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Citizens United and the Future of FCC Content Regulation

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by
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I. Introduction

This paper examines the potential impact of *Citizens United v. Federal Election Commission* upon content-based Federal Communications Commission ("FCC") regulations. Although *Citizens United* focused on Federal Election Commission ("FEC") regulations, the case reflects the various First Amendment doctrines favored by the current Court, and its reasoning may extend to other areas of regulated speech.

Part I of the paper will discuss several prominent areas of First Amendment doctrine, as well as the roles of the FCC and the FEC. Part II will briefly describe the background and outcome of *Citizens United*. Finally, Part III will analyze several FCC regulations, primarily regarding content and ownership, in light of the case.

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II. Theoretical Foundations of the First Amendment, the FCC, and the FEC

Political and legal scholars have advocated several prominent theories on the purpose of the First Amendment. Justice Holmes and Judge Learned Hand favored the "marketplace of ideas" interpretation: the idea that the First Amendment is meant to encourage a free exchange of opinions and information.[1] Others focused on the importance of political speech and scientific knowledge as necessary components of effective self-governance.[2] In contrast to the marketplace of ideas and political theory understandings, some theorists view the First Amendment as protection for individual expression, focusing on the right to speak more than the right to listen.[3] This theory of the purpose of the First Amendment plays a less significant role in *Citizens United.*

The Federal Communications Commission regulates the broadcast portion of the electromagnetic spectrum, including both radio and television, for the sake of "public convenience, interest, or necessity."[4] Other areas of media, including cable and satellite television, also fall within the FCC's jurisdiction.[5] The FEC, created in 1974, has jurisdiction over enforcement of federal campaign finance laws.[6] According to Justice Kennedy, the primary function of the FEC is censorship.[7] Justice Stevens, however, called this "nonsense" in his dissent in *Citizens United.*[8]

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1. MARK FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, MASS MEDIA LAW 9–11 (7th ed. 2005).

2. *Id.* at 16–21; *see* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 252–57 (1961); NORMAN REDICH, JOHN ATTANASIO, & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 497, 503–04, (3d ed. 2005), *available at* LEXIS.

3. FRANKLIN ET AL., *supra* note 1, at 21–24; REDICH ET AL., *supra* note 2, at 504.

4. 47 U.S.C. § 303 (2010).

5. United States v. Sw. Cable Co., 392 U.S. 157, 167–68 (1968); Cable Commc'ns Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779 (1984); 47 U.S.C. § 152 (2010); 47 U.S.C. § 522 (2010); 47 U.S.C. § 338 (2010). There are many additional areas of FCC jurisdiction, such as telephones, but these will not be discussed in this essay.

6. FEDERAL ELECTION COMMISSION, *About the FEC*, http://www.fec.gov/about.shtml (last visited May 14, 2010).

7. Citizens United v. FEC, 130 S. Ct. 876, 896 (2010) ("Because the FEC's 'business is to censor, there inheres the danger that [it] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression.'" (citing Freedman v. Md., 380 U.S. 51, 57–58 (1965))).

8. *Id.* at 944, n.39 (Stevens, J., dissenting).

The majority opinion in *Citizens United* reflects a concern for the health of the marketplace of ideas.[9] Justice Kennedy writes, "[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[10]

Justice Kennedy, in part II of the majority opinion, refers to political speech as "speech that is central to the meaning and purpose of the First Amendment."[11] This section was joined by Justices Alito, Roberts, Scalia, and Thomas, but not by Justices Stevens, Ginsburg, Breyer, and Sotomayor.[12] Justice Kennedy views speech as a key aspect of the "integrity of the election process," questioning the FEC's speech regulations.[13] For Kennedy, the potential chilling effect of these regulations is especially dangerous due to the censorship function of the FEC.[14]

The dissent focuses on a variety of laws that restrict speakers based on their identity, stating that the First Amendment is not absolute.[15] The dissent acknowledges the special importance of political speech.[16] However, the primary focus for the dissent is the value of precedent and a strong government interest in reducing the appearance of corruption in elections.[17]

The majority opinion of *Citizens United* reflects the idea that freedom of speech is a necessary component of self-governance.[18] For Kennedy and the Justices who share this view, laws impacting political speech must be analyzed with the greatest possible suspicion, and strict scrutiny will be applied.[19] According to this framework, the First Amendment is "[p]remised on mistrust of governmental power,"

