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## Limiting Political Contributions After *McCutcheon*, *Citizens United*, and *SpeechNow*

Albert W. Alschuler

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LIMITING POLITICAL CONTRIBUTIONS AFTER *MCCUTCHEON*,  
*CITIZENS UNITED*, AND *SPEECHNOW*

*Albert W. Alschuler\**

Abstract

There was something unreal about the opinions in *McCutcheon v. FEC*. These opinions examined a series of strategies for circumventing the limits on contributions to candidates imposed by federal election law, but they failed to notice that the limits were no longer breathing. The D.C. Circuit’s decision in *SpeechNow.org v. FEC* had created a far easier way to evade the limits than any of those the Supreme Court discussed. *SpeechNow* held all limits on contributions to super PACs unconstitutional.

This Article argues that the D.C. Circuit erred; *Citizens United v. FEC* did not require unleashing super PAC contributions. The Article also considers what can be said for and against a bumper sticker’s declarations that “MONEY IS NOT SPEECH!” and “CORPORATIONS ARE NOT PEOPLE!” It proposes a framework for evaluating the constitutionality of campaign-finance regulations that differs from the one currently employed by the Supreme Court. And it proposes a legislative scheme of campaign-finance regulation that would effectively limit contributions while respecting the Supreme Court’s campaign-finance decisions.

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## INTRODUCTION: THE ELEPHANT (OR SUPER PACHYDERM) IN THE ROOM

Both the plurality and the dissenting opinions in *McCutcheon v. FEC*<sup>1</sup> seem unreal. At issue in *McCutcheon* was the validity of the Bipartisan Campaign Reform Act's (BCRA's) "aggregate" contribution limits—its limits on the total amounts a person may contribute to all candidates and political committees during a single election cycle. The principal issue dividing the U.S. Supreme Court was whether, in the absence of these limits, donors could evade the BCRA's "base" limits—its limits on the amount a person may contribute to an individual candidate.

The Court held the aggregate limits unconstitutional by a vote of five-to-four.<sup>2</sup> In a concurring opinion, Justice Thomas argued that limits on campaign contributions and expenditures should be subject to strict scrutiny—a standard that apparently would invalidate them all.<sup>3</sup> The most significant aspect of the *McCutcheon* decision, however, may be the willingness of the other eight Justices to assume the validity of the base limits and of measures truly necessary to prevent their circumvention.<sup>4</sup>

The four dissenting Justices described a series of circumvention strategies they feared might follow invalidation of the aggregate limits. These strategies involved multiple political action committees (PACs),<sup>5</sup> party committees, joint fundraising committees, and contributions from one campaign to another.<sup>6</sup> The dissenters and the four Justices of the plurality debated at length whether the hypothesized scenarios were realistic and whether they would violate existing laws (a tangle of statutes and regulations described by Justice Scalia at argument as "so intricate that I can't figure [them] out"<sup>7</sup>). The dissenters and the plurality also considered whether, if the circumvention strategies were not already prohibited, legislation less restrictive than the aggregate contribution limits could block them. A reader of the principal opinions

1. 134 S. Ct. 1434 (2014).

2. *See id.* at 1440 (plurality opinion); *id.* at 1462 (Thomas, J., concurring); *id.* at 1465 (Breyer, J., dissenting).

3. *See id.* at 1464 (Thomas, J., concurring).

4. *See id.* at 1442 (plurality opinion) (noting that "[t]his case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption" but then concluding that the aggregate limits "do little, if anything" to prevent circumvention of the base limits); *id.* at 1468–69, 1472–73 (Breyer, J., dissenting) (citing the Court's earlier approval of the base limits and arguing that donors would evade these limits in the absence of aggregate limits).

5. Conventional PACs, not super PACs. The difference will be explained shortly.

6. *McCutcheon*, 134 S. Ct. at 1472–75 (Breyer, J., dissenting).

7. Transcript of Oral Argument at 17, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-536\\_21o2.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_21o2.pdf).

was likely to end up full of admiration for judicial patience that outran his own.

The plurality and dissenting opinions assumed contributors would employ the circumvention strategies if only they could and that it would matter whether they did. Both opinions contrived not to notice that the base limits were no longer breathing. Contributors had a far easier way to evade them than any of those the Supreme Court discussed. The corpse lay at the Justices' feet, and the Court itself was widely accused of homicide. But the Justices averted their eyes.

A super PAC is a political action committee that does not contribute to the official campaigns of candidates for office but instead prepares and places its own advertisements supporting candidates and/or disparaging their opponents.<sup>8</sup> Two months after the Supreme Court's decision in *Citizens United v. FEC*<sup>9</sup> in 2010, the en banc D.C. Circuit held all limits on donations to super PACs unconstitutional in *SpeechNow.org v. FEC*.<sup>10</sup> The court offered no defense of the merits of its ruling. It simply said that one broad statement in the *Citizens United* opinion compelled its result.<sup>11</sup> *Citizens United*'s critical statement was: "[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption."<sup>12</sup>

Before *SpeechNow*, the Federal Election Commission (FEC) enforced a statute limiting a person's contributions to a PAC of any sort to \$5000 per year.<sup>13</sup> On June 14, 2012, however, Sheldon Adelson and his wife Miriam exercised the newly recognized right of all Americans to contribute \$10 million to the super PAC of their choice.<sup>14</sup> They gave these funds to Restore Our Future, a super PAC supporting Mitt Romney's presidential campaign.<sup>15</sup> At the time of this contribution, Sheldon Adelson told friends that he planned to spend at least \$100 million supporting causes and candidates during the 2012 election cycle.<sup>16</sup>

But Adelson's estimate was too low. Although the Adelsons' contributions to official campaigns and super PACs roughly matched

8. See *McCutcheon*, 134 S. Ct. at 1442 n.2 (plurality opinion).

9. 558 U.S. 310 (2010).

10. 599 F.3d 686 (D.C. Cir. 2010) (en banc).

11. *Id.* at 694–95.

12. *Citizens United*, 558 U.S. at 357.

13. See 52 U.S.C.A. § 30116(a)(1)(C) (West 2014).

14. See *Adelson, Sheldon G. & Miriam O: Donor Detail*, OPENSECRETS.ORG, [https://www.opensecrets.org/outsidespending/donor\\_detail.php?cycle=2012&id=U0000000310&type=I&super=N&name=Adelson%2C+Sheldon+G.+%26+Miriam+O](https://www.opensecrets.org/outsidespending/donor_detail.php?cycle=2012&id=U0000000310&type=I&super=N&name=Adelson%2C+Sheldon+G.+%26+Miriam+O) (last visited Apr. 3, 2015).

15. Alicia Mundy & Sara Murray, *Adelson Gives \$10 Million to Pro-Romney Super PAC*, WALL ST. J. (June 13, 2012, 10:47 AM), <http://blogs.wsj.com/washwire/2012/06/13/adelson-gives-10-million-to-pro-romney-super-pac/>.

