CORPORATE CAPITAL & LEGAL PERSONALITY: A MARXIST ACCOUNT OF *CITIZENS UNITED* TEN YEARS LATER

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"Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory . . . ."[1]

"[Men] may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."[2]

I. INTRODUCTION

To say *Citizens United v. Federal Election Commission* is a controversial case would be an understatement.[3] In the ten years since *Citizens United* was decided, aided by other federal court decision's loosening election regulation,[4] billions of U.S. dollars have flooded elections from individual donors and corporations, who can contribute unlimited funds to complex networks of independent-expenditure only political action committees (super PACs) and certain nonprofit organizations that are not required to publicly disclose the identities of contributors (so-called "dark money" groups).[5] Further, with the Federal Election Commission (FEC) in perennial deadlock, disclosure enforcement has become increasingly difficult.[6]

The *Citizens United* decision itself, authored by Justice Anthony Kennedy, led to the drafting of an uncharacteristically scathing dissent by soon retiring Justice David Souter (though it will not be released for another four decades),[7] a public rebuke of the Court at President Barack Obama's

[1] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[2] Abrams v. New York, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[3] *See* Citizens United v. FEC, 558 U.S. 310 (2010).

[4] *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185 (2014); SpeechNow.org v. FEC, 559 F.3d 686 (D.C. Cir. 2010), *cert. denied sub nom.* Keating v. FEC, 562 U.S. 1003 (2010).

[5] *See, e.g.*, Karl Evers-Hillstrom, Doug Weber, Anna Massoglia, Andrew Mayershn, Grace Haley, Sarah Bryner, & Alex Baumgart, *More Money, Less Transparency: A Decade Under Citizens United*, OPEN SECRETS (Jan. 14, 2020), https://www.opensecrets.org/news/reports/a-decade-under-citizens-united.

[6] *See, e.g.*, Anna Massoglia & Karl Evers-Hillstrom, *Court Says It Can't Rescue FEC from Partisan Deadlock . . . Again*, OPEN SECRETS (May 14, 2019), https://web.archive.org/web/20200207211546/https://www.opensecrets.org/news/2019/05/court-cant-rescue-fec-from-partisan-deadlock/.

[7] See Jeffrey Toobin, *Money Unlimited*, THE NEW YORKER (May 14, 2012), https://www.newyorker.com/magazine/2012/05/21/money-unlimited; Tony Mauro, *Souter Blocks Access to his Papers for 50 Years*, THE NAT'L L. J. (Aug. 26, 2009), https://www.law.com/nationallawjournal/almID/1202433393342/Souter-blocks-access-to-his-papers-for-50-/.

2010 State of the Union Address,[8] protests that disrupted the proceedings of the Supreme Court itself,[9] and continued calls for its reversal through a constitutional amendment, which has become a standard platform for the Democratic party.[10]

Yet, if one looks to the opinion itself, the opportunities for the Court, known for its strong interest in constitutional avoidance, narrow rulings, and the doctrine of *stare decisis* on statutory questions,[11] had several alternatives to opening up all corporate and union treasury funds for independent expenditures on electioneering communications, invalidating a narrowly tailored statute and contravening precedent.[12] For example, Justice Kennedy methodically considered (and quickly dismissed) narrower statutory exceptions, at least one of which the Government accepted as viable.[13] Justice Stevens, in his dissent, notes that Citizens United had relinquished its facial constitutional challenge at the district court level, and the Court could simply find the statute unconstitutional as applied to Citizen United.[14] However, the Court's 5-4 decision, helmed by Justice Kennedy, took the constitutional question head on, overturned past precedent, and invalidated a narrowly tailored federal statute wholesale.[15]

This raises the question of what motivated Justice Kennedy to take this arduous path to giving corporations the First Amendment right to speech. From a legal realist perspective,[16] a simple explanation is suggested by the WNYC podcast *More Perfect*: (1) Justice Kennedy had a clerk in the Ninth Circuit who lived through thought policing in Communist Romania, and (2) Justice Kennedy has a strong affinity for George Orwell's *1984*, especially its message about the dangers of government control of thoughts and

[8] *See* President Barack Obama, *Remarks by the President in State of the Union Address*, THE WHITE HOUSE (Jan. 27, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address.

[9] Adam B. Lerner, *Citizens United Protests Interrupt Supreme Court Arguments*, POLITICO (Jan. 21, 2015), https://www.politico.com/story/2015/01/citizens-united-supreme-court-arguments-114456.

[10] *See, e.g.*, DEMOCRATIC NAT'L COMM., *Restoring and Strengthening Our Democracy*, https://democrats.org/where-we-stand/party-platform/restoring-and-strengthening-our-democracy/ (last visited May 1, 2020).

[11] *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[12] *See* Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 441b (2006)), *invalidated by Citizens United*, 558 U.S. at 365–66; McConnell v. FEC, 540 U.S. 93 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

[13] *See Citizens United*, 558 U.S. at 322–27.

[14] *See id.* at 396-405 (Stevens, J., dissenting).

[15] *See id.* at 318–72.

[16] *See, e.g.*, Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Proud*, 44 HARV. L. REV. 1222, 1242-43 (1931), https://doi.org/10.2307/1332182; JERMONE FRANK, LAW AND THE MODERN MIND 108-26 (1930).

beliefs.[17] From this perspective, these anecdotes and their collective moral—that government interference in the expression of thought and belief is inherently dangerous—would form the basis for Justice Kennedy's decision.

However, another simple explanation—perhaps the simplest—lies precisely in Justice Kennedy's existence as a jurist in a corporate capitalist society. In other words, to riff on *The Communist Manifesto*, Justice Kennedy's "jurisprudence is but the will of [the corporate capitalist] class made into a law for all, a will whose essential character and direction are determined by the economical conditions of [the corporate capitalist] class."[18] The majority opinion in *Citizens United*, by that token, is a manifestation (conscious or unconscious) of the will of corporate capitalism as the prevailing mode of production.

Taking the lead of Karl Marx and Friedrich Engels, this paper will analyze Justice Kennedy's opinion through the lens of Marxist legal theory by tracing the material and legal development of corporate legal status as a means of preserving and reinforcing corporate capitalism. Accordingly, Part II of this essay will begin, in Section A, by outlining the perspectives of Marx and Engels about law, as well as those by Soviet legal theorist Evgeny Pashukanis and Italian Marxist philosopher Antonio Gramsci. Then, Sections B and C will lay out the material and legal developments through U.S. history that laid the groundwork for *Citizens United*, namely the rise of corporate constitutional rights and the treatment of corporations in modern election regulation. Finally, Part III will analyze the basic arguments of the majority, concurring, and dissenting opinions in *Citizens United*, as well as its progeny, through a Marxist lens to offer a simple explanation of how Justice Kennedy's controversial decision came to be.

II. BACKGROUND

To fully analyze *Citizens United* from a Marxist paradigm, it is first important to elaborate precisely what one means by Marxist legal theory and Marxism's status within the field of legal studies, particularly Critical Legal Studies (CLS).[19] The works of Marx and Engels and subsequent Marxist theorists, e.g., Pashukanis and Gramsci, greatly inform such contours. Based on these works, the Justice Kennedy's opinion (and its fallout) can be traced as a natural outgrowth of the material and legal conditions through U.S. history.

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[17] *See* More Perfect, *Citizens United*, WYNC STUDIOS (Nov. 2, 2017), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/citizens-united.

[18] Karl Marx & Frederick Engels, Manifesto of the Communist Party, in 1 MARX/ENGELS SELECTED WORKS 98 (Moscow: Progress Publishers, 1969) (https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf).

