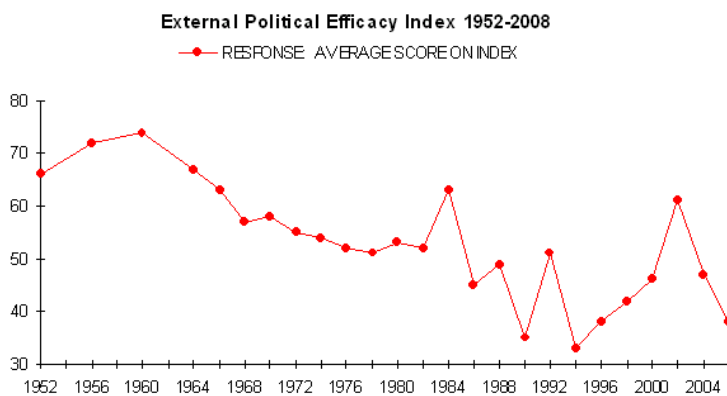
The public has poorly received the *Citizens United* decision since it was handed down in 2010. A moveon.org survey conducted shortly after the decision found that forty seven percent of respondents strongly disagreed with the ruling, and another eighteen percent somewhat disagreed. These numbers compare with eleven percent of respondents strongly agreeing with the ruling, and another seventeen percent somewhat agreeing. A year later in February 2011, a Washington Post-ABC News poll found that eighty-five percent of Democrats, eighty-one percent of Independents, and seventy-six percent of Republicans opposed the ruling. A Democracy Corps survey conducted in January 2012 found similar levels of opposition to the decision compared to the moveon.org survey conducted two years prior. The results indicated that forty-six percent strongly opposed the ruling, and sixteen percent somewhat opposed. This compared with nine percent strongly agreeing with the decision, and fifteen percent somewhat agreeing with the decision. These public opinion surveys and polls indicate that the unpopularity of the decision has remained relatively constant since 2010. It is important to address one issue

pertaining to the public reception of the decision, and my countervailing argument regarding the right to republican government. Since I am utilizing public opinion as a measure of confidence I must acknowledge that the Constitution was not established out of concepts of rule of the majority. However it is important realize that this argument does not center on the fact that it is a highly unpopular decision, and therefore unconstitutional. My argument focuses on how the Supreme Court challenges the republican government tradition, a governing model for the United States that is a right under Article IV, Section 4 of the Constitution.

The argument for accepting declining confidence as a violation of republican government is bolstered by the Doing What Works survey presented in *Better not Smaller: What Americans Want from their Federal Government* by the Center for American Progress (2010). Respondents favored the statement that the government “serves special interests” over “serves the public interest” by a margin of sixty-six percent to thirty-one percent (30). The data, again, shows that there is a disconnection between the electorate and the government. The wealth of data presented so far clearly indicates that there is an issue with public confidence both prior to and following *Citizens United*. Under these conditions, the countervailing constitutional question has merit and can now be used to analyze how the trend in declining confidence manifests itself in society. The manifestation of declining confidence has had important ramifications for political behavior and efficacy. Individuals have record low levels of efficacy, and subsequently political turnout has declined. If these trends exist because of the perceptions of an unresponsive government at the expense of arbitrary interference from special interests (which the data suggests) then the public is not fully realizing the right to vote as freedom as non-domination.

The manifestation of declining confidence: Influencing Political Behavior

What is particularly problematic about the decline of confidence in government is not simply that the phenomenon exists, but rather what it means for individuals. Without analyzing the ramifications of declining confidence, it can be difficult to understand why the *Citizens United* decision undermines the republican tradition. These ramifications can be considered in a variety of contexts, but I want to consider turnout in elections specifically since *Citizens United* deals with campaign finance issues. To begin this analysis, I wanted to consider measures of external political efficacy in relation to what was already revealed about levels of trust in the government. I ran a correlation analysis to glean if any association exists between the ANES Trust in Government Index and the External Political Efficacy Index. There was a moderate-to-strong positive association, $r=.60$, between these indexes. This suggests that as trust increases so does external efficacy. Considering this association, it is logical to expect a similar trend in external efficacy over the same period. Graph 4 confirms that there is a similar trend in external efficacy.



Graph 5B.4.1 Source: *The American National Election Studies* Aug-23-2010

Graph 4: Average External Political Efficacy Index

Due to the association and pattern similarities it is likely that efficacy and trust are related to one another. This conclusion is not just seen in the data, but is highly logical, because external efficacy is a rating of an individual's perception of whether or not they have a say in what the government does as well as if the government cares about what they think. Therefore it makes sense that if people do not have confidence in the government, and people express perceptions that the government is entrenched by special interests then they will have lower levels of political efficacy.

The next vital question to ask is why does political efficacy matter. The question can be answered by considering the following notion. If people believe the government does not care about what they think or that they cannot influence the government a probable recourse will be abstention from voting or participating in politics. The decline of political participation, as expressed through declining voter turnout, has followed a trend that began decades ago similarly to trends in declining confidence and efficacy. Given the overlap between the formation of confidence and efficacy, and the logical link between efficacy and political participation it is possible to understand the basic premise for why *Citizens United* was flawed.