16. *Id.*

the estimate (\$98 million—including an additional \$20 million to Restore Our Future), two Republican fundraisers told the press that the Adelsons contributed at least \$45 million more to groups that were not required to identify their contributors.<sup>17</sup> The amount of their 2012 donations exceeded the entire amount that John McCain, the 2008 Republican presidential nominee, spent during his general election campaign.<sup>18</sup> The Adelsons led a list of ninety-five individuals or couples and fifty-six organizations that each contributed \$1 million or more to outside spending groups in 2012.<sup>19</sup>

An independent expenditure group like Restore Our Future may not coordinate its expenditures with those of an official election campaign.<sup>20</sup> Like many other “candidate-specific” or “alter ego” super PACs, however, Restore Our Future was managed by people close to the candidate it supported.<sup>21</sup> They included Carl Forti, the political director of Romney’s 2008 presidential campaign; Charles Spies, counsel and chief financial officer of the 2008 campaign; and Larry McCarthy, another prominent veteran of Romney’s 2008 effort.<sup>22</sup> These managers might have known without coordination or palaver what expenditures would please Governor Romney.<sup>23</sup>

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17. See Theodoric Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, PROPUBLICA (Dec. 20, 2012, 12:47 PM), <http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012>.

18. See News Release, Fed. Election Comm’n, 2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total (June 8, 2009), available at <http://www.fec.gov/press/press2009/20090608PresStat.shtml>. Because Senator McCain accepted public funding for his campaign, the amount he could spend was limited. See *Public Funding of Presidential Elections Brochure*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/pubfund.shtml> (last visited Feb. 3, 2015). His opponent, Senator Obama, did not accept public funding, News Release, *supra*, and no future nominee is likely to accept it either.

19. See *2012 Top Donors to Outside Spending Groups: Top Individuals*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=V&superonly=N> (last visited Feb. 3, 2015) [hereinafter *2012 Top Individual Donors*]; *2012 Top Donors to Outside Spending Groups: Top Organizations*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=V&superonly=N> (last visited Feb. 3, 2015) [hereinafter *2012 Top Organizational Donors*].

20. See 11 C.F.R. §§ 109.20–.23 (2009).

21. See Mike McIntire & Michael Luo, *Fine Line Between “Super PACs” and Campaigns*, N.Y. TIMES (Feb. 25, 2012), [http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html?pagewanted=all&_r=0).

22. Rachael Marcus, *PAC Profile: Restore Our Future*, CTR. FOR PUB. INTEGRITY (Jan. 30, 2012), <http://www.publicintegrity.org/node/7977/>. McCarthy’s chief claim to fame was that he devised the Willie Horton ad that helped elect President George H. W. Bush in 1988. *Id.*

23. Priorities USA Action, President Obama’s alter ego super PAC, was similarly directed by people close to him. See Aaron Mehta, *PAC Profile: Priorities USA Action*, CTR. FOR PUB. INTEGRITY (Jan. 30, 2012), <http://www.publicintegrity.org/2012/01/30/8025/pac-profile-priorities-usa-action/>.

Candidates may, within limits, raise money for super PACs and may address super PAC gatherings.<sup>24</sup> In the month before the Adelsons' initial \$10 million contribution, Sheldon Adelson met with Governor Romney and reportedly sought “assurance that Romney would support Israel more strongly than President Obama has.”<sup>25</sup>

Adelson, a Las Vegas casino owner,<sup>26</sup> has an agenda. It includes opposition to a two-state solution to the Israeli–Palestinian conflict and positions on a number of issues that directly affect Adelson’s business interests. An appendix to this Article describes some of these interests.<sup>27</sup>

Without prearrangement or coordination, the managers of a super PAC may recognize an effective division of labor. Their job is to attack an opponent while the favored candidate takes a higher road. Independent expenditure groups have been called “the attack dogs and provocateurs of modern politics.”<sup>28</sup> A report shortly before the 2012 election declared:

Republican super PACs have spent three times as much opposing Obama as they have backing Romney, \$46 million to \$14 million. The gap is even larger on the Democratic side (though the absolute numbers are much smaller), where there’s been nearly \$28 million in attacks on Romney and only a little more than \$3 million in favor of Obama. . . . Republican super PACs spent more trying to sink Mitt Romney during the Republican primaries than the president’s Democratic allies have spent in favor of [the

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24. See FED. ELECTION COMM’N, ADVISORY OPINION 2011–12 (June 30, 2011), <http://saos.fec.gov/aodocs/AO%202011-12.pdf>. Although, after *SpeechNow*, an individual may give unlimited amounts to a super PAC, a candidate may not request a donation exceeding the amount this individual could give to a conventional PAC. See *id.* For a useful description of the very strange law on this subject, see Larry Norton, Ron Jacobs & Margaret Rohlifing, *Candidates and Super PACs: A Complicated Relationship*, POL. L. BRIEFING (Feb. 13, 2013), <http://www.politicallawbriefing.com/my-blog/2013/02/candidates-and-super-pacs-a-complicated-relationship/>.

25. Callum Borchers, *Adelson Reportedly Gives \$10m to Pro-Romney Super PAC*, BOSTON GLOBE (June 13, 2012), <http://www.bostonglobe.com/news/politics/2012/06/13/sheldon-adelson-donates-million-super-pac-backing-mitt-romney/kmYCnXf8qOMDbglsUYi1PL/story.html>.

26. See Mundy & Murray, *supra* note 15.

27. *Infra* app. C, “The Effect of Campaign Dollars II: The Generosity of Sheldon Adelson.”

28. Jeremy W. Peters, *Conservative “Super PACs” Synchronize Their Messages*, N.Y. TIMES (Sept. 24, 2012), <http://www.nytimes.com/2012/09/25/us/politics/conservative-super-pacs-sharpen-their-synchronized-message.html> (“Independent groups have long been the attack dogs and provocateurs of modern politics. The ads they produce—about a convict on furlough named Willie Horton or Swift Boat veterans—have become synonymous with dirty politics.”).



President] during the entire campaign, \$4.7 million to \$3.2 million.<sup>29</sup>

Once *SpeechNow* unleashed super PAC contributions, the pretense that the BCRA's base and aggregate limits served a useful purpose became absurd. These limits do more harm than good. Restricting contributions to official election campaigns while permitting unlimited contributions to super PACs does not limit the amount an individual may contribute to an electoral effort; it merely channels funds to less responsible and more destructive speakers. Contributions to a candidate's official campaign currently are capped at \$2700 per election<sup>30</sup> (\$5400 total for both primary and general elections),<sup>31</sup> while an unleashed satellite campaign may accept \$10,000, \$100,000, \$1 million, and \$10 million contributions.

To consumers of commercials on couches, super PACs are faceless groups with noble names like Restore Our Future, Priorities USA Action, and Americans for a Better Tomorrow, Tomorrow.<sup>32</sup> When one of these groups goes too far (for example by telling demonstrable falsehoods), a candidate can deplore its misconduct and accurately deny responsibility. Unlike the candidates they support, super PACs typically vanish once an election is over.<sup>33</sup>

*SpeechNow* has degraded rather than enhanced the quality of electoral advocacy. The flood of attack ads has contributed to the nation's cynicism about politics, a cynicism that runs deep among young people.<sup>34</sup> Even without the *SpeechNow* decision, running for

29. David A. Graham, *The Incredible Negative Spending of Super PACs—in 1 Chart*, THE ATLANTIC (Oct. 15, 2012, 5:16 PM), <http://www.theatlantic.com/politics/archive/2012/10/the-incredible-negative-spending-of-super-pacs-in-1-chart/263643/>.

30. See 52 U.S.C.A. § 30116(a)(1)(A) (West 2014); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013); *Contributions*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/contrib.shtml> (last visited Apr. 21, 2015) (providing the inflation-adjusted limits for 2015–16).