9. *Id.* at 896.
10. *Id.* at 899. Part II of this essay will discuss this in greater detail.
11. *Id.* at 892.
12. *Id.* at 886.
13. *Id.* at 895–96.
14. *Id.* at 896.
15. *Id.* at 945–48.
16. *Id.* at 946.
17. *Id.* at 929–82.
18. *Id.* at 898, 886 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.").
19. *Id.* at 898.

the fear being that such regulations may allow for favoring some viewpoints over others.[20]

III. Citizens United v. FEC

Section 441b, the regulation at issue in *Citizens United*, banned express advocacy by any corporate entity within thirty days of a primary election or sixty days of a general election.[21] This ban also extended to broadcasts of electioneering communications.[22] There was an exception for political action committees, which the Court describes as "burdensome alternatives" that did not overcome the First Amendment concerns."[23] For these reasons, the Court treated the regulation of corporate expenditures in Section 441b as the equivalent of banning speech.[24]

The case was about corporate expenditures, not corporate campaign contributions.[25] The Court relied heavily on the reasoning of *Bellotti* and *Buckley*, which addressed the constitutionality of previous election regulations.[26] In *Buckley*, the Supreme Court invalidated certain campaign expenditure and contribution limits.[27] In *Bellotti*, the Supreme Court invalidated a state law banning independent corporate expenditures regarding any state referendum.[28] According to the Court in *Citizens United*, the essential holding of both *Bellotti* and *Buckley* is that restriction of political speech based on the corporate identity of the speaker is unconstitutional.[29] Quoting *Bellotti*, the Court writes that it is unconstitutional to permit:

20. *Id.* at 882–83, 898–99. (The Court stated, "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion.").

21. *Id.* at 897.

22. *Id.*

23. *Id.* at 897–98.

24. *Id.* at 898 ("As a 'restriction on the amount of money a person or group can spend on political communication during a campaign,' [Section 441b] 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" (citing Buckley v. Valeo, 424 U.S. 1, 19 (1976))).

25. *Id.* at 909.

26. *Buckley*, 424 U.S. at 22; First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

27. *Buckley*, 424 U.S. at 142; *see also Citizens United*, 130 S. Ct. at 902.

28. *Bellotti*, 435 U.S. at 767; *see also Citizens United*, 130 S. Ct. at 902.

29. *Citizens United*, 130 S. Ct. at 902.

> [L]egislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication... In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.[30]

The Court in *Citizens United* recognizes that a subsequent decision, *Austin v. Michigan State Chamber of Commerce*, permitted the regulation of corporate campaign expenditures.[31] The Court notes that *Austin*, as well as the cases and regulations that followed, depend on three rationales: anti-distortion, anti-corruption, and the protection of shareholders.[32] The anti-distortion and anti-corruption rationales reflect a concern that wealthy corporations and unions might represent a disproportionate level of influence over elections, damaging the integrity of the process.[33] The shareholder protection argument represents a fear that dissenting shareholders will be compelled to fund corporate political speech.[34] The Court rejects the shareholder argument, suggesting that corporate governance can address this issue.[35] The Court also rejects the anti-corruption and anti-distortion arguments, overruling *Austin* in the process.[36] On other grounds, the Court finds that Section 441b may "have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption."[37]

Reflecting the high value placed on political speech under the First Amendment, the majority quotes *Bellotti*, writing that it is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[38]

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30. *Id.* at 902 (citing *Bellotti*, 435 U.S. at 784–85).
31. *Id.* at 903.
32. *Id.*
33. *Id.* at 902–11.
34. *Id.* at 911.
35. *Id.*
36. *Id.* at 904–11.
37. *Id.* at 908.
38. *Id.* at 904 (citing *Bellotti*, 435 U.S. at 777).