[19] *See* Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1 (1986).

A. Marxism & Law

Before turning directly to the thoughts of Marx, Engels, and other Marxists theorists on law, a quick reflection on the status of Marxist legal theory in relation to CLS seems warranted. Despite CLS's Leftist orientation and core observations that law is inherently political and tends to serve the ruling class,[20] the status of Marxism within CLS has been relatively strained. According to Akbar Rasulov:

In the broader symbolic economy of the CLS project, the part that was most commonly allocated to Marxism was that of an essentially talentless but unfailingly big-headed distant relative in a second-rate Victorian novel, a supporting character whose sole reason for being introduced into the story was to help the reader perceive more efficiently the inherent moral superiority of the main protagonist.[21]

Though Rasulov outlines potential historical rationales for attempts by Crits (i.e., CLS scholars) to distance itself from Marxism in the Reagan Era, he also highlights, on the level of theory,[22] three challenges that Crits, such as Mark Tushnet and Duncan Kennedy, posed to Marxist legal theory: (1) the "problem of mechanism," or how to account for law that does not directly correspond with class struggle; (2) the "problem of law's constitutive function," or how to parse law's role in both the means of production and in class relations; and (3) the "problem of reification" of law, or how to avoid the Hegelo-conceptualism of nineteenth century German philosophy and jurisprudence.[23] According to Rasulov, this conceptualism to the Crits conceives of law "as some kind of over-homogenised or over-essentialised 'thing'" that legal realism rejects, and to address this problem of reification, Marxist legal theory should account for "how the legal order actually works at the level of everyday routine legal practices and what role, therefore, it really plays in the formation of the material conditions of social life."[24] Yet, despite the challenges (or, for Rasulov, perhaps because of them), there has been a resurgence in the wake of the Great Recession in Marxist legal theory, especially in the field of international law.[25]

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[20] *See id*.

[21] Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 TRANSNAT'L LEGAL THEORY 622, 632 (2014).

[22] *See id*. at 627–31.

[23] *Id*. at 632–39.

[24] *Id*.

[25] *See id*. at 639 & n.72; *see also, e.g.*, GRIETJE BAARS, THE CORPORATION, LAW AND CAPITALISM: A RADICAL PERSPECTIVE ON THE ROLE OF LAW IN THE GLOBAL POLITICAL ECONOMY (2019); Christopher Tomlins, *Marxist Legal History, in* OXFORD HANDBOOK OF LEGAL HISTORY 520 & n.81 (Markus D. Dubber & Christopher Tomlins eds., 2018); CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW (2005).

Considering the above, the exploration of Marxist legal theory below is sensitive to the theoretical challenges posed above. Accordingly, in taking up Marx and Engels (as well as Pashukanis and Gramsci), special attention will be given to the theoretical limits and common pitfalls of Marxist approaches to law.

1. Marx & Engels on Law & Corporations

While it is often remarked that Marx and Engels neither made law the direct object of their writing nor formulated a systematic approach to law,[26] their work suggests that Marx, who studied law,[27] and Engels did consider law significant in their elaboration of historical materialism; in fact, they frequently wrote on the subject (though not in detail) over a diffuse array of manuscripts over their lives.[28] Beyond the polemical context of the *Manifesto* cited above, one of the "best known" of Marx's passages is the preface to *A Contribution of the Critique of Political Economy*.[29] In this passage, Marx sets out a "general conclusion" that guided his work:

> In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. . . . At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or—this merely expresses the same thing in legal terms—with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure.
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> In studying such transformations it is always necessary to distinguish between the material transformation of the economic conditions of production . . . and the legal, political, religious, artistic or philosophic—in

[26] *See, e.g.*, Tomlins, *supra* note 25, at 519; HUGH COLLINS, MARXISM AND LAW 9 (1982); MAUREEN CAIN & ALAN HUNT, MARX AND ENGELS ON LAW 1–4 (1979); Andrew Vincent, *Marx and Law*, 20 J. L. & SOC. 371 (1993).

[27] *See* DAVID MCLELLAN, KARL MARX: A BIOGRAPHY 15–27 (4th ed. 2006)

[28] *See* CAIN & HUNT, *supra* note 26, at 1–4.

[29] Tomlins, *supra* note 25, at 519; *see also* KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY *preface* (Moscow: Progress Publishers, 1977) (https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm) [hereinafter Preface].

> short, ideological forms in which men become conscious of this conflict and fight it out.[30]

In parsing Marx's base/superstructure metaphor, one finds the "material forces of production," (i.e., economic forces) which correspond to the "relations of production" (i.e., property relations), the totality of which comprises the economic base. From this base, the societal superstructure arises, wherein the ideological forms of social consciousness (law, politics, religion, art, etc.) operate.[31] As the material productive forces develop, they eventually conflict with the existing property relations, which registers in the superstructure in the creation of clashing ideologies that spur on social revolution and new relations of production.[32] In this way, "[t]he mode of production of material life conditions the general process of social, political and intellectual life."[33] Thus, one can account for the incremental developments from feudalism to capitalism by looking at the development of material productive forces and the resulting conflict in property relations that manifest in social revolutions that use ideological forms, such as law, to establish new property relations. An example provided by Hugh Collins is the development of commercial classes (tradesmen, mercantilists, landed gentry, etc.) interested in the free alienability of land helping spur on the English Civil Wars, culminating in the Tenures Abolition Act of 1660.[34]

However, scholars, such as Maureen Cain and Alan Hunt, note that the base/superstructure metaphor runs the risk of (1) determinism and (2) reductionism, i.e., (1) the assertion of unilateral causality between the economic base and the resulting superstructure and (2) the reduction of all accounts of the superstructure to the content of the base.[35] To avoid these misconceptions, Christopher Tomlins offers the formulation "[o]rigination in" rather than "determination by" (whereas Cain and Hunt offer "dependence of law")[36] in explaining how the "mode of production of material life *conditions* the general process of social, political and intellectual life ."[37] As noted by Cain, Hunt, and Tomlins,[38] Engels, in later letters, clarifies that the formula—economic base solely determines ideological superstructure—over simplifies the theoretical framework. In a letter to Joseph Bloch, Engels explains:

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30 *Id.*

31 *Id.*

32 *See* Tomlins, *supra* note 25, at 521–23.

33 *See* Tomlins, *supra* note 25, at 520.

34 *See* COLLINS, *supra* note 26, at 21–22.

35 *See* CAIN & HUNT, *supra* note 26, at 49–50.

36 CAIN & HUNT, *supra* note 26, at 50.

37 *See* Tomlins, *supra* note 25, at 520.

38 *See* CAIN & HUNT, *supra* note 26, at 50; Tomlins, *supra* note 25, at 523.