31. See *Contributions*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/contrib.shtml> (last visited Apr. 21, 2015) (citing 11 C.F.R. § 100.2(a) (2014)) (“Primaries, runoffs and general elections are considered separate elections, with separate contribution limits.”).

32. These names are not fictitious. In 2012, the first super PAC supported Mitt Romney; the second, Barack Obama; and the third, Steven Colbert. Tom Murse, *5 Big Super PACs to Watch*, ABOUT NEWS, <http://uspolitics.about.com/od/presidency/tp/5-Big-Super-Pacs-To-Watch.htm> (last visited Feb. 3, 2015).

33. Jake Harper, *After Election, Dozens of Super PACs Shut Down*, SUNLIGHT FOUND. (Nov. 16, 2012, 4:51 PM), <http://sunlightfoundation.com/blog/2012/11/16/super-pacs-shut-down/>.

34. See INST. OF POLITICS, HARVARD UNIV., SURVEY OF YOUNG AMERICANS' ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE 19 (23d ed. 2013), [http://www.iop.harvard.edu/sites/default/files\\_new/spring\\_poll\\_13\\_Exec\\_Summary.pdf](http://www.iop.harvard.edu/sites/default/files_new/spring_poll_13_Exec_Summary.pdf) (“At no time since President Obama was

office would mean entering a world of sharpened knives, but *SpeechNow* has made the warfare worse.<sup>35</sup> Michael McConnell

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elected in 2008 have we reported less trust, more cynicism and more partisanship among our nation's youngest voters.”).

35. New Jersey's elections for state offices in 2013 provide an illustration. These elections followed a consent decree that, echoing *SpeechNow*, forbade the enforcement of state limits on super PAC contributions. See Consent Order for Permanent Injunction at 2, *Fund for Jobs, Growth, & Sec. v. N.J. Election Law Enforcement Comm'n*, No. 3:13-CV-02177-MAS-LHG (D.N.J. July 11, 2013). Outside spending then reached \$35 million, twice what it had been in the year of the immediately preceding gubernatorial election. See Nicholas Confessore, *Big Money Flows in New Jersey Races to Thwart Christie Agenda*, N.Y. TIMES (Nov. 4, 2013), <http://www.nytimes.com/2013/11/05/nyregion/in-new-jersey-big-money-flows-to-foil-christie.html>. One super PAC spent \$2 million to influence a single state senate race, all of it apparently devoted to broadcasting an advertisement in which an ominous voice declared that a candidate “had been prohibited from practicing law in [New Jersey].” See *id.* The voice did not mention that the candidate’s “prohibit[ion]” was brief and rested on his failure to pay an annual registration fee on time. See *id.*

The 2014 campaign to defeat Justice Robin Hudson of the North Carolina Supreme Court also illustrates the political discourse *SpeechNow* has fostered. In 2010, over her dissent and that of two other justices, Justice Hudson’s court held that retroactively requiring people convicted of sex offenses to wear large ankle-bracelet transmitters and visible GPS tracking devices, to spend six hours per day recharging these devices, and to submit to electronic monitoring of their movements, in some cases for the rest of their lives, was nonpunitive and did not violate the ex post facto clause. See *State v. Bowdich*, 700 S.E.2d 1, 2–4 (N.C. 2010). When Justice Hudson ran for reelection four years later, a group called Justice for All NC sponsored television advertisements accusing her of “sid[ing] with child molesters.” Mark Binker, *Big Business Spends to Unseat NC Supreme Court Justice Hudson*, WRAL.COM (Apr. 30, 2014), <http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/>. This group, which listed a mailbox in a UPS store as its headquarters, received \$650,000 from the Republican State Leadership Committee, a Washington, D.C. super PAC. See Duncan McFadyen, *A Closer Look at “Child Molester” Attack Ad and Where Money Funding It Comes from*, WFAE.ORG (May 1, 2014, 12:10 AM), <http://wfae.org/post/closer-look-child-molester-attack-ad-and-where-money-funding-it-comes>. The super PAC in turn received funds primarily from businesses like Blue Cross/Blue Shield, Koch Industries, and the Las Vegas Sands Corporation. *Republican State Leadership Cmte: Top Contributors, 2014 Cycle*, OPENSECRETS.ORG, [http://www.opensecrets.org/527s/527cmtdetail\\_contribs.php?ein=050532524&cycle=2014](http://www.opensecrets.org/527s/527cmtdetail_contribs.php?ein=050532524&cycle=2014) (last visited Feb. 3, 2015).

Six former justices of the North Carolina Supreme Court called the attack on Justice Hudson disgusting, and the justice’s principal opponent disavowed it, saying, “I will always run a positive effort.” Erik Eckholm, *Outside Spending Enters Arena of Judicial Races*, N.Y. TIMES (May 5, 2014), <http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html>. A commentator observed, “[S]pecial interest money . . . often goes toward ads attacking judges’ criminal records, even when the interest group is focused on business interests or other unrelated issues.” *Id.* The amount Justice Hudson was able to raise to respond to the advertisement fell far short of the amount spent broadcasting it, see *id.*, but she won reelection with 42.5% of the primary vote and 52.5% of the general election vote. See *Robin Hudson*, BALLOTPEDIA, [http://ballotpedia.org/Robin\\_Hudson](http://ballotpedia.org/Robin_Hudson) (last visited Apr. 2, 2015).

Television viewers have seen innumerable advertisements like the ones just described. As both *McCutcheon* and *Citizens United* observed, “[T]he First Amendment ‘has its fullest and most urgent application precisely to the conduct of campaigns for political office.’”

comments, “I am skeptical of any governmental effort to police campaign speech to make it less negative, vitriolic, or immoderate, but there is little to be said for laws that exacerbate these vices.”<sup>36</sup>

Allowing unlimited contributions to feral attack dogs while limiting contributions to candidates themselves is schizophrenic. No sane legislator would vote in favor of this regime, and no legislator ever has. The United States has this topsy-turvy regime because the D.C. Circuit (or the Supreme Court or the two courts together) held that the First Amendment requires it.

The thought that the Constitution requires this regime however, looks crazy too. Just as only a loopy legislator could vote in favor of America’s current system of campaign finance, only a cracked court could confront the question afresh and conclude that a \$3000 contribution to Mitt Romney’s presidential campaign may be prohibited because it is corrupting while a \$10 million contribution to Restore Our Future is protected because it “do[es] not give rise to corruption or the appearance of corruption.”<sup>37</sup> No single court has taken full responsibility for the constitutional decision that produced America’s Dickensian system of campaign finance.

As best I can tell, no supporter of the BCRA has said out loud that it would be better to strike down the statute’s base limits than to retain them as a device for channeling funds to super PACs. But I just said it. Rather than keep the BCRA on life support, the Supreme Court would do better to pull the plug, overrule its long line of precedents upholding contribution limits, and afford the statute a decent burial. Justice Thomas’s concurring opinion in *McCutcheon* referred to *Buckley v. Valeo*,<sup>38</sup> the 1976 decision that first upheld base and aggregate contribution limits,<sup>39</sup> and said, “[W]hat remains of *Buckley* is a rule without a rationale.”<sup>40</sup>

*SpeechNow* left no way to go but up. *McCutcheon*, in fact, improved federal campaign financing slightly by permitting major contributors to channel a larger portion of their donations to candidates and political parties rather than super PACs.<sup>41</sup> Rather than acknowledge that the

*McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

36. Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 *YALE L.J.* 412, 455 (2013).