So far it has been established that:

1. Public confidence in the government has declined over time
2. Negative attitudes about that the entrenchment of special interests in the government grew
3. Negative attitudes about politicians grew
4. Political Efficacy has declined over time

The culmination of all these trends over the last 3 to 5 decades establishes that republican government traditions are not being met. Non-participation in politics has grown as a result of domination through arbitrary interference. The creation of this environment is damaging to the democratic ideals in which the American model of republican democracy is founded on. Ideals

are damaged by the fact that when people decide not to participate in governance, democracy is not fully representative. The ability for dissent, as Pettit (1997) explains is a requirement in the republican tradition, is going to decline or cease to exist. This subsequently impacts the republican ideal placing voting at the core of freedom as non-domination. Individuals do not have the ability to influence their government to act in their interests. The decline in participation is even more problematic given the disproportionate impact of low turnout among lower-income individuals. Lijphart (1997) explains that this is so well accepted in the context of American elections that it does not warrant further discussion (2). Economically skewed voter turnout has serious ramifications for lower-income groups to offer dissent, because their views are likely not going to be represented in the government, yet they are likely to be influenced by policy decisions. Again, republican ideals are not being met.

Uneven participation across income groups

The uneven participation among the electorate questions the concept of republican democracy, because it conflicts with the idea that elected officials are representing the people. While the Constitution is by no means an egalitarian document, one measure of universalism comes in Article IV, Section 4 that guarantees every State the right to a republican form of government. In other words, this part of the Constitution guarantees a government that is representative and this is achieved through the election of politicians as explained in other parts of the Constitution. When individuals in lower-income groups participate at lower levels than individuals in other income groups, they are unable to adequately achieve representation through government institutions. Inadequate representation leads to a situation where policies are less

inclined to consider the needs of these individuals resulting in the absence of a voice in the political marketplace.

The disproportionate absence of political voice across income groups is problematic because lower-income individuals are more likely to be adversely impacted by policy decisions if their preferences are considered to a lesser extent and without the possibility of dissent. They can even be rendered powerless, and this is a direct conflict to the principles of republican government. When this occurs policies are not created under deliberative processes that are a core of republicanism according to Pettit. Gilens (2005) offers empirical evidence that the government is more responsive to the demands of affluent policy preferences (793). The underlying issue is that policy preferences are skewed in the direction of increased wealth. Clearly this phenomenon challenges the notion of republican democracy, and is a direct consequence of skewed voter turnout during elections.

When policy preferences are skewed in the direction of specific groups along economic lines republican principles are undermined because state power is being created along factional or sectional lines. The ramifications of income skewed policy preferences can be outlined in the context of an institutionalist approach to understanding the development of policy feedback. Beland (2010) outlines that the underlying theme of historical institutionalism is that political institutions and public policies create constraints and opportunities that impact the behavior of policy actors. Historical institutionalism claims that institutions allow or prevent specific social and political constituencies from participating in the design of public policy through concrete opportunities or obstacles. When this theoretical phenomenon is coupled with temporal data from Gilens (2005) it becomes easy to see that money is an underlying issue in the formation of

policy issues, and is clearly a method of exerting power along sectional divisions in society. The *Citizens United* decision provides another avenue in which money can create arbitrary interference and undermine the republican governing tradition of freedom as non-domination. The decision provides corporate and union power the opportunity to heavily influence another governing institution creating a greater sectional divide, which the republican tradition would claim as an inappropriate use of state power. In other words, the Supreme Court decision is ill advised.

The Supreme Court decision is not simply an inappropriate use of state power, because it perpetuates sectional policy preferences in the direction of economic advantage. It also undermines voting as freedom as non-domination because individuals are choosing not to vote in response to their perceived inability to be represented by politicians. Many individuals have essentially “given up” and this is seriously problematic. Policy feedbacks have provided accumulative advantages that favor special interests and wealthy political actors over the last 3 to 5 decade. When corroborated with the trends of declining trust there is a clear perception that individuals feel powerless (at least to a certain degree). This can be conceptualized by the decline in voter mobilization. In *Power and Powerlessness*, Gaventa argues that

The power of A is also strengthened by the fact that the powerlessness of B is similarly accumulative, and that power and powerlessness may each re-enforce the other towards the generation of B’s quiescence. In the decision-making arena, B suffers continual defeat at the hands of A. Over time, B may cease to challenge A owing to the anticipation that A will prevail. But B’s non-challenge allows A more opportunity to devote power to creating barriers to exclude participation in the future. The inaction of B in the second-

dimensional sense becomes a sum of the anticipation by B of defeat and the barriers maintained by A over B's entering the decision-making arena anyway, and the reinforcing effect of one upon the other (22).