> The economic situation is the basis, but the various elements of the superstructure—political forms of the class struggle and its results, to wit: constitutions established by the victorious class after a successful battle, etc., juridical forms, and even the reflexes of all these real struggles in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogmas—also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their *form*.[39]

In a letter to Walther Borgius, Engels, in a simpler form, again states that, while economic conditions ultimately determine historical development, "[p]olitical, juridicial, philosophical, religious, literary, artistic, etc., development . . . all these react upon another and also upon the economic base."[40] Thus, "[i]t is not that the economic position is the *cause and alone active*, while everything else only has a passive effect. There is, rather, interaction on the basis of the economic necessity, which *ultimately* always asserts itself."[41]

With this understanding of the base/superstructure metaphor in mind, the following excerpt below from Volume III of *Capital* presents a further elaboration on the purpose and genesis of law specifically:

> It is furthermore clear that here as always it is in the interest of the ruling section of society to sanction the existing order as law and to legally establish its limits given through usage and tradition. Apart from all else, this, by the way, comes about of itself as soon as the constant reproduction of the basis of the existing order and its fundamental relations assumes a regulated and orderly form in the course of time. And such regulation and order are themselves indispensable elements of any mode of production, if it is to assume social stability and independence from mere chance and arbitrariness. These are precisely the form of its social stability and therefore its relative freedom from mere arbitrariness and mere chance. Under backward conditions of the production process as well as the corresponding social relations, it achieves this form by mere repetition of their very reproduction. If this is continued on for some time, it entrenches itself as custom and tradition and is finally sanctioned as an explicit law.[42]

This final quotation contains, what Colin Sumner describes, the three most basic features of the Marxist legal theory: (1) the centrality of the mode of production and its consequences for law; (2) the utility of the legal system

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[39] Friedrich Engels, *Engels to J. Bloch, in* IN KÖNIGSBERG (Berlin: Progress Publishers, 1999) (1895) (https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf).

[40] Friedrich Engels, *Engels to Borgius, in* MARX AND ENGELS CORRESPONDENCE (International Publishers, 2000) (1968) (https://www.marxists.org/archive/marx/works/1894/letters/94_01_25.htm).

[41] *Id.*

[42] KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, VOLUME III 577 (International Publishers, 1959) (https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-III.pdf).

for control of the ruling class; and (3) the legal system's role in protecting the reproduction of economic systems from heterodox influence.[43] It also elaborates further the "interaction," suggested by Engels, between law and the economic base, operating "metanormatively" (following Hugh Collins) both as an influence on the nature of property relations at the base and as a manifestation of the dominant ideology in the superstructure.[44]

However, scholars of Marxist legal theory recognize common pitfalls in understanding law's treatment by Marx and Engels that directly correlate to the determinism and reductionism mentioned above. For Sumner, there are two reductive traps: (1) economism (wherein the legal system is a mere reflex of the economic structure) and (2) instrumentalism (wherein law is a mere weapon of the ruling class).[45] Similarly, Collins offers the formulations "crude materialism" and "crude instrumentalism."[46] For Sumner and Collins, economism or crude materialism fails to account for manifestations of law that do not have a direct correspondence to property relations (which would reduce all of law and legal reasoning to contract and property) and for the effect of the other ideological components in the superstructure—culture, politics, religion, etc.—on law. And (crude) instrumentalism fails to account for the actual mechanisms through which law is created and executed beyond recitations of "class struggle" or a conscious conspiracy among lawyers and jurists to advance the cause of the ruling class.[47] A common shortcoming in these two reductive tendencies is that they neglect to consider the how law as ideology comes to exist, both as an outcome of the base/superstructure dynamic and in the social consciousness,[48] or to take Engels' expression, in the "brains of the participants."[49]

Before turning to the Marxist legal theory that followed Marx and Engels, it should be mentioned that Marx and Engels did have opportunity to remark on corporations or, to use the language of their late nineteenth century milieu, "stock companies."[50] In Volume III of *Capital*, Marx (along with an editorial note from Engels) describes the rise of stock companies as a result of "enormous expansion of the scale of production and of enterprises, that was impossible for an individual [capitalist]," turning such a capitalist "into a mere manager, administrator of other people's capital."[51] The stockholder

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[43] COLIN SUMNER, READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW 246-247 (1979).

[44] COLLINS, *supra* note 26, at 88-89.

[45] SUMNER, *supra* note 43, at 247.

[46] COLLINS, *supra* note 26, at 25.

[47] SUMNER, *supra* note 43, at 248–53; COLLINS, *supra* note 26, at 43.

[48] SUMNER, *supra* note 43, at 248–53; COLLINS, *supra* note 26, at 43.

[49] *Engels to J. Bloch*, *supra* note 39.

[50] CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, VOLUME III, *supra* note 42, at 315.

[51] *Id.*

is, in turn, "a mere money-capitalist" whose dividends are "entirely divorced from the function in the actual process of reproduction."[52] To Marx, this "social property" turns the stock company's economic processes into "social functions," which Marx describes as follows:

> This is the abolition of the capitalist mode of production within the capitalist mode of production itself, and hence a self-dissolving contradiction, which prima facie represents a mere phase of transition to a new form of production. It manifests itself as such a contradiction in its effects. It establishes a monopoly in certain spheres and thereby requires state interference. It reproduces a new financial aristocracy, a new variety of parasites in the shape of promoters, speculators and simply nominal directors; a whole system of swindling and cheating by means of corporation promotion, stock issuance, and stock speculation. It is private production without the control of private property.[53]

While Marx's prognostication has yet to come true in the century since *Capital* was published, his depiction of state interference, stock speculation, and the creation of a financial aristocracy have rung true in the U.S. context given the perennial antitrust and securities regulation of corporations through the Great Depression, Great Recession, and the many booms and busts in between and the growth of income inequality (typically at the benefit of corporate executives and major shareholders) in the post-Reagan era.[54]

2. Marxism & Law After Marx & Engels: Evgeny Pashukanis & Antonio Gramsci

Marx and Engels are, of course, not the final words in Marxist approaches to law. Here, special focus will be given to the works of Soviet legal theorist Evgeny Pashukanis and Italian Marxist thinker Antonio Gramsci. While Pashukanis is viewed by some as reductively economistic,[55] his work represents as a serious attempt to articulate how property relations (as legal relations) are derived from economic activity and become manifest in legal ideology.[56] Gramsci, on the other hand, provides an account of law's

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[52] *Id.*

[53] *Id.* at 316.

[54] *See, e.g.*, CONG. RSCH. SERV., R46212, WAGE INEQUALITY AND THE STAGNATION OF EARNINGS OF LAW-WAGE WORKERS, CONTRIBUTING FACTORS AND POLICY OPTIONS (2020); CONG. RSCH. SERV., IFI1422, FEDERAL SECURITIES LAWS: AN OVERVIEW (2020); CONG. RSCH. SERV., IFI1234, ANTITRUST LAWS: AN INTRODUCTION (May 2019); Michael Brill et. al., *Understanding the Labor Productivity and Compensation Gap*, 6 BUREAU OF LAB. STAT. 1 (2017); CONG. RSCH. SERV. R41319, THE DODD-FRANK WALL STREET REFORM ACT: EXECUTIVE COMPENSATION (2012).

[55] *See, e.g.*, SUMNER, *supra* note 43, at 249–53; COLLINS, *supra* note 26, at 24.