37. *Citizens United* used the quoted language to describe super PAC expenditures, see 558 U.S. at 357, but *SpeechNow* concluded that this language applies to super PAC contributions as well. See *SpeechNow.org v. FEC*, 599 F.3d 686, 694–95 (D.C. Cir. 2010) (en banc).

38. 424 U.S. 1 (1976) (per curiam).

39. *Id.* at 58.

40. *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring).

41. See Nathaniel Persily, *Bringing Big Money out of the Shadows*, *N.Y. TIMES* (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html>.

BCRA's contribution limits died in 2010 with *SpeechNow*, however, the supporters of regulating campaign contributions sounded the customary trumpets. "[T]oday's decision eviscerates our Nation's campaign finance laws," the *McCutcheon* dissenters cried.<sup>42</sup> An orchestra of journalists, commentators, and fundraisers for politicians denouncing the decision echoed this theme.<sup>43</sup>

The dissent in *McCutcheon* did not give super PAC contributions and expenditures even a glance, and the plurality referred to them only in a footnote—one that might have led an uninitiated reader to the erroneous conclusion that circumvention by super PACs is part of the statutory scheme rather than the result of dubious constitutional rulings:

A PAC is a business, labor, or interest group that raises or spends money in connection with a federal election, in some cases by contributing to candidates. A so-called "Super PAC" is a PAC that makes only independent expenditures and cannot contribute to candidates. The base and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs.<sup>44</sup>

During oral argument in *McCutcheon*, however, four Supreme Court Justices—Scalia, Breyer, Kennedy, and Ginsburg—pointed to the elephant in the room. Each of these Justices asked whether super PAC contributions and expenditures hadn't made the BCRA's contribution limits pointless or worse.<sup>45</sup> Justice Scalia, for example, asked Solicitor

42. *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting).

43. See, e.g., Linda Greenhouse, *An Indecent Burial*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html> (declaring that *McCutcheon* "toss[ed] out the window . . . the post-Watergate system of campaign finance regulation"); Robert B. Reich, *McCutcheon, and the Vicious Cycle of Concentrated Wealth and Political Power*, ROBERTREICH.ORG (Apr. 3, 2014), <http://robertreich.org/post/81598620368> (declaring that the "shameful" *McCutcheon* decision "effectively eviscerat[es] campaign finance laws").

44. *McCutcheon*, 134 S. Ct. at 1442 n.2 (plurality opinion).

45. Transcript of Oral Argument, *supra* note 7, at 20 (Scalia, J.) (noting that "much of the money that used to go to [political parties] now goes to [super] PACs" and that "the consequence . . . has been very severe with respect to national political parties"); *id.* at 30 (Scalia, J.) (suggesting that if donating the entire \$3.2 million an individual could give to all federal candidates, parties, and conventional PACs in the absence of the aggregate limits poses "the evil of big money," so does giving the same amount to an independent PAC); *id.* at 31 (Scalia, J.) ("[B]ig money can be in politics. The thing is you can't give it to the Republican Party or the Democratic Party, but you can start your own PAC. That's perfectly good. I'm not sure that that's a benefit to our political system"); *id.* at 33 (Breyer, J.) ("And now you say the person can do the same thing anyway; just call it independent. And what independent does, he can spend 40 million. He can spend 50 million. And all that does is sort of mix up the messages because the parties can't control it. Now, that's, I think, the question that's being asked. And I think that that is a very serious question . . . . Is it true? So what? What are we supposed to do?"); *id.* at 33 (Kennedy, J.) (following Justice Breyer's question with the statement, "And I have the same question. You have two—two persons. One person gives an amount to a

General Verrilli, “[I]sn’t the consequence of—of this particular provision to sap the vitality of political parties and to encourage . . . drive-by PACs for each election?”<sup>46</sup> Verrilli managed almost to complete a sentence—one that included the words “I think the answer is we don’t know one way or another”—before Justice Scalia interjected, “I think we do.”<sup>47</sup>

There seemed to be no good answer to the Justices’ queries. The Solicitor General said things like, “I’m not here to debate the question of whether the Court’s jurisprudence is correct with respect to the risks of corruption from independent expenditures,”<sup>48</sup> and “we take the constitutional First Amendment framework of this Court’s decisions as a given. The Court has—the Court has determined that independent expenditures do not present a risk of quid pro quo corruption.”<sup>49</sup> Translated into English, these responses seemed to say, “Weren’t you guys the ones who started this charade?”

One commentator noted Justice Scalia’s questions to the Solicitor General and accused the Justice of chutzpah—“that quality enshrined in a man who, having killed his mother and father, throws himself upon the mercy of the court because he is an orphan.”<sup>50</sup> Justice Scalia and the other Justices of the *Citizens United* majority had created the super PAC, and to point to this PACman’s gobbling up of the BCRA as a reason for dismantling the statute further took nerve. It was as though, five or ten years after *McCutcheon*, in 2019 or 2024, the dissenters’ predictions of circumvention of the BCRA’s base limits had proven accurate and the plurality’s contrary predictions had proven incorrect—and the plurality then pointed to the ease of circumvention as a reason

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candidate that’s limited. The other takes out ads, uncoordinated, just all on his own, costing \$500,000. Don’t you think that second person has more access to the candidate who’s—when the candidate is successful, than the first?”); *id.* at 42–43 (Ginsburg, J.) (suggesting that an aggregate limit “drives contributions toward the PACs and away from the parties, that money—without these limits, the money would flow to the candidate, to the party organization, but now, instead, it’s going to the PACs”); *id.* at 43 (Scalia, J.) (initiating the dialogue with the Solicitor General that is described in text immediately following this footnote); *id.* at 51–52 (Scalia, J.) (calling it “fanciful to think that the sense of gratitude that an individual Senator or Congressman is going to feel because of a substantial contribution to the Republican National Committee or Democratic National Committee is any greater than the sense of gratitude that that Senator or Congressman will feel to a PAC which is spending [an] enormous amount of money in his district”).

46. *Id.* at 43.

47. *Id.*

48. *Id.* at 52.

49. *Id.* at 43.

50. Garrett Epps, *How Close Will the Supreme Court Get to Ending Campaign Finance Laws?*, ATLANTIC (Oct. 8, 2013, 4:43 PM), <http://www.theatlantic.com/politics/archive/2013/10/how-close-will-the-supreme-court-get-to-ending-campaign-finance-laws/280401/> (quoting Leo Rosten’s definition of “chutzpah”) (internal quotation marks omitted).

for striking down the base limits.<sup>51</sup> The comedian Jon Stewart played portions of the *McCutcheon* argument on *The Daily Show* and made the same point.<sup>52</sup> As the argument played, the screen showed what appeared to be a courtroom sketch of the Justices on the bench smoking from a hookah.<sup>53</sup>

Perhaps the opinions in *McCutcheon* ignored the super PAC elephant because pointing to it as the Justices had at argument would have brought further accusations of chutzpah. But pretending the elephant was not there did not make either the plurality opinion or the dissenting opinion stronger. Rather than plead for mercy as an orphan, the killer seemed to be insisting that his parents were alive and in need of his care. When Solicitor General Verrilli indicated that super PAC circumvention was a product of the Court's campaign-finance jurisprudence, Justice Scalia had an accurate, if somewhat chilling, response: "It is what it is, though."<sup>54</sup>

Some observers predict that the Supreme Court will end the irrationality of limiting contributions to candidates while permitting unlimited contributions to super PACs by striking down the limits on contributions to candidates.<sup>55</sup> This Article, however, argues for the opposite resolution—rejecting the *SpeechNow* decision and upholding the BCRA's limits on contributions to super PACs.