This is known as the second dimension of power, and it provides theoretical insight into how voter turnout trends are related to concepts of political efficacy and also confidence in governing institutions. When Individuals consider themselves to be powerless in the political marketplace the recourse is quiescence from the decision-making arena, and thus removing their ability to effectively dissent. Voters are also not exhibiting freedom as non-domination when the second dimension of power becomes manifested in individuals. The manifestation of the second dimension of power is apparent among the American electorate given the skewed decline of voter turnout across income groups and attitudinal data relating to confidence, special interests and political efficacy.

The second dimension of power is particularly relevant to *Citizens United*, because the Supreme Court decision magnifies the role of money in politics by further skewing political marketplace inequality. Now individuals must also compete with aggregate entities that are able to accumulate significant spending advantages. The participation of aggregate entities in the political marketplace shifts control of the marketplace from individuals to corporations and unions driving the importance of money in elections.

I must again acknowledge critics that would likely respond that any group of individuals could decide to organize to combat the issue of money in elections. However, I again contest that many individuals lack the social, human, and economic capital to reach a point where they can even compete with these pre-existing organizations. From a formal perspective, my critics are

absolutely correct that anyone can organize. The Service Employees International Union is a perfect example of when it is possible for economically disadvantaged individuals to organize effectively, but at a substantive level it is unrealistic to expect individuals across society to organize. This coincides with my earlier use of Pettit exclaiming that the state can play a role in regulation in a case where achieving non-domination individually is next to impossible from a substantive perspective. Under these circumstances the state can make laws aiding individuals ability to achieve a substantive level of non-domination, and in the case of *Citizens United* this republican concept is completely ignored.

The role of money in elections and the shift to institutionalized representation through larger entities is problematic, because it is likely to enhance negative opinions of special interests, confidence in government and political efficacy. The enhancement of these trends would also likely reinforce turnout trends, with the possibility of further decline. The underlying issue in American politics is whether or not an individual believes that the political process is going to represent and respond to their own problems and desires. The evidence indicates that this is not the case, and this is a direct example of the second dimension of power becoming manifested in society. If individuals feel powerless in the sense that their opinions are disregarded then they have allowed their consciousness to be shaped by those who have the power to elicit responses from politicians. It is the manifestation of domination through arbitrary interference. This is why the *Citizens United* decision deserves to be criticized. It is laying the groundwork for this sense of powerlessness and arbitrary interference to influence the most vital actors in the voting process, individuals. The reasons and evidence that I have laid out establish why the Supreme Court should have considered whether our constitutional right to a republican

form of government is being met. However, it is not adequate to frame my argument against the Supreme Court without a deeper analysis of the majority opinion.

The majority opinion: A liberal model approach and its shortcomings

Justice Kennedy's majority opinion in *Citizens United* is best defined as having a liberal market approach that favors a political marketplace with the absence of regulations from the government. The decision is rooted in ideas of formal equality, as the Court seeks to establish a marketplace that confronts the issue of state power as more problematic than money in political campaigns and communication. By ruling that corporations and unions share the same First Amendment rights to speech, and therefore unlimited independent expenditures the decision removes the ability of the state to have any control in the political marketplace. The idea of formal equality in the political marketplace is grounded under principles in the Constitution, but there are also many contentions with the Constitution. The contentions are rooted in the countervailing argument already offered, and they expose a multitude of flawed reasoning in the opinion. The conflict between the Court opinion and the countervailing argument is whether or not regulation of corporate and union expenditures or if the lack of public confidence stemming from ideas of government responsiveness is more damaging to republican democracy. I will show that the rhetoric espoused by the Court, while supporting their claim also supports the claim of the countervailing argument. In some cases the support for the countervailing claim even outweighs the reasoning for supporting the majority opinion.

The majority consistently turns to the idea that the political marketplace is one that should remain unregulated, because people have the final say in the selection of their representatives through voting. Kennedy says, "Under our Constitution it is We The People who

are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important- vitally important- that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that people have access to the views of every group in the community,” making a brilliant point that the power of democracy lies within the people. The statement also should be questioned under the evidence that the people are not hearing the views of every group in the community. The mere existence of extensively low confidence, efficacy, voter turnout, and the stratification of turnout across income groups is evidence that every group in the community does not have their views heard. It is therefore troubling that the Court would deliver an opinion that perpetuates these attitudes among the electorate. It is also necessary to ask whether or not arbitrary interference is a problem in society. The data I have utilized shows that it has become a problem, and it is due to the domination of special interests over the government. If the government is entrenched to special interests, and those special interests are now able to have even greater political influence how are the people going to be able to hear the views of every group? Gaventa’s second dimension of power indicates that the phenomenon of low confidence and turnout will continue rather than rectify itself. This is deeply problematic when the Constitution guarantees the right to a republican form of government, yet the ideals of republican government are not being met.

The Court seeks to bolster their opinion by acknowledging the role of favoritism and influence in politics, but in the end reaches the wrong conclusion on the matter. The opinion states that, “Favoritism and influence are not...avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor

voters and contributors who support these policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” This argument confirms the evidence presented in Gilens (2005), and while the Court is correct that favoritism and influence are not avoidable issues in politics the majority fails to recognize that a problem exists when the government makes policies that drives favoritism along economic lines. The problem is that this favoritism occurs in a sectional manor as a result of arbitrary interference because politicians must follow the will of those who will finance their campaigns for re-election, and dissent cannot occur from all corners of society.