[56] *See* BAARS, *supra* note 25, at 16; MIÉVILLE, *supra* note 25, at 77.

coercive and educational role, as ideology, in the ruling class's hegemony over the subaltern classes.[57]

a. Pashukanis: Commodity Form Theory of Law

As articulated by China Miéville, the central argument of Pashukanis' *General Theory of Law and Marxism* is that "the logic of the commodity form is the logic of the legal form."[58] Thus, Pashukanis writes "[a]s the wealth of capitalist society assumes the form of an enormous accumulation of commodities, society presents itself as an endless chain of legal relationships."[59] According to Pashukanis, the logic of the commodity form involves the exchange of commodities (as products of labor and bearers of value) by commodity owners who, by virtue of their ownership and formal equality in exchange, are bearers of legal rights, i.e. legal subjects.[60] Accordingly, as the division of labor and systems of commodity circulation develop, products of labor by abstraction become commodities that possess objective economic value (rather than arbitrary personal value), just as humans become abstract legal subjects (rather than zoological beings).[61] In fully developed capitalist society, property is transformed from mere factual possession to "an absolute immovable right which follows the object" everywhere it goes and is protected by the state.[62] So, too, is the act of exchange between commodity owners, as legal subjects, transformed:

> Thus, the legal subject is the abstract commodity owner elevated to the heavens. His will – will understood in a legal sense – has its real basis in the wish to alienate in acquisition and to acquire in alienation. For this desire to be realized it is necessary that the desires of commodity owners be directed to one another. Legally, this relationship is expressed as a contract or an agreement of independent wills. Therefore, contract is one of the central concepts of law.[63]

In this way, the "commodity fetishism" of capitalist society, the social phenomenon of attributing value to objects as products of labor by abstraction, corresponds with a "legal fetishism," the social phenomenon of attributing rights to individuals as legal subjects by abstraction.[64]

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[57] *See* Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32 (1982).

[58] MIÉVILLE, *supra* note 25, at 78; *see also* Evgeny Pashukanis, *General Theory of Law and Marxism*, in PASHUKANIS: SELECTED WRITINGS IN MARXISM AND LAW 69 (Piers Bierne & Robert Sharlet eds., 1980).

[59] Pashukanis, *supra* note 58, at 62.

[60] *See id.* at 76.

[61] *See id.* at 77.

[62] *See id.* at 78.

[63] *Id.* at 81-82.

[64] *Id.* at 79.

This conception of legal form as the reflection of the commodity form, by itself, may be viewed as overly economistic.[65] Yet Pashukanis argues that the moment when the legal form is most evident is not in the actual process of exchange (though it has a clear role there as well) but in legal disputes:

> A dispute, a conflict of interest, elicits the form of law, the legal superstructure. In a dispute, i.e. in a lawsuit, the parties engaged in economic activity already appear as parties, i.e. as participants in the legal superstructure; the court in its most primitive form—this is the legal structure *par excellence*. Through the judicial process the legal is abstracted from the economic, and appears as an independent element.[66]

Thus, the manifestation of the legal superstructure, the realm of ideology, presented by a lawsuit best shows the legal form as independent from the economic form, though it fundamentally corresponds to the economic form. From there, the state "injects clarity and stability into the legal structure" through the enforcement of the judicial decision.[67]

Like Marx, Pashukanis also addresses the stock corporation, seeing it as the natural consequence of the above process of abstraction of value from property:

> In a stock corporation the individual capitalist is merely the bearer of title to a certain share of the unearned income. His economic and legal activity, as owner, is limited exclusively to the sphere of nonproductive consumption. The basic mass of capital becomes a fully impersonal class force. To the extent that they participate in market circulation, which supposes the autonomy of its separate parts, these parts appear as the property of legal persons. In fact the comparatively small circle of the largest capitalists can dispose of it acting through their hired representatives or agents. The legally distinct form of private property does not now reflect the actual position of objects, for with the assistance of methods of participation and control actual domination goes far beyond purely legal bounds.[68]

While Pashukanis, following Marx, states that this is the precise moment of development when capitalist society has matured sufficiently enough to transform into its antithesis through class revolution of the proletariat,[69] Greitje Baars and Miéville takes Pashukanis' commodity form theory a different direction to argue that corporate legal personality (not

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[65] *See, e.g.*, SUMNER, *supra* note 43, at 249-53; COLLINS, *supra* note 26, at 24.

[66] Pashukanis, *supra* note 58, at 67.

[67] *Id.* at 68; s*ee also* Nigel Simmonds, *Pashukanis and Liberal Jurisprudence*, 12 J. L. & SOC'Y 135, 140 (1985).

[68] Pashukanis, *supra* note 58, at 87.

[69] *Id.*

discussed by Pashukanis) comes from precisely the legal form he articulates—the corporation as the commodity owner has legal rights.[70]

b. Gramsci: Social Hegemony & Law

On the other hand, Gramsci, rather than focus on the specific capitalist economic forces at the base and their correspondence in the legal superstructure above, turns his focus to how the state operates in the superstructure and uses ideology to reinforce the control of the ruling class through social hegemony.[71] Gramsci describes social hegemony as "[t]he 'spontaneous' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is 'historically' caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production."[72] Intellectuals, such as thinkers, artists, and politicians, act as the state's "deputies" in developing this consent by making the dominant ideology of the ruling class become the ideology of the masses and obscuring.[73] This is reinforced by the political government's "direct domination," "[t]he apparatus of the state's coercive power which 'legally' enforces discipline on those groups who do not 'consent' either actively or passively."[74]

As such, law has a role in the ruling class's hegemony as both repressive (in the state's direct domination) and as educational (in developing civil society's consent or social hegemony).[75] As articulated by Gramsci:

> In reality, the State must be conceived of as an "educator", in as much as it tends precisely to create a new type or level of civilizations. Because one is acting essentially on economic forces, reorganizing and developing the apparatus of economic production, creating a new structure, the conclusion must not be drawn that superstructural factors should be left to themselves, to develop spontaneously, to a haphazard and sporadic germination . . . . [The State] operates according to plan, urges, incites, solicits, and "punishes"; for, once the conditions are created in which a certain way of life is "possible" then "criminal action or omission" must have a punitive sanction . . . . The "prize-giving" activities of individuals and groups, etc.,

[70] *See* BAARS, *supra* note 25, at 68-70; MIÉVILLE, *supra* note 25, at 108.

[71] Antonio Gramsci, *The Intellectuals*, *in* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 131, 145 (Quintin Hoare & Geoffrey N. Smith eds. 1971).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *See* Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 530 (2000).

> must also be incorporated in the conception of the Law; praiseworthy and meritorious activity is rewarded, just as criminal actions are punished. . .[76]

Sumner describes this as "the ideological function of law" in unifying fractions the ruling class in practice and mystifying the social structure from the masses through coercion and consent.[77] In this way, the state solves the "juridical problem," i.e., the "problem of education of the masses, of their 'adaptation' in accordance with the requirements of the goal to be achieved . . . through 'law' the State renders the ruling group 'homogeneous,' and tends to create a social conformism" to support the ruling group's existence.[78] This is what Gramsci describes as the "will to conform," which the bourgeois class revolutionized in the concept of law and the function of the state.[79]

While Gramsci never fully addressed the role of judges in the process of social hegemony and direct domination, Pablo Ciocchini and Stefanie Khoury have attempted to study the judicial decision-making process in domestic courts (in the penal system's reaction to the "crime problem" created by neoliberal capitalism) and international human rights courts (in their failure to hold corporations accountable) "as both repressive technicians and moral and intellectual leaders in neo-liberal capitalist societies."[80] Their empirical analysis demonstrates how coercion and consent can be rendered by judicial actors in conventional and international settings.[81]

B. The Material & Legal History of the Corporation in U.S. Jurisprudence

Following the lead of Marx's historical materialism, a historical analysis is needed of the economic conditions that underlie the dominant ideology, manifest in statutes and case law (especially that of the Supreme Court of the United States), that led to *Citizens United*. Specifically, by tracing the material, i.e., economic, development of corporations in the U.S. and the subsequent corresponding legal reactions to their development (both in general and in the context of election regulation),[82] *Citizens United* can be understood as a natural outgrowth of its material and legal pedigree.

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[76] Antonio Gramsci, *State and Civil Society*, *in* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 445, 508 (Quintin Hoare & Geoffrey N. Smith eds. 1971).