Until now, *SpeechNow* seems to have escaped criticism. Even commentators who deplore unlimited super PAC contributions accept the D.C. Circuit's judgment that this consequence flows inescapably from *Citizens United*.<sup>56</sup> Michael Kang, for example, declares that *Citizens United* "utterly removed room for argument about Super PACs"<sup>57</sup> and "made *SpeechNow* an easy case with only one possible outcome."<sup>58</sup>

51. See, e.g., Joe Patrice, *McCutcheon Oral Argument: Or, Justice Scalia Explains How \$3.5 Million Isn't That Much Money*, ABOVE THE LAW (Oct. 9, 2013, 10:25 AM), <http://abovethelaw.com/2013/10/mccutcheon-oral-argument-or-justice-scalia-explains-how-3-5-million-isnt-that-much-money/>.

52. *Donors Unchained*, DAILY SHOW WITH JON STEWART (Apr. 3, 2014), <http://thedailyshow.cc.com/videos/74yxyf/donors-unchained>.

53. *Id.*

54. Transcript of Oral Argument, *supra* note 7, at 52.

55. See, e.g., Paul Blumenthal & Ryan Grim, *After Today's Supreme Court Ruling, Here's How All This Will End*, HUFFINGTON POST (Apr. 2, 2014, 3:30 PM), [http://www.huffingtonpost.com/2014/04/02/supreme-court-mccutcheon-decision\\_n\\_5077549.html](http://www.huffingtonpost.com/2014/04/02/supreme-court-mccutcheon-decision_n_5077549.html).

56. Hostility towards the *Citizens United* decision may have contributed to the willingness of some commentators to give the D.C. Circuit a pass.

57. Michael S. Kang, Essay, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1912 (2013).

58. *Id.* at 1911.

All nine members of the en banc D.C. Circuit (including the three appointed by Democrats) joined the *SpeechNow* opinion.<sup>59</sup> Five other federal courts of appeals have since endorsed the D.C. Circuit's ruling,<sup>60</sup> and one court of appeals had made a similar decision prior to *SpeechNow*.<sup>61</sup> The Supreme Court declined to review *SpeechNow*,<sup>62</sup> and the FEC acquiesced in the D.C. Circuit's ruling.<sup>63</sup> This Article will swim against the tide and fill a large gap in the literature.

The quiet acceptance of *SpeechNow*, however, is perplexing. For thirty-nine years, the Supreme Court has distinguished contributions to groups making electoral expenditures from the expenditures made by these groups. It has said that statutory limits on expenditures are subject to "strict" scrutiny. These limits must not only "further[] a compelling interest" but must also be "narrowly tailored to achieve that interest."<sup>64</sup> The Court has treated limits on contributions to candidates and political groups differently. It has said that "speech by proxy" is not "entitled to full First Amendment protection"<sup>65</sup> and that contribution limits are not subject to "strict" scrutiny. They must merely be "closely drawn" to match a "sufficiently important interest."<sup>66</sup> In its opening paragraph, its closing paragraph, and many places in between, the opinion in *Citizens United* described the issue before the Court as one of the validity of expenditure limits.<sup>67</sup> The Court noted that "contribution limits, . . . unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption."<sup>68</sup>

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59. See *SpeechNow.org v. FEC*, 599 F.3d 686, 688 (D.C. Cir. 2010) (en banc).

60. See *Republican Party of N.M. v. King*, 741 F.3d 1089, 1095–96, 1103 (10th Cir. 2013); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487, 489 (2d Cir. 2013) (approving a preliminary injunction but formally reserving judgment on the merits); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537–38, 538 n.3 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154–55 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696–99 (9th Cir. 2010).

61. See *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 308 (4th Cir. 2008); see also *EMILY's List v. FEC*, 581 F.3d 1, 11, 25 (D.C. Cir. 2009); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1657–61 (2011).

62. *Keating v. FEC*, 562 U.S. 1003 (2010) (denying a writ of certiorari to review *SpeechNow*, 599 F.3d 686).

63. See FED. ELECTION COMM'N, ADVISORY OPINION 2010-11, <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (Commonsense Ten); FED. ELECTION COMM'N, ADVISORY OPINION 2010-09, <http://saos.fec.gov/aodocs/AO%202010-09.pdf> (Club for Growth).

64. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotation marks omitted).

65. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion).

66. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

67. See *Citizens United*, 558 U.S. at 318–19, 356–57, 372.

68. *Id.* at 359; see *id.* at 356 (again stressing *Buckley's* distinction between expenditures and contributions).

Contributions to super PACs are in fact *contributions*. Like contributions to candidates, they appear to be a form of “speech by proxy” entitled to only limited protection. As the Court acknowledged, the validity of limiting contributions of any sort was not before it.<sup>69</sup> The claim that *Citizens United* resolved an issue the Court said it was not considering rests on a single sentence: “[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>70</sup> *SpeechNow* reasoned that if independent expenditures do not corrupt, the contributions that make these expenditures possible cannot corrupt either.<sup>71</sup>

As this Article will show, the sentence upon which the D.C. Circuit relied was dictum. Moreover, if read literally, this sentence would be incompatible with *Buckley* and other precedents on which the Court purported to rely, with a very recent decision the Court certainly did not mean to disturb (*Caperton v. A. T. Massey Coal Company*<sup>72</sup>), and with a later statement by the plurality in *McCutcheon*.

What the Court apparently meant, and indeed the only thing it properly could have decided, was that independent expenditures are *insufficiently* corrupting to warrant any limitation. Under the Court’s two-tiered standard of review, an interest can be strong enough to justify a limitation of *contributions* even when it is insufficient to justify a restriction of *expenditures*. Reading the crucial sentence to mean only what the *Citizens United* Court probably did mean would have left the validity of Congress’s limitation of super PAC contributions unresolved.

In resolving this issue, the D.C. Circuit should have treated as central a question it ignored entirely—whether limits on contributions to super PACs can sensibly be treated differently from the limits on contributions to official campaigns that *Buckley v. Valeo* upheld. The answer to that question would have been no. Although *Citizens United* not only left *Buckley* undisturbed but also relied on it heavily, the D.C. Circuit ignored the bearing of *Buckley* on the issue before it.

This Article examines *Citizens United*’s distinction between preventing quid pro quo corruption (an interest the Court has held can justify Congressional restrictions on speech) and limiting ingratiation and access (an interest that *Citizens United* says cannot justify any restriction on speech). It considers four behaviors that proponents of campaign- finance regulation might call corrupt: (1) the explicit exchange of favorable governmental action for campaign contributions;

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69. *Id.* at 359.

70. *Id.* at 357.

71. *See* *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc).

72. 556 U.S. 868 (2009).