The Court expressly upholds and extends the reasoning of *Bellotti* and *Buckley*, and overrules *Austin*, writing:

> Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.[39]

The effect of Section 441 and *Austin* are of particular concern to the Court.[40] According to the Court, access to various viewpoints, including those held by corporations, is a protected interest held by the voters.[41]

IV. Potential Impact on FCC Regulations

A. Mandating Noncommercial Television

Cable operators are considered speakers in the sense that they exercise editorial control when deciding which channels to carry.[42] However, the Court has permitted regulations in this area that would not be permissible in other mediums.[43] Cable operators and satellite providers are compelled to carry a minimum amount of noncommercial programming.[44] This falls within the "public interest" justification for FCC regulations.[45]

The FCC issues licenses to noncommercial educational stations or public broadcast stations which seek "primarily to serve the educational needs of the community."[46] Congress and the FCC have passed additional laws and regulations in this area that are arguably content-based. This includes rules addressing the use of logos,[47]

39. *Id.* at 913 (citation omitted).

40. *Id.* at 906 ("*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment.").

41. *Id.* at 907.

42. Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494–95 (1986).

43. *Id.* at 496–97 (Blackmun, J., concurring).

44. 47 C.F.R. § 25.701(f) (2010) (governing satellite providers); 47 C.F.R. § 76.56 (2010) (governing cable companies).

45. 47 C.F.R. § 25.701(a) (2000) ("[Satellite] providers are subject to the public interest obligations set forth . . . ").

46. 47 C.F.R. § 73.621(a) (2010); 47 U.S.C. § 397(6) (2010).

47. 47 U.S.C. § 399a (2010) (addressing the use of logos).

symbols or other identifying marks of corporations that provide financial support to these television stations,[48] descriptions of products and services, and endorsement of candidates for political office.[49]

In *Minority Television Project v. Federal Communications Commission*, the United States District Court for the Northern District of California addressed a First Amendment claim that certain advertising restrictions placed on noncommercial educational television stations by the FCC were facially unconstitutional.[50] These regulations included a ban on any paid advocacy for or against a particular viewpoint on a public issue or candidate for office, as well as more traditional commercial advertisements.[51] Some of these regulations are now codified into a statute that prohibits public broadcast stations from offering commercial or political advertisements.[52]

In addition, the plaintiff in *Minority Television Project*, a noncommercial educational station, challenged regulations promulgated by the FCC.[53] The Court applied intermediate scrutiny, upholding Section 399 as being "narrowly tailored to further a substantial government interest."[54]

The court in *Minority Television Project* distinguished Section 399 and related regulations from the laws at issue in *FEC v. Wisconsin Right to Life*.[55] In *Wisconsin Right to Life*, the Supreme Court struck down a portion of the Bipartisan Campaign Reform Act of 2002 that barred certain advertisements made by a nonprofit political advocacy corporation.[56] The Court in *Wisconsin Right to Life* applied strict scrutiny.[57] However, the court in *Minority Television* Project found that an intermediate tier test was appropriate, and found that

48. 47 U.S.C. § 399b (regulating advertisements).

49. 47 U.S.C. § 399 (2010) (prohibiting endorsement of candidates).

50. Minority Television Project, Inc. v. FCC, 649 F. Supp. 2d 1025, 1026 (N.D. Cal. 2009).

51. *Id.* at 1026–27.

52. 47 U.S.C. § 399b(a) (2010).

53. *Minority Television Project,* 649 F. Supp. 2d. at 1028.

54. *Id.* at 1030–31, 1048 (citing FCC v. League of Women Voters of California, 468 U.S. 364, 381–85 (1984)).

55. *Id.* at 1032–33.

56. FEC v. Wisconsin Right to Life, 551 U.S. 449, 457 (2007).

57. *Id.* at 464.

encouraging noncommercial educational radio and television is a substantial government interest.[58]

The governmental interest in protecting noncommercial broadcasting is based on the content of the broadcasting, something recognized by the court in *Minority Television.* "The FCC dedicated these stations in this manner because of the 'high quality type of programming which would be available to such stations—programming of an entirely different character from that available on most commercial stations.'"[59] The court recognized that the lack of dependence on traditional advertising permits noncommercial broadcasters to produce programming that differs in substantial ways from traditional commercial broadcasters.[60] For this reason, the court upheld the rules and regulations regarding advertising and endorsements on noncommercial stations.[61] The court directly addressed the ban on advocacy advertisements, stating that permitting those types of advertisements would endanger the independence of noncommercial broadcasters, potentially changing their programming.[62] It is important to note, however, that this decision related to paid endorsements of candidates; noncommercial broadcasters are free to editorialize and express support for candidates or political causes as long as no money is exchanged.[63]

B. Must-Carry Obligations

The FCC's rules and regulations require cable operators to carry a specified number of local commercial and noncommercial television stations.[64] For example, 47 U.S.C. § 534 provides:

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58. *Minority Television*, 649 F. Supp. 2d at 1033.