[77] SUMNER, *supra* note 43, at 258.

[78] Antonio Gramsci, *The Modern Prince*, *in* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 313, 428 (Quintin Hoare & Geoffrey N. Smith eds. 1971).

[79] *State and Civil Society*, *supra* note 76, at 529.

[80] Pablo Ciocchini & Stefanie Khoury, *A Gramscian Approach to Studying the Judicial Decision-Making Process*, 26 CRITICAL CRIMINOLOGY 75 (2018).

[81] *See generally id.*

[82] This historical materialist methodology is used by Grietje Baars in analyzing the material and legal rise of the corporation in English common law. *See* BAARS, *supra* note 25 at 41–73.

1. Colonial & Antebellum America

While the origins of the commercial corporation can be traced to Renaissance Europe, its presence in North America came as a result of the European colonial project—the English, French, Dutch, Spanish, and Portuguese all chartered monopoly companies to organize colonial trade and governance.[83] However, negative English and French experiences with corporations (namely, the South Sea Company bubble and the Mississippi Company bubble crises) and general distrust of government-created monopolies created a healthy skepticism in England and its colonies about government-chartered corporations (of note is Adam Smith's invective against such corporations in *The Wealth of Nations* as well as the Boston Tea Party, which occurred on an East India Company ship, and the early American debate over the first Bank of the United States).[84] At the same time, use of special statutes—federal, state, and municipal—to create government-chartered corporations (though typically small and with a specific public purpose) proliferated in U.S. in the post-colonial era.[85] Prior to the Civil War, New York, New Jersey, Connecticut, and Iowa, for example, enacted corporation statutes with limited liability provisions, though New York and New Jersey limited the scope of their statutes to manufacturing businesses.[86]

These material developments correspond with jurisprudential developments as well. Over the tenure of the Marshall Court, the Chief Justice wrote on the status of corporations on three occasions. First, in *Bank of the United States v. Deveaux*, Chief Justice John Marshall, describing a corporation as "a collection of many individuals united into one body, under a special name, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting in several respects as an individual," held that Bank of the United States, a public corporation, had the right to sue in federal court as a matter of "justice and convenience."[87] In *Trustees of Dartmouth College v. Woodward*, again Chief Justice Marshall recognized that a private corporation such as Dartmouth College whose corporate charter represented a contract between the King and the

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[83] *See* Philip J. Stern, *The Corporation in History*, *in* THE CORPORATION: A CRITICAL, MULTI-DISCIPLINARY HANDBOOK 25–27 (Grietje Baars & André Spicer eds., 2017).

[84] *See id* at 27–29.

[85] *See,e.g.*, Robert E. Wright, *For and Non-Profit Special Corporations in America, 1608-1860*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW (Harwell Wells ed., 2018); Stern, *supra* note 83, at 28–29.

[86] *See* Stern, *supra* note 83, at 29; David McBride, *General Corporation Law: History and Economics*, 74 L & CONTEMP. PROBS. 1, 3 (2011).

[87] Bank of the U.S. v. Deveaux, 9 U.S. 61, 64, 67 (1809).

trustees, were protected by the Contracts Clause of the U.S. Constitution, [88] yet stating:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.[89]

However, near the end of his term on the bench, Chief Justice Marshall, writing the decision in *Providence Bank v. Billings*, held that a Providence Bank, a private corporation asserting protection under the Contracts Clause, is not exempt from taxation, something the state could only abdicate with an explicit provision, when its charter is silent on the issue.[90] Despite the Marshall Court's willingness to extend certain rights to corporations, Chief Justice Marshall unequivocally identified corporations as "invisible, intangible, and artificial being[s]."[91]

2. From the Gilded Age to the Great Depression

While the early U.S. experience with corporations was marked with general skepticism, the post-Civil War period, the expansion of the railroad, and burgeoning industrial revolution ushered in a full embrace of corporations, [92] culminating in the adoption of general incorporation enabling statutes at the turn of the century.[93] Even through the Progressive Era's antitrust and labor legislation, the size and number of corporations vastly expanded as did the stock market.[94] Despite the growth of public investors and increasingly enlightened consumers, it was not until the Great Crash of 1929 that the excesses of the stock market—inadequate reporting, the manipulation of insider information, frenzied speculation, etc.—were laid bare and that serious government intervention occurred.[95]

In the pre-Great Depression era spanning the Gilded Age to the Roaring Twenties, the jurisprudence of the Supreme Court followed the economy in

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[88] *See* Trs. of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

[89] *Id.* at 636.

[90] *See* Providence Bank v. Billings, 29 U.S. 514.

[91] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 66 (Liveright Publishing Corporation, 2018).

[92] *See* Stern, *supra* note 83, at 32.

[93] *See* LINDA O. SMIDDY & LAWRENCE A. CUNNINGHAM, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 228-31, 241 (LexisNexis 2010).

[94] *See* Dalia T. Mitchell, *Legitimating Power: A Brief History of Modern U.S. Corporate Law*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 512–14 (Harwell Wells ed., 2018).

[95] *See id.*

turn.[96] In *Santa Clara Cnty. v. S. Pac. R.R. Co.*, the Court summarily implied, as a result of Chief Justice Waite stating during oral argument that the Court did not wish to hear arguments on the question as all were in agreement on the question, that the Fourteenth Amendment applies to corporations.[97] The Court took this further in *Pembina Consol. Silver Mining Co v. Pennsylvania*, fully elaborating the Fourteenth Amendment's protection of corporations.[98] However, in *Northwestern Nat. Life Ins. Co v. Riggs*, the Court, while reaffirming the applicability of the Fourteenth Amendment's property and equal protections to corporations, did limit the applicability of the liberty protection, drawing the distinction between natural and artificial persons,[99] confirmed nine years later in *Pierce v. Society of Sisters*.[100]

3. From the New Deal to the Modern Corporate State

Only with the fallout of the Great Depression did meaningful regulation of private and public-trade corporations come about with the 1933 and 1934 Security Exchange Acts and the creation of the Securities Exchange Commission.[101] The resulting four decades led to the development of shareholder "democracy," the bureaucratic expertise of directors, mangers, and executives, and lowered standards of judicial review such as the business judgment rule and fairness evaluations.[102] In the post-Watergate era, the conceptualization of corporate boards as managers further lowered the standards for the duty of care and duty of loyalty, and caused an era of hostile takeovers, leveraged buyouts and a massive influx of passive investors interested only in stock ownership and profit maximization.[103] From the Reagan administration onward, corporate tax breaks (from the Economic Recovery Tax Act of 1981 to the Tax Cut and Jobs Act of 2017)[104] and bailouts (e.g., during the U.S. Savings and Loans crisis and the Great Recession)[105] occurred simultaneously with insider trading and accounting

96 *See, e.g.*, George Skouras, *On the Formation of the American Corporate State: The Fuller Supreme Court, 1888-1910*, 22 J. JURIS. 37 (2011).

97 *See* Providence Bank v. Billings, 29 U.S. 514 (1830).

98 *See* Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181, 188–89 (1888).

99 *See* Northwestern Nat'l Life Ins. Co. v. Riggs, 202 U.S. 243, 255 (1906).

100 *See* Pierce v. Soc'y of Sisters, 258 U.S. 510, 573 (1925).

101 *See* Mitchell, *supra* note 94, at 516.

102 *See id.* at 517–22.

103 *See id.* at 522–28.

104 *See* Tax Cut and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017); Economic Recovery Tax Act, Pub. L. No. 97-34, 95 Stat. 172 (1981).