(2) the implicit understanding that favorable action will follow contributions; (3) the conscious taking of favorable action in response to contributions without any prior agreement or understanding; and (4) the affording of gratitude and access to contributors without consciously favoring them in making more substantial decisions. The Article concludes that, despite some signals pointing the other way, the Court probably meant to distinguish only between the third and fourth categories. The Court did not mean to deny that deliberately using public dollars to repay private favors is corrupt and that Congress may prohibit contributions large enough to make conscious favoritism of this sort likely. Under this standard, large super PAC contributions qualify as corrupting.

This Article also emphasizes a related governmental interest that neither *Citizens United* nor *SpeechNow* mentioned—the anti-circumvention interest that became the primary focus of the principal opinions in *McCutcheon*. The most obvious objection to unlimited super PAC contributions is that they provide a way around statutory limits on contributions to candidates. As the Supreme Court’s focus on expenditures in *Citizens United* turned into the D.C. Circuit’s focus on contributions in *SpeechNow*, however, neither court addressed this issue. *Citizens United* should not be read as resolving an issue the Court did not consider.

This Article proposes a legislative scheme for restricting electoral contributions and expenditures grounded on the anti-circumvention principle. This scheme would impose no limits on independent expenditures by either individuals or groups. Subject to some exemptions, however, every group making electoral expenditures would be required to provide an accounting of which individuals had provided the funds it spent and how the funds each individual supplied had been allocated to the support of particular candidacies. Individuals and groups would be responsible for ensuring that no more of any individual’s contributions were used to influence a single election than the law allowed. Groups that for practical reasons could not make the required accounting could establish separate political action committees to receive, spend, and account for individual contributions. A legislative scheme of this sort would meet the requirements of *Buckley*, *Citizens United*, *McCutcheon*, and the First Amendment.

This Article also proposes a framework for analyzing campaign-finance restrictions that differs from the one the Supreme Court now employs. The Court has treated electoral contributions and expenditures simply as speech and has considered whether the interest in preventing quid pro quo corruption can justify restricting this speech. Contributions and expenditures would better be viewed as hybrids of protected speech and unprotected conduct. These contributions and expenditures affect

two different audiences in two different ways. From the perspective of one audience—the public—political contributions and expenditures look like speech. Their goal is to persuade members of the public to vote a certain way. But from the perspective of a second audience—the favored candidate—these contributions and expenditures look like other corrupting gifts. Campaign dollars can persuade a candidate to favor a contributor in the same way that an expense-paid trip to the Super Bowl might.

The Court's leading decision on hybrids of protected speech and unprotected conduct is *United States v. O'Brien*,<sup>73</sup> which upheld convictions of war protestors for destroying their draft cards. Although *Buckley v. Valeo* concluded that the standard articulated in *O'Brien* did not apply to campaign-finance regulation,<sup>74</sup> it did not consider the sort of argument offered in this Article. Whether one uses the Supreme Court's current framework for analyzing campaign-finance issues or the structure proposed by this Article, *SpeechNow* was wrongly decided.

Some observers may believe that the train has left the station and that to argue against the *SpeechNow* ruling is to stand on the station's deserted platform and whistle. They have no doubt that the Supreme Court would approve *SpeechNow*, and they would not be surprised if the Court were to strike down all limits on campaign contributions as well.

I have five comments:

First, *Citizens United* and *McCutcheon* were five-to-four decisions with the same five Justices in the majority in both cases. If even one of these Justices were to vote to uphold limits on contributions to super PACs, these limits would be likely to stand.

Second, only a Court that wished to preserve a façade of campaign-finance regulation while gutting its core would be likely to strike down limits on super PAC contributions while upholding limits on contributions to candidates. A split judgment of this sort could happen, but I am reluctant to attribute disingenuous posturing to any of the Justices. The limits on super PAC contributions and the limits on contributions to candidates seem likely to stand or fall together, as they should.

Third, if Justices Kennedy, Scalia, and Thomas were to confront the issue afresh, they apparently would hold all limits on campaign contributions unconstitutional. The other two members of the majority, however, Chief Justice Roberts and Justice Alito, have not indicated that they share this position. In the arguments and opinions in *McCutcheon* and *Citizens United*, these Justices seemed genuinely

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73. 391 U.S. 367 (1968).

74. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam).

concerned about the overbreadth of the challenged statutes. As the *McCutcheon* plurality argued, forbidding an individual who has contributed the maximum amount to each of nine candidates from contributing to a tenth is a peculiar way of keeping him from contributing too much to any one candidate.<sup>75</sup> Moreover, as this Article will explain, *Citizens United* was correct to strike down a statute that blocked a group from preparing and disseminating campaign material simply because that group had organized as a corporation.

Fourth, even Justices who would strike down all limits on campaign contributions if they were to consider the issue afresh might hesitate to overrule a line of Supreme Court decisions upholding these limits over the course of almost four decades.<sup>76</sup>

Finally, the Supreme Court's decision in *Citizens United* sparked widespread indignation. One week after the decision, President Obama denounced it in his State of the Union address.<sup>77</sup> Obama's opponent in the 2008 presidential election, Senator McCain, called it "the worst decision ever."<sup>78</sup> Fourteen resolutions in Congress proposed correcting it by constitutional amendment.<sup>79</sup> A public opinion poll reported 80% opposition.<sup>80</sup> A decision striking down all remaining limits on electoral

75. See *McCutcheon*, 134 S. Ct. at 1448–49.

76. Cf. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992) (emphasizing "the force of *stare decisis*" when reaffirming *Roe v. Wade*, 410 U.S. 113 (1973), nineteen years after that decision). In a concurring opinion in *Citizens United* joined by Justice Alito, Chief Justice Roberts offered an exceptionally thoughtful analysis of the principle of *stare decisis*. See *Citizens United v. FEC*, 558 U.S. 310, 377–79 (2010) (Roberts, C.J., concurring).

77. See, e.g., Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), [http://nytimes.com/2010/01/29/us/politics/29scotus.html?\\_r=0](http://nytimes.com/2010/01/29/us/politics/29scotus.html?_r=0).

78. See Alice Robb, *McCain Addresses Oxford*, OXONIAN GLOBALIST (Oct. 11, 2012), <http://toglobalist.org/2012/10/mccain-addresses-oxford/>.

79. See, e.g., League of Women Voters of the U.S. Campaign Fin. Task Force, *Review of Constitutional Amendments Proposed in Response to Citizens United*, LEAGUE WOMEN VOTERS, <http://www.lwv.org/content/review-constitutional-amendments-proposed-response-citizens-united> (last visited Feb. 3, 2015).

80. See, e.g., Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR20100217011151.html>.

In political terms, it seemed that five Supreme Court Justices pushed elected officials from the path of an onrushing bus and stood in the path themselves. *Citizens United* enabled legislators to divert attention from the porousness of their own limitations on political contributions and expenditures and to cast themselves as reformers committed to revoking the license the Supreme Court had issued to buy and sell influence. A five-to-four ruling in which every Justice in the majority had been appointed by Republican Presidents and three of the four dissenters had been appointed by Democrats made the Court seem responsible for what some have called a system of legalized bribery. See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 8 (2011) (quoting Jack Abramoff: "I was participating in a system of legalized bribery. All of it is bribery, every bit of it."); Ray Henry, *Jimmy Carter: Unchecked Political Contributions Are "Legal Bribery,"* HUFFINGTON POST (July

contributions could provoke similar outrage—especially if this decision were by a five-to-four vote and if every Justice appointed by a Republican president were in the majority and every Justice appointed by a Democratic president in dissent. A constitutional amendment repudiating the Court’s position might follow.<sup>81</sup> The damage that decimating the last remnants of federal election law would do to the Court’s reputation could give some Justices pause.