59. *Id.* at 1033 (citing Nat'l Pub. Radio, Inc. v. FCC, 254 F.3d 226, 227 (D.C. Cir. 2001)).

60. *Id.* at 1037 ("Congress also heard evidence that the advertising prohibitions were necessary to preserve the unique programming presented by public stations . . . Public radio also provides four hours of daily news of a different nature than that provided by commercial stations . . . '[P]ublic television is the primary source of children's educational programming in the United States.'") (citation omitted).

61. *Id.* at 1042.

62. *Id.* at 1041.

63. FCC v. League of Women Voters of California, 468 U.S. 364, 381–85 (1984).

64. STUART MINOR BENJAMIN, DOUGLAS GARY LICHTMAN, HOWARD SHELANSKI, & PHILIP J. WEISER, TELECOMMS. L. & POL'Y, 513 (2d ed. 2006); 47 U.S.C. § 534 (2010) (requiring carriage of local commercial stations); 47 U.S.C. § 535 (2010) (requiring carriage of noncommercial stations).

> Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to [47 U.S.C. § 325(b)].[65]

It is significant to note that these must-carry rules and regulations require cable operators to carry a specified number of local commercial channels, as well as all programming of those channels without alteration.[66] There are also must-carry obligations for satellite providers, but they do not function in the same manner.[67] Regulations governing the retransmission of broadcast signals by cable providers are codified in 47 C.F.R. Sections 76.51 through 76.70. These regulations raised First Amendment concerns, which have been addressed by the Supreme Court.[68]

In a pair of significant decisions, known as *Turner I* and *Turner II*, the Supreme Court addressed the must-carry requirements of the Cable Television Consumer Protection and Competition Act of 1992.[69] In *Turner I*, the Court recognized cable operators as First Amendment speakers, both through programs created by the cable operators and by exercising editorial discretion when choosing which channels to offer as part of their service.[70] The Court found that there was adequate reason to apply a different level of scrutiny because of technological differences between broadcast television and cable television, including the scarcity of broadcast channels as opposed to cable channels.[71] The Court rejected the argument that these types of regulations are merely economic and do not impact speech interests, and therefore refused to apply a rational basis test.[72] In *Turner I*, the

65. 47 U.S.C. § 534(a).

66. 47 U.S.C. § 534(a)–(c) (2010); *see* 47 U.S.C. § 534(b)(3)(B) (2010)(providing that cable operators "shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted . . . ").

67. BENJAMIN ET AL., *supra* note 64, at 513; 47 U.S.C. § 338 (2010). *See also supra* part III.A.

68. *See infra* p. 13.

69. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ("*Turner I*"); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) ("*Turner II*").

70. *Turner I*, 512 U.S. at 636–37.

71. *Id.* at 636–39.

72. *Id.* at 640–41.

primary task for the Court was to determine whether must-carry regulations are a content-based or content-neutral regulation of speech.[73] If they are content-neutral, they receive intermediate scrutiny.[74] This is based on the *O'Brien* test, that ". . . [A] content-neutral regulation will be sustained if: it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[75] Although it recognized that these rules do not impact editorial discretion, the Supreme Court held that must-carry rules are content-neutral, although it recognized that these rules do impact editorial discretion.[76] The Court remanded for further factual findings.[77]

The Supreme Court in *Turner I* focused both on the purpose of the First Amendment in protecting the interests of speaker as well as the value of the marketplace of ideas.[78] In a split decision in *Turner II,* the Supreme Court again upheld the must-carry provisions.[79]

In her dissent in *Turner II*, Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg, wrote that "'appellees' characterization of must-carry as a means of protecting these stations, like the Court's explicit concern for promoting 'community self-expression' and the 'local origination of broadcast programming,' reveals a content-based preference for broadcast programming."[80]

Within the context of advocacy, the Supreme Court in *Citizens United* ruled that the purpose of the First Amendment is not to

73. *Id.* at 642–43.