The Court also says, “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” Justice Kennedy’s claim must be challenged based on the evidence that counters this idea. While it may be difficult to gauge the electorates’ faith in democracy, it is hard to believe the Court would accept national turnout rates less than 60% for every presidential election since 1968 and under 40% for every midterm election following 1970 as signs that faith is high among the electorate.

The error in Kennedy’s claim is even taken a step further when he says, “The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestions that the electorate will refuse to take part in democratic governance because of additional political speech made by a corporation or any other speakers.” Again, the existing contrary evidence shows external political efficacy is at an all time low, as is voter turnout and

confidence in the government and the root cause is connected to the arbitrary interference and domination that organized interests have over the government. This phenomenon does not align with the republican tradition of freedom as non-domination. To simply accept the opinion of Kennedy without question would undermine that there is an existing disconnect among politicians and individuals in society, which is being driven by perceptions of representation.

Neblo et al. (2010) also provides evidence that Justice Kennedy's claim about when individuals will choose to engage in the political marketplace is fundamentally flawed. In a study of deliberative democracy, Neblo et al (2010) found in a national survey that individuals were more likely to express an interest in being involved in politics if they felt the government was not influenced by self-serving politicians and officials (570). Given that individuals perceive the government as corrupt due to organized special interests a logical conclusion would be that people would mobilize if domination through arbitrary interference were diminished. In other words, if we were better achieving republican government through freedom as non-domination more people would likely vote. Some critics may argue that a lack of mobilization is a sign of complacency or satisfaction with the current structure of governing institutions, and I will concede this might be true for some of the electorate. But I challenge this notion as the norm given that I do not see it as a possible conclusion when political efficacy and trust in government are at an all time low in American history. The evidence shows that this simply cannot be the case for a majority of individuals who choose not to participate in politics, and it is more likely related to feeling of powerlessness at the expense of domination through arbitrary interference. The problem with the majority opinion is that rather than curbing this domination, it allows for

its expansion into another governing institution by giving corporations and unions the right to unlimited independent expenditures during political campaigns.

Another point of criticism to the regulation-free political marketplace approach that is found in the majority opinion revolves around the right to enlightened self-government. The opinion states, “speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. ‘In a republic where people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.’ The right of citizens to inquire, to hear, to speak and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” A dilemma exists in this idea, because the evidence presented earlier suggests that people do not believe they are able to hold their elected officials accountable. It becomes much more difficult for the people to be sovereign, when money drives who has the ability to access the marketplace. And while citizens have the right to inquire, to hear, to speak and to use information to reach consensus it appears that doing this has resulted in abstention from the political marketplace. The consensus for many individuals is that voting is not worth it, because the government does not respond to their needs.

The Court attempts to further justify this idea of the people holding officials accountable by referencing the advent of the Internet and prompt disclosure that allows individuals to make their minds up for themselves. While laudable in effort, it is necessary to ask why individuals should have to seek out information on corporate political speech in relation to it’s interest in making profit and also in influencing elected officials. Under the constitutional right to a republican form of government the people should be able to prevent this from occurring in the first place. The notion of republican government means this could be done through the

legislature since they are the representatives of the people. Even more concerning is the fact that this statement from the Court is given when in reality the ability of the citizenry to find and disseminate this information in a timely and effective manner would be next to impossible. This discussion has now come full circle to the point raised by Pettit that achieving republicanism does not mean individuals must always seek out the truth individually due to the fact that there are significant barriers to substantively achieving republican government purely as individuals. The Court may argue otherwise, but the republican tradition allows for the state to interfere if it means better preserving freedom as non-domination than simply saying it is up to individuals to decide for themselves. In the context of campaign finance regulation state interference should trump the purely individualistic approach argued by the Court, because it is clear that people are not enjoying their right to vote as freedom as non-domination. The regulation of campaign finance better ensures that the constitutional right to republican government under Article IV, Section 4 of the Constitution can be met.

A final point to discuss in regards to the majority opinion pertains to the legal notion that, “Laws that burden political speech are “subject to strict scrutiny” and must prove a “compelling interest and is narrowly tailored to achieve that interest.” It can be argued that these conditions were met under previous law that established PACs as a form of political speech for corporations and unions. Corporate and union actors were not completely eliminated from participating in political speech, but they faced restrictions that prevented them from achieving undue influence in the marketplace. *Citizens United* reversed those regulations, and this leaves potential for the marketplace to become further dominated by money and arbitrary interference. A compelling interest exists that given the make-up of the political marketplace and the role of actors in it the

state had the right to curb the influence of unions and corporations in political speech. The burden placed on corporations and unions was narrowly tailored because they were able to participate in the marketplace to an extent. The decline of confidence, efficacy and turnout began while these narrowly tailored restrictions existed, and given that there is an association between these attitudes and perceptions of entrenched special interests controlling the government it is problematic that the Supreme Court made the decision that it did. It is clear that our constitutional right to republican government is not being met under *Citizens United*.