105 *See, e.g.*, CONG. BUDGET OFF., REPORT ON THE TROUBLED ASSET RELIEF PROGRAM—OCTOBER 2012 (2012) (https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/tarp10-20120.pdf); DAVITA SIFTEN GLASBERG & DAN SKIDMORE, CORPORATE WELFARE POLICY AND THE WELFARE STATE: BANK DEREGULATION AND THE SAVINGS AND LOAN BAILOUT (Aldine de Gruyter, 1997).

scandals (e.g., Enron) [106] and market declines (e.g., the Dot-com Bubble and the Great Recession),[107] resulting in attempts at government regulation of corporations and securities (e.g., the Sarbanes-Oxley Act and the Dodd-Frank Act).[108]

While the judicial role in the development of modern corporate law greatly occurred in the Delaware state judiciary, the Supreme Court during this period maintained the Fourteenth Amendment's protection of corporations and began recognizing First Amendment impacts on corporations in protecting newspaper companies facing oppressive taxes and nonprofit corporations such as the NAACP, whose members were prohibited from conducting advocacy operations.[109]

However by the late 1970s, the Supreme Court, in the 5-4 *First National Bank v. Bellotti* decision, invalidated a Massachusetts law prohibiting corporate advertising expenditures in ballot initiatives for which the corporation did not have a direct business interest.[110] In so doing, the *Belloti* Court, overruling the *Pierce* Court, extended First Amendment liberty protections through the Fourteenth Amendment (because such advertising expenditures qualify as speech) to corporations beyond interests materially related to its business or property.[111] Justice Powell's rationale for this decision was twofold: (1) the inherent worth of speech does not depend upon its source, corporate or otherwise, and (2) the governmental interest in preventing undue corporate influence on referenda (which do not implicate corruption as in elections of officials) was unsubstantiated.[112] Chief Justice Rehnquist, in his dissent, reasserted Chief Justice Marshall's original conception of corporations in *Dartmouth College*, and noted that *Santa Clara County* was decided without argument or discussion as to the issue of whether a business corporation was a "person" entitled to equal protection rights, to balk at the idea of business corporations (distinguishable from newspaper companies or the NAACP) having non-business-related political speech rights.[113]

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[106] *See, e.g.*, BALA G. DHARAN & WILLIAM R. BUFKINS, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Foundation Press, 2004).

[107] *See, e.g.*, ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD (2018); ROGER LOWENSTEIN, ORIGINS OF THE CRASH: THE GREAT BUBBLE AND ITS UNDOING (2004).

[108] *See* Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (2002); Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[109] *See* NAACP v. Button, 371 U.S. 415 (1963); Grosjean v. Am. Press Co., 297 U.S. 233 (1936)

[110] *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

[111] *See id.* at 778–84 (stating that the lower court's finding, under *Pierce*, "that a corporation's First Amendment rights must derive from its property rights under the Fourteenth" was an "artificial mode of analysis, untenable under decisions of this Court").

[112] *See id.* at 777, 788–92.

[113] *See id.* at 822-28 (Rehnquist, C.J., dissenting).

C. And Now for Something Completely Different: Campaign Finance Regulation

Though unrelated to the material and legal development of the corporate form and its attendant rights *per se*, an understanding of the material and legal genesis of federal election regulations, particularly as applied to corporations and unions, is equally important to understanding *Citizens United* and analyzing it from a Marxist perspective.

Prior to the Watergate Scandal, the Supreme Court's consideration of the Tillman Act of 1907, which prohibited corporate contributions to federal elections,[114] and the Federal Corrupt Practices Act of 1910, which set spending limits and was the first federal law requiring financial disclosure of electoral spending, [115] primarily arose in the context of labor union issues.[116] On these occasions, the Supreme Court recognized the value of these statutes to prevent, as Justice Frankfurter put it, "the corroding effect of money employed in elections by aggregated power" of monied interests.[117]

The passage of the Federal Election Campaign Act (FECA) and amendments to in 1974 after Watergate,[118] which established an elaborate campaign finance regulation scheme and created the FEC, ironically opened the door to several constitutional challenges to its various provisions. The most notable of these, *Buckley v. Valeo*, resulted in the Supreme Court, while upholding individual contribution limits to candidates, struck down limits on expenditures by candidates, independent expenditures, among other things.[119] Of particular importance to the Court were (1) that restrictions on the expenditure of money on political communication restricts expression and (2) that, while limitations on contributions to candidates are justified by a governmental interest in preventing corruption or its appearance, limits on expenditures whether by candidates or independent persons (which do not give rise to corruption issues) cannot be justified by a governmental interest equalize the relative ability to influence elections.[120] When *Buckley* was upheld again in the state law context in *Nixon v. Shrink Mo. Gov't PAC*, Justice Stevens (following Justice Breyer) questioned in his concurrence one

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[114] *See* Federal Corrupt Practices Act of 1910 (Publicity of Political Contributions Act of 1910), Pub. L. No. 61-274, 36. Stat. 822 (1910).

[115] *See* Publicity of Political Contributions Act, Pub. L. No. 61-274, 36. Stat. 822 (1910).

[116] *See, e.g.*, Pipefitters Local 562 v. United States, 407 U.S. 385 (1972); United States v. UAW-CIO, 352 U.S. 567 (1957); United States v. Cong. Indus. Org., 335 U.S. 106 (1948).

[117] *See UAW-CIO*, 352 U.S. at 582.

[118] *See* Federal Election Campaign Act (FECA) of 1971, Pub. L. 92-225, 86 Stat. 3 (1971); FECA Amendments of 1974, Pub. L. 93-334, 88 Stat. 1263 (1974).

[119] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[120] *See id.* at 19, 56.

of *Buckley*'s core premises: "Money is property; it is not speech."[121] In *FEC v. Massachusetts Citizens for Life*, the Court held that, as applied, the FECA's PAC requirement was a substantial burden on the free speech of an exclusively political non-profit corporation without shareholders.[122]

In the state law context, the Supreme Court held, in *Austin v. Mich. Chamber of Commerce*, that a Michigan law prohibiting the use of a corporation's treasury money for independent expenditures (though permissible from a segregated fund) did not violate the First and Fourteenth Amendment.[123] Justice Marshall's decision recognized a compelling governmental interest in combatting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[124] Justices Kennedy and Scalia in their dissents return to the *Buckley* Court's dismissal of the governmental interest in equalizing political speech.[125]

In 2002, the passage of the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold Act,[126] amended the FECA to deal with "soft money" issues (by prohibiting parties and candidates from raising or spending funds not in compliance with contribution restrictions) and "issue advocacy" advertisements by prohibiting corporate treasury-funded "electioneering communications," i.e., broadcast advertisements that name a federal candidate, within thirty days of a primary or caucus or sixty days of a general election.[127] The BCRA faced its first major test in *McConnell v. FEC*, which in a piecemeal fashion upheld most of the BCRA, including the soft money and electioneering communication provisions, from a facial constitutional challenge.[128] These limitations were justified on anti-corruption grounds and anti-distortion grounds, respectively.[129] Justice Kennedy, in a sixty-eight page opinion, signaled his dissatisfaction with *Austin* and his support of *Bellotti* in dissenting with respect to the Court's upholding of the electioneering communication provisions.[130]

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121 *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring); *see also id.* at 400 (Breyer, J., concurring).

122 *See* FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986).

123 *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

124 *See id.* at 660.

125 *See id.* at 684-85 (Scalia, J., dissenting); *see also id.* at 705-04 (Kennedy, J., dissenting).