74. *Id.* at 642.

75. United States v. O'Brien, 391 U.S. 367(1968).

76. *Turner I*, 512 U.S. at 643–52.

77. *Id.* at 668.

78. *Id.* at 641. ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions 'raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" (citations omitted).

79. *Turner II*, 520 U.S. 180, 185 (1997).

80. *Id.* at 234 (citation omitted).

equalize the ability to speak.[81] One of the major justifications for must-carry provisions is to promote local broadcasters.[82] In the past, the Supreme Court has found that these provisions were content-neutral. However, based on the Court's analysis in *Citizens United*, it is not clear that the Court would analyze the must-carry obligations in the same manner.

C. Areas of Overlap: Sections 312 and 315 of the Communications Act

Section 312(a)(7) of the Communications Act states that the FCC may revoke a license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy."[83] Section 312(a)(7) requires broadcasters to permit legally qualified candidates to purchase or access airtime.[84] This is based on a reasonableness standard, and broadcasters may consider several factors before deciding whether or not to sell airtime or permit access.[85] These factors include the disruptiveness of the requested programming and the number of potential candidates who may request similar amounts of airtime.[86]

The First Amendment and Section 312(a)(7) do not guarantee a right to use the broadcast facilities of FCC licensees, only that qualifying candidates must have the same access to those facilities.[87] They have the right to purchase access; it is not merely given to them.[88]

The Court has recognized especially strong First Amendment interests in this area, stating:

> The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312(a)(7). We have recognized that "it is of particular importance that candidates

81. Citizens United v. FEC, 130 S. Ct. 876, 904 (2010) (citing Buckley v. Valeo, 424 U.S. 1, 49 (1976)).

82. *See generally Turner I*, 512 U.S. at 333–36; *Turner II*, 520 U.S. at 201–05.

83. 47 U.S.C. § 312(a)(7) (2010).

84. *Id.*; Levinson, 9 FCC Rcd. 3018, 3018 (1994).

85. Levinson, 9 FCC Rcd. at 3019.

86. *Id.* (citing Columbia Broad. Sys., Inc. v. FCC, 453 U.S. 367, 387 (1981)).

87. *Columbia Broad. Sys.*, 453 U.S. at 381–82, 382 n.7.

88. *Id.* at 382.

> have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." Indeed, "speech concerning public affairs is . . . the essence of self-government." The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.[89]

In recognizing these First Amendment interests, opinions may vary widely on whose interests will receive the most weight. Years of case law focused on the interests of the voting public in hearing speech indicate a possibility that the Court may begin focusing more attention on the interests of speakers, both as candidates or advocacy groups and as broadcasters.

Section 315 of the Communications Act, with its roots in Section 18 of the 1927 Radio Act, is known as the "Equal Time Rule."[90] This applies to broadcast television, as well as to channels for which a cable operator or satellite provider is the "originator" or has exclusive control over all content.[91] The rule states:

> No cable television system is required to permit the use of its facilities by any legally qualified candidate for public office, but if any system shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such system shall have no power of censorship over the material broadcast by any such candidate.... In making time available to candidates for public office, no system shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service

89. *Id.* at 396 (citations omitted).

90. BENJAMIN ET AL., *supra* note 64, at 227–28; 47 U.S.C. § 315 (2010).

91. BENJAMIN ET AL., *supra* note 64, at 246–47; Use of Broadcast and Cable Facilities by Candidates for Public Office, 34 F.C.C. 2d 510 (1972); Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations, 19 FCC Rcd. 5647 (2004).

> rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.[92]

This means that any broadcaster that permits a qualified candidate to use its station must permit qualified opposing candidates to use the stations as well, under similar terms.[93] Stations are not required to sell the exact same timeslot to opposing candidates, although offering significantly different timeslots may raise concerns.[94]

It is significant to note that Section 315 is not the same as the Fairness Doctrine.[95] Section 315 requires broadcasters to treat all qualified candidates the exact same way in terms of access to broadcast facilities.[96] In contrast, the Fairness Doctrine was issue-oriented and addressed the public's right to access different viewpoints.[97] The FCC abandoned the Fairness Doctrine in 1985.[98]

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92. 47 C.F.R. § 76.205 (2010). Although the regulations referring to broadcast television and satellite television are not included here, the language for each is the same. *See* 47 C.F.R. § 25.701(i) (2010); 47 C.F.R. § 73.1941 (2010).