Now that the flaws and contentions in the majority opinion have been exposed. It should become obvious that the countervailing constitutional argument is a solid alternative option that the Court could have considered when attempting to decide the constitutionality of independent expenditures made by unions and corporations. With this countervailing argument in mind, the Court could have considered solutions that better enhance deliberative ideals than the current decision does and better preserved republican democratic ideals.

Principles of Deliberation: A Framework the Supreme Court should have explored

In *Democracy and Deliberation*, Fishkin (1991) discusses three essential circumstances that must exist for a democratic society to reach full realization and legitimacy. Those conditions, political equality, deliberation, and nontyranny operate simultaneously to create an ideal situation for democracy. If the Supreme Court had been concerned with this they would not have ruled that corporations and unions share the same rights as individuals in the political process. What is most problematic is the fact that the Court espouses rhetoric about achieving the best deliberation, but gives no credence to any type of deliberative theory and instead utilizes the liberal deregulated model. Rather than looking to simply open up the marketplace regardless of

the consequences, the Supreme Court should have utilized basic deliberative principles that provide a better framework for creating competition and ensuring that governmental institutions are responsive to American citizens. In doing so, the Supreme Court could have defended its opinion under the countervailing constitutional argument I have provided.

The Supreme Court argument took a wrong turn by ascribing corporations and unions personhood status under natural personhood theory. The basic reasoning behind natural person theory for corporations stems from the idea that the corporation is not dependent upon state law or individual shareholders for existence, and they are in fact natural persons. To understand how this exists in legal theory Allman (2011) uses an analogy involving childbirth and the role of the state,

As with a newborn baby, the state plays no part in birthing a corporation; rather, the state's only role in its creation is to memorialize the event with a charter of incorporation (or birth certificate, as it were). Under the natural person theory, a corporation is not the product of legislative consent but 'simply a natural outgrowth of the economic tendency toward business combination.' As such, the corporation is not an artificial entity but rather a naturally existing person 'which has compelled the law to grant it official recognition' (395-96).

Natural person theory rests on the assumption that the corporation exists separately from shareholders and not because of them. This is due to the fact that a corporation can have perpetual life and can outlast an individual shareholder or any collection of shareholders. It also assumes that the actions of a corporation are not the product of any one person (396). This interpretation of corporate personhood rights arose from the *Lochner* Era of the early twentieth

century, a period that unsurprisingly is directly tied to the rise of liberal market theory. This theory was resurrected under the Roberts Court in *Citizens United* and is tied to the conservative leaning of the bench. The natural personhood theory fails to properly account for the three deliberative principles outlined by Fishkin, and is a downfall to the Court's argument. Natural personhood theory is the downfall of the Court's opinion, because it prevents the Court from being able to fully consider the countervailing notions of confidence in governing institutions and republican government.

By ascribing personhood status to corporations and unions it is not possible to address the political market conditions that have resulted in declining voter turnout, confidence and efficacy over the last few decades and instead lays the groundwork to perpetuate them. Personhood status does not consider institutional arrangements and the associated advantages, which underwrites the exposed flaws in *Citizens United*. Ignoring this problem undermines the notion of deliberative, republican democratic ideals. Therefore it is not surprising that *Citizens United* fails to meet any of the conditions of political equality, deliberation, and nontyranny outlined by Fishkin (1991) and as a result each of these conditions is worthy of individual discussion.

Political Equality:

Fishkin (1991) defines political equality as, "the institutionalization of a system which grants equal consideration to everyone's preferences and which grants everyone appropriately equal opportunities to formulate preferences on the issues under considerations" (30-31). When taken at face-value, this definition of political equality provided by Fishkin (1991) seems aligned with the argument presented in a concurrence by Justice Scalia that the First Amendment, "never

shows why ‘the freedom of speech’ that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form.”

However upon further discussion Fishkin (1991) expands his explanation of political equality to include three requirements: formal political equality, insulation conditions, and an effective hearing (31). It is at these latter two requirements that we can see how using natural person theory does not allow for the full realization of political equality.

The use of natural person jurisprudence is flawed because the insulation conditions and effective hearing principles required for political equality cannot exist when corporations are able to use general treasury funds on independent expenditures during political campaigns. The insulation condition is the guarantee that irrelevant factors do not interfere with the political process, and that “the political sphere must be protected from being determined by spillover effects from social or economic inequalities in the society” (31). Democratic elections should be impartial to actors with greater economic means otherwise the electorate will be less inclined to participate. This condition is already apparent in the United States political marketplace and is reasoned evidence for why regulation is justifiable under the countervailing constitutional right to confidence in governing institutions and republican government. Under this argument, a representative government that is backed with the confidence of the people can decide what constitutes irrelevant factors, which even aligns with the Court’s own rhetoric that the legislature is the people’s representative. This concept also closely mirrors Pettit’s claim that republican ideals are met when individuals are free from the domination of arbitrary interference.