### I. AN OVERVIEW OF THIS ARTICLE

This Article proceeds as follows: Part II describes the *Citizens United* and *SpeechNow* rulings and how they changed federal election law. It explains why the Supreme Court’s statement that independent expenditures do not corrupt was dictum and perhaps double dictum.

Part III examines how *Citizens United* and *SpeechNow* changed the financing of election campaigns. Contrary to widespread perception, these decisions do not appear to have produced a significant increase in political spending by large corporations. Instead, they led to an explosion of large individual contributions.

Part IV takes as its text a bumper sticker displayed by opponents of *Citizens United*: “MONEY IS NOT SPEECH! Corporations are not People!” Both of this bumper sticker’s assertions appear to be flawed. Although money is not speech, the First Amendment protects the expenditures needed to bring speech to audiences; and although corporate entities are not people, the government may not deny the use of a common and beneficial form of organization to speakers alone.

The bumper sticker nevertheless suggests appropriate concerns. Campaign contributions are not simply funds used to bring speech to audiences; they are also cash gifts likely to influence recipients and beneficiaries in ways the First Amendment does not protect. And

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17, 2013, 1:21 PM), [http://www.huffingtonpost.com/2013/07/17/jimmy-carter-bribery\\_n\\_3611882.html](http://www.huffingtonpost.com/2013/07/17/jimmy-carter-bribery_n_3611882.html); Bruno J. Navarro, *Jesse Ventura Likens Politics to Bribery*, CNBC (June 19, 2012, 10:23 PM), <http://www.cnbc.com/id/47883494>.

One suspects that Chief Justice Roberts’ decisive vote to uphold most of the Affordable Care Act in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), was influenced partly by his desire to avoid another five-to-four, Republican vs. Democrat decision invalidating major legislation—a decision that would have made a seemingly partisan Court responsible for America’s inability to repair its defective health-care system as well as its defective campaign-finance system. Cf. Greg Stohr, *Can Roberts Save His Supreme Court from Partisanship?*, BLOOMBERG (Dec. 1, 2014, 5:00 AM), <http://www.bloomberg.com/politics/articles/2014-12-01/roberts-on-pivot-again-as-high-court-weighs-obamacare>. The indignation engendered by *Citizens United* may not prompt the Supreme Court to reconsider that decision anytime soon, but it might have saved Obamacare.

81. In retirement, Justice Stevens has joined the call for such an amendment. See JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 79 (2014).

although people have a right to use the corporate form of organization when they speak, they have no right to use this form to evade appropriate restrictions on individual speech, including limits on campaign contributions.

Part V draws on the analysis of Part IV and argues that campaign contributions and expenditures should be viewed as hybrids of protected speech and unprotected gifts. When the harms produced by speech do not depend on the message the speech conveys, an all but insurmountable presumption against legislative regulation is inappropriate.

Part VI proposes a legislative scheme for enforcing statutory limits on individual contributions—one in which, with some exceptions, every organization making electoral expenditures would be required to account for which individuals had supplied the funds it used to influence particular elections.

*Citizens United* declared that campaign contributions and expenditures may be limited only to prevent “quid pro quo corruption.” Part VII considers several possible meanings of this term and which of them the Supreme Court had in mind.

Part VIII explains why *SpeechNow* erred by striking down the BCRA’s limits on contributions to super PACs. Not only was the statement in the *Citizens United* opinion on which the D.C. Circuit relied dictum, but the Supreme Court gave several indications that it did not mean this statement quite the way it sounds. The central question in *SpeechNow* should have been whether limits on contributions to super PACs differ significantly from the limits on contributions to official election campaigns that the Supreme Court has upheld, and the answer to this question would have been no.

Part IX considers whether the ability of a candidate’s supporters to establish multiple super PACs makes limiting contributions to an individual PAC pointless. It argues among other things that the Supreme Court’s decision in *McCutcheon* does not preclude aggregate limits on super PAC contributions.

Part X ends the Article on a somewhat fanciful note. It explores the implications of *SpeechNow* by discussing a hypothetical case in which a lobbyist places a newspaper advertisement for a used car dealership owned by a powerful state legislator and also hires a political satirist to deliver a monologue at the legislator’s birthday party.

Several appendices follow the Article. They address issues tangential to the Article, and they document at greater length than a footnote could some observations the Article offers along the way.

Appendix A—“Have *Citizens United* and *SpeechNow* Ended the Game?”—considers whether, by halting the enforcement of the BCRA restrictions, *Citizens United* and *SpeechNow* have left no one with

standing to raise the issues presented by these cases again.

Appendix B—“The Effect of Campaign Dollars I: Statistical and Non-Statistical Evidence”—examines the efforts of social science researchers to determine whether campaign contributions have influenced the decisions of elected officials.

Appendix C—“The Effect of Campaign Dollars II: The Generosity of Sheldon Adelson”—considers what motivates one of the largest political donors of all time and what effect his contributions might have had.

Appendix D—“The Effect of Campaign Dollars III: Executive Clemency”—focuses on one kind of official decision that has unmistakably been influenced by campaign contributions.

Appendix E—“The Effect of Campaign Dollars IV: The Appointment of Ambassadors”—focuses on another kind of decision that clearly has been influenced by campaign cash.

Appendix F—“Partisan Advantage and Incumbent Protection”—considers how much the self-interest of legislators is likely to shape campaign-finance legislation and how ready courts should be to strike down legislation that might have been prompted in part by the legislators’ own interests.

## II. *CITIZENS UNITED*, *SPEECHNOW*, AND HOW THESE DECISIONS CHANGED ELECTION LAW

For more than 100 years prior to *Citizens United*, federal law had prohibited corporations from contributing to the campaigns of candidates for federal office,<sup>82</sup> and labor unions had been subject to the same prohibition for sixty-seven years.<sup>83</sup> For sixty-three years, corporations and unions also had been prohibited from using funds from their general treasuries to advocate expressly the election or defeat of particular candidates.<sup>84</sup> These entities, however, could support candidates in several other ways.

First, corporations and unions could use their general funds to establish and pay the administrative expenses of PACs, and they could direct the actions of these PACs.<sup>85</sup> The PACs could collect contributions

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82. See Tillman Act of 1907, ch. 420, 34 Stat. 864, 864–65. President Roosevelt urged Congress to enact this prohibition, saying, “Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly.” 5 THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS 898–99 (1910).

83. See War Labor Disputes Act, ch. 144, § 9, 57 Stat. 163, 167–68 (1943); see also Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 136, 159–60.

84. See § 304, 61 Stat. at 159; see also 52 U.S.C.A. § 30118(a) (West 2014) (codifying the prohibition of corporate and labor union contributions and expenditures).