93. Columbia Broad. Sys., Inc. v. FCC, 453 U.S. 367, 382 n.7 (1981). The definition of "legally qualified candidate" is codified at 47 C.F.R. § 76.5(q):

> (1) Any person who:
> (i) Has publicly announced his or her intention to run for nomination or office;
> (ii) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and
> (iii) Has met the qualifications set forth in either paragraphs (q)(2), (3) or (4) of this section. [...]

Subsections (q)(2),(3), and (4) address candidates for Presidency and Vice Presidency, including within primary elections.

94. Grace, 40 F.C.C. 297 (1958).

95. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 185–86, n.21 (1973); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 46 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); Scherer, 44 F.C.C. 2d 21, 23 (1973).

96. Green v. FCC, 447 F.2d 323, 328–30 (D.C. Cir. 1971).

97. *Id.*

98. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 142 (1985); Syracuse Peace Council, 2 FCC Rcd. 5043, 5043 (1987) ("Based upon compelling evidence of record, the Commission, in its 1985 Fairness Report, concluded

The abandonment of the Fairness Doctrine did not end the validity of Section 315, and Section 315 does not mandate the Fairness Doctrine.[99]

After *Citizens United*, efforts to revive the Fairness Doctrine may prove especially difficult. In addition to technological changes increasing the number of television channels and likely weakening the scarcity rationale behind the Fairness Doctrine, the Court's analysis in *Citizens United* may prove to be the final blow.[100] While addressing concerns that wealthy corporations may have a disproportionate ability to produce political advertisements, the Court held that the purpose of the First Amendment is not to equalize the ability to impact elections.[101]

Section 315 applies to individual candidates, not political parties.[102] Additionally, as an individual right, Section 315 applies to candidates themselves and not their supporters.[103] *Citizens United* is primarily concerned with the First Amendment rights of corporations, but also with the individuals that form a corporation, implying that regulation of corporate advocacy advertisements were

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that the fairness doctrine disserved the public interest. Evaluating the explosive growth in the number and types of information sources available in the marketplace, the Commission found that the public has 'access to a multitude of viewpoints without the need or danger of regulatory intervention.' The Commission also determined that the fairness doctrine 'chills' speech, finding that 'in stark contravention of its purpose, [the doctrine] operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance.' In addition, the agency found that its enforcement of the doctrine acts to inhibit the expression of unpopular opinion; it places the government in the intrusive role of scrutinizing program content; it creates the opportunity for abuse for partisan political purposes; and it imposes unnecessary costs upon both broadcasters and the Commission.") (footnotes omitted).

99. Ark. AFL-CIO v. FCC, 11 F.3d 1430, 1436–37 (8th Cir. 1993); Meredith Corp. v. FCC, 809 F.2d 863, 873 n.11 (1987); Telecomms. Research and Action Ctr. v. FCC, 801 F.2d 501, 504, 517–18 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (holding that the Fairness Doctrine had been established by the FCC and was not codified by Congress in Section 315).

100. In *Red Lion Broad. Co. v. FCC*, the Supreme Court upheld the constitutionality of the Fairness Doctrine, in part relying on the FCC's mandate to regulate the airwaves in the public interest, as well as the nature of the broadcast spectrum. 395 U.S. 367, 385–89 (1969). However, the Court refused to extend this reasoning to the newspaper industry in a challenge to a state law similar to the Fairness Doctrine. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244, 258 (1974).

101. Citizens United v. FEC, 130 S. Ct. 876, 904 (2010).

102. Greater N.Y.C. Broad. Corp., 40 F.C.C. 235, 236 (1946); Daly, 40 F.C.C. 302, 302 (1959); Nat'l Laugh Party, 40 F.C.C. 289, 289 (1957); Dermer, 40 F.C.C. 407, 407 (1964); Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C. 2d 832, 838 (1970).

103. Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1, 3 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

not only violations of the freedom of speech, but also impacted associational rights.[104] It is possible that this concern for associational rights may lead to stronger protection for the First Amendment rights of political parties.