The concept of the spillover effect is a point of contention in Scalia’s argument, because allowing corporations to act as individuals creates an environment in which corporations can use

their financial clout to affect the political process. In this situation economic inequality that is created in the private sector has a spillover effect into the public sector because the profits and financial advantages corporations accrue through business operations can be used to influence political processes. The *Citizens United* decision given that it allows corporations and unions to use general treasury funds, which are direct profits made by the company magnifies this issue. To clarify the flaws in Scalia's defense of corporations sharing the rights of individuals I must analyze the spillover effect further to draw distinctions between the public and private spheres in society.

The natural person theory fails to make a distinction between the political sphere and private sphere that is necessary for understanding where institutions such as corporations fit into the political landscape, particularly in elections. This is apparent when Scalia argues that individuals have the right to exercise their rights to free speech in association with other individuals in the context of corporations making independent expenditures during campaigns. In this part of his concurrence Scalia says that those who were part of the dissent would not favor censoring the speech of the Republican Party or the Democratic Party because "it is not speech of an 'individual American.' It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf" (*Citizens United v. Federal Election Commission* 2010). This logic, again well grounded under the First Amendment, fails to address the different role of political parties as institutions compared to corporations as institutions. It also does not adequately address the fact that individuals have a declining confidence in governing institutions at the expense of organized power over government officials.

Political parties function as institutions that were intended to allow individuals the ability to come together and give them a voice in the political sphere. This is drastically different from the role of corporations in society. People turn to political parties, because they ascribe to the beliefs, ideals, and policy initiatives offered by the party leaders. The same cannot be said about the interaction between people and corporations. There are many facets to the corporation's function that make a clear distinction between people speaking through association in political parties compared to corporations. The distinction begins with deciding who gets to hold a corporation accountable when they engage in political speech. There are many actors within the corporation from board members, to employees, to shareholders. Therefore it is necessary to question which of these groups determines the stance of the corporation. How do the employees of a corporation deal with their political voice if it differs from the shareholders or board members determining where a position in the political marketplace?

An obvious response may be that they change jobs, but that should not be a recourse due to the fact that a corporation wants to participate in the political marketplace. It is irrational to think that individuals decide where to work based on the political preferences of a firm. Another point of contention along this line of thought involves shareholders who do not adhere to the beliefs of a corporation. The choice to invest is likely not determined out of political context, and the purchasing of stock does not constitute an endorsement of the political voice of a corporation.

The argument is not quite as applicable for unions. Union membership can also be optional, whereas an individual's membership in a corporation cannot be distinguished from the identity of the corporation by the simple fact they employ them. Consider this example: An individual is employed at General Motors. Therefore by default any political speech from GM is

directly tied to this employee because they are part of GM. The situation for unions plays out slightly differently. An individual is employed at GM and is offered the option of joining a union, UAW for example. They decline the membership, because they do not want union representation. When UAW engages in political speech this individual is not part of the identity of UAW, but they are still tied to the identity of being a GM employee. These situations show part of the problem with saying corporations are merely individuals speaking in association. An employee tied to the identity of GM has no recourse to addressing issues stemming from differing views on political speech.

Political parties however do not experience the same problem with their membership. The individual ascribes to the views and ideals of a political party prior to seeking membership in it. An individual is never forced to adhere to the identity of the political party. While it may be unrealistic to think individuals ascribe to every view of a party, the ability to have fluid membership is at least possible if an individual wants to leave. However, it is not always possible to leave a firm especially if market conditions are uncertain and the employee is tied to a paycheck to survive. These contrasting characteristics between membership in a political party and membership in a corporation or union are entirely missed by Scalia. Yet they provide a vivid picture for why it cannot be assumed that unions and corporations are closely comparable to political parties in how individuals seek association to be represented in society. By better understanding this landscape of the political marketplace it is possible to see why the public and private spheres should remain more separated than the Court suggests.

Distinction between the political and private spheres of life is crucial for preventing the spillover effect that can occur when the insulation condition is violated, and thus eliminates the

chance for political equality to exist. The private sphere is where individuals are able to pursue their interests as citizens within a democratic society that are not part of the political or public sphere. In the private sphere individuals are able to define themselves through their career and lifestyle choices, in which they are the driving force behind decision-making processes. It is in this sphere that individuals achieve their status in society through their position in the labor market and the accumulation of wealth (or lack thereof) that comes in association with that position.

As a result, systems of stratification are established through the distribution of wealth that some individuals acquire over others in the private sphere. While it is hard to argue that a completely equitable wealth distribution can exist within a society it is necessary to understand that the accumulation of resources and wealth by those in the private sphere should not be able to influence the public sphere. The spillover effect can become manifest in the public sphere when wealth drives politics. Given previous evidence it is clear that a political marketplace driven by wealth produces an environment where individuals are less inclined to participate in democratic processes. A problem that can be prevented by considering the constitutional right that the people have the right to republican government, which considers freedom as non-domination from arbitrary interference. When it comes to the institution of voting arbitrary interference exists when excessive amounts of money drive political campaigns.