126 *See* Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 155, §§ 101 *et seq.*, 116 Stat. 81 (2002).

127 *See* McConnell v. FEC, 540 U.S. 93 (2003).

128 *See id.*

129 *See id.* at 143, 165, 205.

130 *See id.* at 323–30.

Subsequently, in the 5-4 decision, *FEC v. Wisconsin Right to Life*, Chief Justice Roberts's decision (in a surprising turn from *McConnell*) held that unless an electioneering communication expressly urges the support or defeat of a candidate, it would be eligible for an "as applied" exception to the electioneering communication time limits.[131] Concurring, though not joining in Robert's opinion, Justices Scalia, Kennedy, and Thomas called for the reversal of the part of *McConnell* upholding § 203(a) of the BCRA.[132]

III. ANALYSIS

Considering the above theory and history, the stage was set for *Citizens United* by 2010 as a direct consequence of jurisprudential treatment of campaign finance and corporate personality. Analyzing the decision itself and the related cases that have followed from the perspective of Marxist legal theory, Justice Kennedy's decision in *Citizens United* can be seen clearly as a manifestation of the dominant ideology of corporate capitalism, despite the pleadings, procedural posture, and precedent.

A. A Marxist Analysis of the Decision: An Argument Within the Corporate Capitalist Ideological Paradigm

The opinions contained in *Citizens United* center around at least three central debates: (1) whether the pleadings, procedural posture, and precedent bar a facial constitutional challenge of BCRA § 203; (2) what free speech rights are due to a corporation; and (3) whether compelling government interests exist (or whether there are other available safeguards). Each of these centers of contention will be analyzed from the lens of Marxist legal theory.

1. Getting Over the Hurdles of Pleadings, Procedure, & Precedent

The primary question presented by *Citizens United* was whether documentary *Hillary: The Movie*, made by Citizens United (a non-profit corporation that receives individual and for-profit donations) could be made available as video-on-demand within the thirty days of the 2008 primary election under the BCRA.[133] Because of the Supreme Court's holding in *McConnell* and because the documentary *Hillary* expressly urged the defeat of Hilary Clinton as a candidate for President, the District Court found BCRA § 203 constitutional facially and as applied.[134]

Justice Kennedy, before turning to the constitutional question, addresses whether the case could be resolved on other grounds, namely (1)

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131 *See* FEC v. Wis. Right to Life, 551 U.S. 449 (2007)

132 *See id.* at 483–504 (Scalia, J., concurring).

133 *See* Citizens United v. FEC, 558 U.S. 319-21 (2010).

134 *Id.* at 322 (citing Citizens United v. FEC, 530 F.Supp. 2d 274 (D.D.C. 2008)).

whether *Hillary* does not actually qualify as an electioneering communication, (2) whether *Hillary* is not express advocacy (and this eligible for a *Wis. Right to Life* exception), (3) whether the Court ought to find a video-on-demand exception, or (4) whether the Court ought to find an exception for non-profit corporation who found political speech overwhelmingly from individual donors.[135] With respect to the first and second narrower arguments, Justice Kennedy finds that *Hillary* is an electioneering communication and express advocacy; with respect to the third and fourth narrower arguments, Justice Kennedy finds them untenable with the statute.[136] Justice Stevens, on the other hand, argues in his dissent that video-on-demand is relatively novel and that the Court could easily expand the *Massachusetts Citizens for Life* exception to organizations like Citizens United (political non-profit corporations with *de minimis* for-profit corporation donations) or as applied to Citizens United itself.[137]

With the Court unable to interpret its way out the problem, Justice Kennedy argues the constitutional challenge cannot be avoided whether it is facial or as applied (despite Justice Steven's argument for excluding a facial challenge on procedural grounds)[138] because, considering the Government's ambivalence in defending the statute (also known as alternative arguments, per Justice Stevens),[139] the possibility of protracted review of corporate election communications and the "complicated" nature of election regulation, such as simply creating a segregated fund and regularly reporting to the FEC, acting as a quasi-prior restraint leads to the chilling of speech.[140]

Thus, Justice Kennedy is left with what to him appear as conflicting lines of precedent: *Austin* and *McConnell* versus *Buckley* and *Bellotti*.[141] His ground for picking the latter to overrule the former, supported by Chief Justice Roberts,[142] is that it is an aberration and that the anti-distortion interest in *Austin* and, by extension, *McConnell* (discussed *infra* in Part III.A.3) is not compelling and could be used to justify all kinds of limitations on free speech.[143] Honing in on the historical pedigree running from Early American history (much to Justice Scalia's dismay)[144] through the Tillman Act to the BCRA, Justice Stevens, in turn, argues that *Buckley* and *Bellotti* are

135 *Id.* at 322–29.

136 *Id.*

137 *Id.* at 406–09 (Stevens, J., dissenting).

138 *Id.* at 396–405.

139 *Id.* at 402 n.7.

140 *Id.* at 329–41.

141 *Id.* at 348.

142 *Id.* at 377–82 (Roberts, C.J., concurring).

143 *Id.*

144 *Id.* at 385–93 (Scalia, J., concurring).

compatible with the other precedent; the former as it was evaluating a different independent expenditures provision than the one here, the latter as it implicated corporate viewpoint-discrimination in state referenda.[145]

From the perspective of Marxist legal theory, the above debate presents as a conflict within the dominant ideology over how the ruling class of corporate capitalists ought to funnel their unearned income to form and control the political superstructure. Even in the face of the allegedly draconian rules of campaign finance laws, the corporation's interest in influencing elections, while not able to directly contribute to candidates or (pre-*Citizens United*) fund express advocacy for or against candidates, is easily achieved through manifold voices (e.g., PACs, lobbying, the individual speech of directors, executives, and shareholders, etc.) and manifold methods (e.g., issue advertising, media and events not covered by statute, etc.). There is no fundamental challenge to the corporation's legal form, as a legal subject (i.e., a rights-holding commodity owner). From the Gramscian perspective, this debate appears as a dialogue to determine how best to maintain social hegemony in enabling the ruling corporate capitalist class to control the state; in other words, how far can the Court lift the veil on the dominant corporate class's control over the state and maintain the consent of the masses to society's structure.[146] With Justice Kennedy prevailing, this leads to the core issue: corporate free speech rights.

2. Money as Speech, Corporations as Speakers

Turning to the core issue of *Citizens United*, Justice Kennedy's argument for corporate free speech rights rest on two pillars: (1) money is political speech (*Buckley*) and (2) corporations are speakers (*Bellotti*).[147] As such, identity-based discrimination against corporate speakers in the form of limits on their independent expenditures from their corporate treasury funds is an impermissible violation of free speech (a "ban").[148] Justice Stevens, in response, takes to task these two premises. First, Justice Stevens begins his dissent with "the real issue in this case concerns how, not if, the appellant may finance its electioneering"[149]—the BCRA rules in no way ban corporate speech wholesale. Second, Justice Stevens finds the majority's simple citation to *Bellotti* as insufficient to explain *why* corporate identity ought to be afforded the same respect as individuals.[150]

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[145] *Id.* at 441–46 (Stevens, J., dissenting).

[146] *See The Intellectuals*, *supra* note 71, at 145.

[147] *Id.* at 342–48 (Kennedy, J., majority opinion).

[148] *Id.*

[149] *Id.* at 393 (Stevens, J., dissenting).

[150] *Id.* at 419–25.