D. Ownership Regulations

In *Citizens United*, the majority is concerned that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[105] In the context of FCC regulations, the relationship between the identity of the speaker and the content of their speech is assumed; it is the basis for many ownership regulations.[106] The FCC has listed three overall purposes for ownership regulations: "diversity, competition, and localism."[107]

The FCC has promulgated a series of regulations regarding cross-ownership of media within communities, and horizontal and vertical integration of media corporations.[108] The Telecommunications Act of 1996 in part requires the FCC to review its ownership regulations to determine whether they serve the public interest.[109] Limitations on owning multiple media outlets such as radio stations, newspapers, and television stations within the same defined region have been upheld as falling within the public interest.[110] This has been based on the scarcity of broadcast spectrum in both radio and television, as well as the interest in preserving diversity of viewpoints.[111]

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104. *Citizens United*, 130 S. Ct. at 908 ("Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.").

105. *Id.* at 899.

106. *See generally* Amendment of Sections 73.35, 73.240, and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 FCC Rcd. 2d 306 (1970).

107. Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, 18 FCC Rcd. 13620, 13627 (2003).

108. BENJAMIN ET AL., *supra* note 64, at 389–408; 47 C.F.R. § 73.3555 (outlining the regulatory framework for cross-media ownership in a given location).

109. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 110 (1996).

110. Prometheus Radio Project v. FCC, 373 F.3d 372, 401–02 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

111. *Id.*

However, although the FCC regulations are designed to increase the number of speakers, the majority in *Citizens United* addresses a concern that FEC regulations will decrease the number of speakers.[112] The FCC regulates ownership of broadcast television stations and terrestrial radio stations due to fears of both unfair market power and the danger of one entity controlling the availability of information in a given area.[113] There is a concern that if one entity owns all or most media outlets in a region, the public will only have access to one viewpoint.[114] This concern assumes a link exists between station ownership and content.

The majority in *Citizens United* cites, with apparent approval, the dissent in *United States v. Automobile Workers,* writing, "the dissent concluded that deeming a particular group 'too powerful' was not a 'justificatio[n] for withholding First Amendment rights from any group-labor or corporate.'"[115] While FCC ownership regulations are not direct regulation of speech, their function is to reduce the amount of speech controlled by any one corporation. However, the FCC regulations are designed to increase the number of speakers, while the FEC regulation in question had the opposite effect. The possible application of *Citizens United* to FCC ownership regulations will depend on whether the focus becomes the rights of the speaker or the rights of the listeners to a vibrant marketplace of ideas.

V. Conclusion

The regulatory decisions of the FCC will be given a high level of deference by the courts.[116] Regulations that may be at least arguably content-based are routinely upheld. However, the content-neutrality

112. Citizens United v. FEC, 130 S. Ct. 876, 899 (2010).

113. BENJAMIN ET AL., *supra* note 64, at 403–08; FRANKLIN ET AL., *supra* note 1, at 201–02, 218–20. *See also* Telecommunications Act.

114. BENJAMIN ET AL., *supra* note 64, at 403–08; FRANKLIN ET AL., *supra* note 1, at 218–20.

115. *Citizens United*, 130 S. Ct. at 901 (citing U.S. v. Auto. Workers, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting)).

116. Prometheus Radio Project v. FCC, 373 F.3d 372, 390 (3d Cir. 2004) ("[T]he traditional APA standard of review is even more deferential 'where the issues involve elusive and not easily defined areas such as programming diversity in broadcasting.' Yet even when an administrative order involves policy determinations on such elusive goals, a 'rationality' standard is appropriate. Additionally, when an agency has engaged in line-drawing determinations and our review is necessarily deferential to agency expertise, its decisions may not be 'patently unreasonable' or run counter to the evidence before the agency.") (internal quotation marks and citations omitted).

of must-carry obligations was determined in a split decision.[117] Changes in the composition of the Court, technological advancements, and changes within the media industry all have the potential to affect similar claims.

It is difficult to determine whether the *Citizens United* decision will have a significant impact outside election law jurisprudence. Its relevance in telecommunications may not be in direct application, but may serve as a guide to how the current Supreme Court may analyze media regulation in the future.

117. *Turner II*, 520 U.S. 180, 185 (1997).

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