The third requirement for political equality, according to Fishkin, is that there must be an effective hearing meaning that, “The major rival viewpoints must get enough of a hearing that people have the opportunity to decide among them (31).” The notion of effective hearing is also found in the majority opinion, but as explained earlier it fails when money is a large determining

factor in who can have their opinion heard in the political marketplace. Scalia's argument equating corporations to individuals further skews a system in which numerous financial barriers have already diminished the ability for effective hearing to exist, and is simultaneously damaging to the right of republican government for the citizenry as it has been defined so far.

Deliberation:

There are two crucial points about deliberation that need to be discussed regarding Fishkin (1991) and the *Citizens United* decision. Fishkin points out that, "political equality without deliberation is not of much use, for it amounts to nothing more than power without the opportunity to think about how that power ought to be exercised... 'In order to express his or her preferences accurately, each citizen ought to have adequate and equal opportunities for discovering and validating, in the time permitted by the need for a decision, what his or her preferences are on the matter to be decided'"(36). This idea that Fishkin presents contends with a point made earlier when discussing whether or not individuals have the capacity and time to form ideas about the validity of corporate political speech and whether or not elected officials are sold out to these interests. Although the Court argued the advent of the Internet and disclosure requirements were adequate mechanisms to address this issue I contend that it must still be questioned as an unnecessary and unrealistic assumption. It is unrealistic and unnecessary; because the legislature has the right to create regulatory schemes if it is determined an unregulated market is inadequate. The republican tradition espouses that the state can create regulation that does not force the individuals to seek out all information on their own.

Therefore under the constitutional right to republican government, the legislature can define campaign finance regulations if it is acting on behalf of the people to ensure that better deliberation can happen among individuals in society. Republicanism is not purely individualistic.

The *Citizens United* decision does not allow for deliberation to flourish, because it perpetuates an environment that encourages the continued trend of declining confidence, efficacy and turnout among the electorate. Therefore, there is incompleteness to the arguments presented in the political marketplace, because money plays such an important role in determining participation, and as Fishkin (1991) explains,

Institutions and situations are closer to the nondeliberative end when they exhibit various forms of incompleteness—incompleteness in the arguments (though to be relevant by one participant or another) that have not been expressed so that others are aware of them; incompleteness in the opportunities for the proponents of a position to answer the arguments expressed on behalf of rival positions; incompleteness in the knowledge or capacities of participants that would permit them to understand the arguments expressed on behalf of one position or another.

Again, given what has been explained about how the liberal economic model operates the Supreme Court ruling does not enhance a truly deliberative, competitive market. The liberal model is inappropriate due to the conditions and trends of the political marketplace over recent decades, and it stands in stark contrast to the republican tradition that favors deliberation.

Nontyranny:

It is likely a surprise for many that the final condition of Fishkin's deliberation, nontyranny, is also not met under the *Citizens United* decision to utilize natural person theory. For a policy to be tyrannical, Fishkin (1991) explains that, "By tyranny I mean the choice of a policy that imposes severe deprivations when an alternative policy could have been chosen that would have imposed no severe deprivations on anyone. By severe deprivation, I mean the destruction of essential human interests" (34). While the term "essential human interests" can be debated for meaning, when we consider the shortcomings of the liberal model in a political marketplace that faces declining confidence, efficacy, and turnout along with rising negative attitudes about the entrenchment of special interests in the government it becomes clear that there is a destruction of essential human interest. That essential human interest is exercising the right to in the republican context as freedom as non-domination. When participation is skewed along economic lines, and a policy further perpetuates that phenomenon then the essential human interest lost is the constitutional guarantee to a republican government. Scalia would likely contend that the right to associate in a collection is also a "destruction of essential human interest," but I have already outlined the problem with Scalia's argument and where it falls short. Not to mention that corporations and unions did already have the right to speak. There speech was merely curbed to prevent undue influence in the political marketplace, which stands in stark contrast to the reality that many individuals do not even participate in the governing process due to lack of government responsiveness to their interests. Regulation of the marketplace is necessary to prevent a further unraveling of confidence among the electorate who feel the government is entrenched to special interests. These individuals have a constitutional right to

freedom as non-domination under the republican tradition, and this requires curbing arbitrary interference from special interests.

Addressing the Needs of the Electorate in the United States: Why Regulation is Necessary

In the context of republican democratic theory, deliberation is essential to preserving legitimacy within a state. It encourages individuals in society to actively participate in governance by providing an opportunity to voice their needs to those who make policy decisions. The decision in *Citizens United* calls into question whether or not the United States is establishing a system of republican governance. Based on the evidence I have provided it seems that our system of representation is failing to adhere to the needs of the electorate. It suggests further that the role of special interests is part of this problem. Given this information it can be seen why the decision in *Citizens United* has further undermined the republican tradition. As discussed earlier, part of the problem with the Court's decision is that they formed a decision off a liberal model that does not adequately address the needs of the electorate. The ability to access institutions of governance varies greatly in the United States, but one institution that can be preserved is voting. It is one political mechanism that is blind to an individuals standing in society and the government should seek to enhance participation through voting due to this defining characteristic.