With a Marxist lens, this debate goes to the heart of corporate capitalist ideology. Money, as an abstract value holder for the value of commodities, is speech just as much as a corporation, as an abstract legal subject *qua* commodity owner, is a speaker. Again, as Justice Stevens notes, this debate is about "how" not "if" corporations can speak as individuals do.[151] By imbuing corporations with free speech rights, of high importance in U.S. society, akin to that of natural person, Justice Kennedy furthers the law's role in advancing the "will to conform," i.e., homogenizing the ruling class across natural and legal personalities and acclimating the masses to the corporate role in elections.

3. Compelling Government Interests & the Disclosure & Disclaimer "Safeguard"

Finally, in evaluating the potential compelling governmental interests that might allow a limitation on corporate free speech rights, Justice Kennedy finds the government's anti-distortion and anti-corruption interest unavailing. With respect to the former, Justice Kennedy argues the "aggregation of wealth" from economic markets is a concern applicable to legal persons, just as much as natural persons.[152] Further, the anti-distortion interest is an attempt to equalize the relative ability of speakers to influence elections, a governmental interest rejected by *Buckley*.[153] This attempt at equalization undermines the "marketplace of ideas."[154] In addition to the effects of corporate domination of electioneering, Justice Stevens defends the anti-distortion interest because corporate speech is not necessarily reflective of the popular support of employees, investors, or customers[155]—the non-corporate legal subjects in capitalist society.

With respect to anti-corruption, Justice Kennedy simply draws the distinction between *quid pro quo* corruption (implicated by direct contributions to candidates) and favoritism that may follow independent expenditures.[156] The latter, he states, are an inherent part of representative democracy.[157] Justice Stevens, in turn, points to the vast record in *McConnell* that demonstrated the undue influence that independent expenditures have on the democratic process.[158]

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151 *Id.* at 393 (Stevens, J., dissenting).

152 *Id.* at 349–56.

153 *Id.*

154 *Id.*

155 *Id.* at 465-75 (Stevens, J., dissenting).

156 *Id.* at 356–61 (Kennedy, J., majority opinion).

157 *Id.*

158 *Id.* at 447–60.

Justice Kennedy's appeal to the marketplace of ideas is a culmination of the legal form corresponding to the commodity form in the political process: when the exchange of ideas is the exchange of money, then the corporation is a legal subject, a speaker, that has the right to participate in the exchange. As a result, the corporation has an unfettered role in the market to advocate for or against candidates. This freedom allows the dominant corporate class to further its role in "educating" the masses into their consent and to allow for its direct domination through the state. Justice Kennedy's acceptance of favoritism is precisely an indication of this social hegemonic process. Even Justice Stevens' defenses of the governmental interests in support of the democratic process point to the conflict within the dominant corporate capitalist ideology: the majority's decision opens the door to the appearance corruption and distortion in the democratic process which would serve to undermine the consent of the masses to the control of the corporate capitalist class.

B. Citizens United's Progeny: A Decade of Continuity

Citizens United has had a lasting effect on subsequent jurisprudence of the Supreme Court and lower federal courts. In the immediate aftermath of *Citizens United*, the D.C. Circuit invalidated the FECA provision limiting individual contributions to super PACs, extending *Citizens United*'s invalidation of a governmental anti-corruption interest.[159] The Supreme Court has since completed the federalism circle by invalidating state laws regulating corporate independent expenditures.[160] Beyond the realm of free speech, the Supreme Court has also recognized the religious rights of closely-held corporations, resulting in the creation of religious exemptions to mandatory contraceptive provisions in the Affordable Care Act.[161] These moves all represent (from the Pashukanisian perspective) the natural consequence of corporations, as artificial commodity owners, possessing precisely the same rights as natural commodity owners in capitalist society and/or (from the Gramscian perspective) a method for the dominant class—as corporate directors, executives, and majority stockholders—to ensure political control through the consent of the masses who have come to value constitutional rights (as a result of the state's use of the law in its role as educator) so highly as to accept their extension to corporations.[162]

No doubt these decisions have resulted in pushback from some members of the Court's bench: *Burwell* was a 5-4 decision and four Justices

159 *See* SpeechNow.org v. FEC, 559 F.3d 686 (D.C. Cir. 2010).

160 *See* Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516 (2012).

161 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

162 See Pashukanis, *supra* note 58, at 76–81; *The Modern Prince*, *supra* note 78, at 428.

joined Justice Breyer's dissent in the Court's *per curiam* decision in *Bullock*.[163] Most notably, in *Jesner v. Arab Bank, PLC*,[164] Justice Breyer dissented—not in the context of corporate constitutional rights but in the context of corporate immunity from Alien Tort Statute (ATS) claims—as follows:

> Immunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose. It allows these entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights . . . without having to shoulder attendant fundamental responsibilities.[165]

Justice Breyer, as Justice Stevens in *Citizens United*, argues within the corporate capitalist paradigm: instead of directly challenging corporate constitutional rights (for they are a *fait accompli*), he argues that they accept the responsibilities of personhood.[166] Even if the Court were to obligate corporations with such responsibilities, it would only serve to further the subaltern classes consent, wrapped in the language of "corporate citizenship," to the rule of the dominant corporate class.

IV. CONCLUSION

In sum, *Citizens United*, despite its initial complexity at first blush, can be explained simply: Justice Kennedy and the majority, as jurists in a corporate capitalist society, followed (consciously or unconsciously) the dominant ideology conditioned by the material productive forces at society's base, developed over U.S. history. From the perspective of Pashukanis, this is a direct product of the legal form following the commodity form—the corporation as legal subject follows the corporation as commodity owner.[167] From the perspective of Gramsci, Justice Kennedy is serving the function of an intellectual leader, reinforcing the ruling class's social hegemony and, by extension, direct domination through political control of the state.[168]

Though it has been over ten years since *Citizens United* opened the door to corporate money in U.S. elections without any meaningful reform since, the new economic conditions awaiting corporate capitalism on the other side of the COVID-19 pandemic may present itself as, what Gramsci would call, an "organic crisis," i.e., a crisis of the ruling class's social hegemony as the

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163 *See, e.g.*, *Burwell*, 573 U.S. at 739–72 (Ginsburg, J., dissenting); *Bullock*, 567 U.S. at 517–18 (Breyer, J., dissenting).

164 *See* Jesner v. Arab Bank, PLC, 138 S.Ct. 1386 (2018).

165 *Id.* at 1437 (Breyer, J., dissenting).

166 *See id.*

167 *See* Pashukanis, *supra* note 55, at 76–81.

168 *See The Intellectuals*, *supra* note 71, at 145.

consent of the masses erodes.[169] By laying bare the systems of social hegemony and direct domination that exist as a result of and to preserve corporate capitalism, the pandemic, and the likely political and economic fallout to follow, may lead to reform or revolution.[170] Understanding the judiciary's role—as "repressive technicians and moral and intellectual leaders" advancing the current and future dominant ideologies conditioned by the changes in the material productive forces to come—will likely be an integral part of that social change.[171]

[169] *See State and Civil Society*, *supra* note 76, at 211.

[170] For the origins of the perennial Marxist debate over reform and revolution, the early debate between German Marxists Rosa Luxemburg and Eduard Bernstein is instructive. *See* ROSA LUXEMBURG, REFORM OR REVOLUTION (1990) (https://www.marxists.org/archive/luxemburg/1900/reform-revolution/index.htm); EDUARD BERNSTEIN, EVOLUTIONARY SOCIALISM (1907) (https://www.marxists.org/reference/archive/bernstein/works/1899/evsoc/index.htm).

[171] Ciocchini & Khoury, *supra* note 80, at 75.