A critical aspect of increasing participation is creating an environment in which individuals in society have the ability to form an effective response or dissent. This is important for the full realization of tolerance among the many facets of society, because it provides all individuals the ability to voice their concerns. The idea of dissent is consistent with the ideals of Fishkin, Neblo et al., and Pettit. The *Citizens United* decision skews the ability to achieve

tolerance in society, an ideal of living in a democracy, because dissent cannot occur as a result of the imbalance of power among actors. In *Repressive Tolerance* (1965), Marcuse explains that when a state has a highly skewed balance of power the liberating force of democracy is not realized. He says,

The liberating force of democracy was the chance it gave to effective dissent, on the individual as well social scale, its openness to qualitatively different forms of government, of culture, education, work—of the human existence in general. The toleration of free discussion and the equal right of opposites was to define and clarify the different forms of dissent: their direction, content, prospect. But with the concentration of economic and political power and the integration of opposites in a society which uses technology as an instrument of domination, effective dissent is blocked where it could freely emerge; in the formation of opinion, in information and communication, in speech and assembly. Under the rule of monopolistic media—themselves the mere instruments of economic and political power—a mentality is created for which right and wrong, true and false are predefined wherever they affect the vital interests of the society (9).

The idea of effective dissent, closely parallels much of the previous discussion of deliberative democratic and republican principles, and should therefore be easily applicable to understanding the flaws in *Citizens United*. The most important take-away from this idea of tolerance as it relates to *Citizens United* is that the liberating force of democracy is not met. To better adhere to democratic and deliberative principles the Supreme Court should have adopted an opinion that recognized trends in the political marketplace that conflict with the constitutional idea that the

people have the right to a republican democracy. The regulation of the political marketplace is justifiable due to the already low and declining levels of public confidence in governing institutions.

Acknowledging Critics:

There will undoubtedly be critics of the ideas and arguments I have presented to point out the flaws in the Supreme Court ruling in *Citizens United*. Critics are likely to dismiss the idea that the government has a right to regulate speech, particularly when it is politically motivated. However, I again want to reiterate how the constitution guarantees the right to republican government, and based on the evidence presented those ideals are not being met. Survey data has revealed that individuals do express a lack of confidence in our governing institutions, and this has become a growing trend in recent decades. Confidence, external efficacy, and voter turnout are all hovering around record lows and there appears to be no sign that this trend is going to rectify itself in the meantime, especially with *Citizens United* further opening up the political marketplace to economically skewed deliberation and domination through arbitrary interference.

The Court approached campaign finance with the simple solution of complete deregulation in the marketplace, but further analysis reveals why this option is flawed. Even if the Supreme Court had still ruled that corporations and unions could use their general treasury funds to make independent expenditures they could have at least handed down a decision that suggested or preserved some form of constraint on the amount of money they are allowed to spend in the political arena. This may not be the most desirable outcome for critics of my argument, but at least it is a compromise that allows corporations and unions to speak with some attempt at preventing an economic skew in the political marketplace. This type of decision would

create a much more competitive market, because smaller businesses and corporations would likely have a more adequate voice in the market. It would also create an environment with reduced barriers for the unorganized to reach a level of organization that allows them to compete in the market, which addresses the question of addressing substantive barriers such as human, social, and economic capital. Although, I do not recommend allowing the use of general treasury spending this hybrid model decision could have at least satisfied certain aspects of what the Supreme Court was trying to achieve because all actors whether individual, union, or corporation could have participated and regulation would have helped to create a more deliberative and truly competitive market.

Lastly I want to espouse that addressing the trade-off between state power and the power money in politics is not easy. The Court's interpretation of the First Amendment was accurate along many lines of reasoning, but to completely ignore the composition of the political marketplace left room for the Court to miss equally worthy constitutional arguments against deregulation. While measuring the confidence of the electorate might seem like an ambiguous task to the Supreme Court when making constitutional decisions, it is one that cannot be forgotten when the constitution grants the people of the United States the right to a republican form of government.

Conclusion:

The debate on *Citizens United* is likely far from over. The decision is still heavily discussed and criticized in the media over two years after it was handed down. It remains wildly unpopular among citizens across ideological lines, and this is rightly so. The data I have analyzed is evidence that a disconnection exists between the electorate and the government. The

Court's decision to deregulate the political marketplace perpetuates this disconnection. The countervailing argument that I have laid out provides an alternative approach to how the Court could have considered the constitutionality for allowing corporations and unions to use general treasury funds for independent expenditures. While this argument may not have swayed the Court, it should have at least been recognized in their opinion. The next step in campaign finance regulations is still unclear, although some politicians have called for an amendment to the Constitution to overturn the majority opinion. I recommend that further research be conducted regarding the electorates' perceptions of confidence, efficacy and the subsequent decision to participate in politics through voting. If more substantial research can be generated in this field a convincing argument can be made for why a federal amendment should exist. It could also end up that the question lands before the Supreme Court in the future, and next time they will not be able to ignore the argument that citizens have the constitutional right to confidence in governing institutions and republican democracy.

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