85. *SSFs and Nonconnected PACs*, FED. ELECTION COMM’N (May 2008), <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml>.

in limited amounts from individuals associated with their creators.<sup>86</sup> They could then make contributions in limited amounts to candidates for federal office and make unlimited expenditures of their own to advocate the election of favored candidates.<sup>87</sup>

Second, without using PACs, corporations and unions could place advertisements concerning political issues, and these advertisements could imply support for or opposition to particular candidates.<sup>88</sup>

Finally, unions and corporations could support candidates in communications circulated only within these organizations, and they could engage in “nonpartisan activity designed to encourage individuals to vote or to register to vote.”<sup>89</sup> “Nonpartisan” get-out-the-vote efforts typically focused on voters likely to support favored candidates.<sup>90</sup>

In *Citizens United*, a nonprofit corporation sought to make available on cable TV a documentary it had produced disparaging Hillary Clinton, who was then a candidate for the Democratic presidential nomination.<sup>91</sup> Funding and promoting the broadcast might have violated two provisions of the BCRA—one prohibiting the use of corporate funds to advocate expressly the election or defeat of a candidate for federal office<sup>92</sup> and another prohibiting the use of corporate funds in the period just before an election to produce any “broadcast, cable, or satellite communication” that even “refers to a clearly identified candidate for Federal office.”<sup>93</sup> The Supreme Court had held that the First Amendment allowed application of the second provision only to communications that were the “functional equivalent” of express advocacy.<sup>94</sup>

*Citizens United* was argued twice. Three months after the initial argument, the Supreme Court restored the case to the docket and ordered the parties to address a question they had not addressed previously—whether *Austin v. Michigan State Chamber of Commerce*<sup>95</sup> and a portion of *McConnell v. FEC*<sup>96</sup> should be overruled.<sup>97</sup> As the first

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86. *Id.*

87. See 52 U.S.C.A. § 30118(b)(2)(C) (West 2014); *SSFs and Nonconnected PACs*, *supra* note 85.

88. See 52 U.S.C.A. §§ 30118(b)(2), (c)(1)(2) (West 2014); 52 U.S.C.A. § 30104(f)(3)(A)(ii) (West 2014).

89. See 52 U.S.C.A. § 30101(9)(B)(ii)–(iii) (West 2014).

90. See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J. L. & PUB. POL’Y 643, 647 (2011).

91. *Citizens United v. FEC*, 558 U.S. 310, 319–20 (2010).

92. See 52 U.S.C.A. § 30118(a) (West 2014).

93. See 52 U.S.C.A. § 30118(b)(2) (West 2014) (prohibiting “electioneering communication[s]”); *id.* § 30104(f)(3)(A)) (defining “electioneering communication[s]”).

94. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456–57 (2007).

95. 494 U.S. 652 (1990).

96. 540 U.S. 93 (2003).

paragraph of *Citizens United* explained, “*Austin* had held that political speech may be banned based on the speaker’s corporate identity,”<sup>98</sup> and a portion of *McConnell* had reiterated that holding.<sup>99</sup>

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97. Order of June 29, 2009, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-205.htm> (docket entry).

98. *Citizens United*, 558 U.S. at 318–19.

99. See *McConnell*, 540 U.S. at 145, 153–54.

Jeffrey Toobin offers a fascinating but somewhat baffling account of the deliberations that followed the initial argument in *Citizens United*. See Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, *NEW YORKER* (May 21, 2012), <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>.

*Citizens United*’s counsel, Theodore Olson, maintained that the statutory restrictions did not apply to the group’s proposed distribution of its film, and Toobin reports that a majority of the Supreme Court voted at conference to accept Olson’s argument. Chief Justice Roberts initially assigned the majority opinion to himself.

According to Toobin:

[Justice Kennedy then prepared] a concurrence which said the Court should have gone much further. Kennedy’s opinion said the Court should declare [the statutory] restrictions unconstitutional, overturn an earlier Supreme Court decision from 1990[, *Austin*], and gut long-standing prohibitions on corporate giving. But after the Roberts and Kennedy drafts circulated, the conservative Justices began rallying to Kennedy’s more expansive resolution of the case. In light of this, Roberts withdrew his own opinion and let Kennedy write for the majority. . . .

The new majority opinion transformed *Citizens United* into a vehicle for rewriting decades of constitutional law in a case where the lawyer had not even raised those issues. Roberts’s approach to *Citizens United* conflicted with the position he had taken earlier in the term. At the argument of a death-penalty case known as *Cone v. Bell*[, 556 U.S. 449 (2009)], Roberts had berated at length the defendant’s lawyer, Thomas Goldstein, for his temerity in raising an issue that had not been addressed in the petition. Now Roberts was doing nearly the same thing . . . .

. . . . [Justice] Souter wrote a dissent that aired some of the Court’s dirty laundry. . . . [He] accused the Chief Justice of violating the Court’s own procedures to engineer the result he wanted.

*Id.* The Court then ordered reargument, affording the government an opportunity to persuade it not to do what it would have done without hearing argument if Justice Souter had not threatened to make a stink.

What’s baffling about Toobin’s report is its failure to explain how every member of a majority that initially voted to accept Olson’s statutory argument ultimately came to join the *Citizens United* dissenters in rejecting this argument. Justice Kennedy’s majority opinion began by rejecting all of Olson’s statutory claims. It concluded that the case could not “be resolved on other, narrower grounds” than those the Court ultimately approved. See *Citizens United*, 558 U.S. at 322–29.



Following reargument, *Citizens United* did overrule *Austin* and *McConnell*.<sup>100</sup> The Court's holding (at least its principal holding) was that "the Government cannot restrict political speech based on the speaker's corporate identity."<sup>101</sup> The Court declared that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others."<sup>102</sup> It found "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."<sup>103</sup> "Speech restrictions based on the identity of the speaker are all too often simply a means to control content,"<sup>104</sup> the Court commented. Congress might have prohibited corporate speech simply because it disliked what many corporations have to say. The judgment that Congress may not

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Unless one of the dissenters in *Citizens United* initially voted to accept Olson's statutory claims, Justice Kennedy must have been a part of the majority that Toobin says voted to accept these claims. Did Justice Kennedy vote at conference to accept Olson's statutory argument and then think better of it? Or might Toobin's sources (an untrustworthy law clerk or two?) have erred in reporting that a majority of the Court voted to reverse on statutory grounds?

How were Chief Justice Roberts and the other Justices who initially voted to accept Olson's statutory claims persuaded to join an opinion rejecting them? At some point, the five Justices who agreed that *Citizens United* should win its case apparently differed among themselves. Some of them apparently favored ruling for *Citizens United* on statutory grounds while others rejected these grounds but concluded that the group should prevail on the basis of a constitutional argument it had not made. If the case had remained in this posture, *Citizens United* would have secured a reversal of the lower court's judgment despite the fact that a majority of the Court had expressly rejected its statutory claims and only a minority had concluded that it should win on the basis of a constitutional claim. Two unsuccessful arguments (one of which *Citizens United* had never offered) would have made the group a winner.

With the Court divided into three minorities (one for reversing on statutory grounds, one for reversing on constitutional grounds, and one for affirming), its decision would have stood for nothing. The Court, however, could not have resolved the difficulty by dismissing certiorari as improvidently granted, for *Citizens United* had come to the Court on appeal, not certiorari. Summarily affirming a case on appeal leaves the lower court opinion in place (although the Supreme Court does not approve this opinion). Summarily reversing without an opinion or with an opinion noting a hopeless division leaves the case in a lawless limbo.

Might the Chief Justice and others have changed their minds about the merits of Olson's statutory argument simply to avoid an awkward situation? Were these Justices willing to reverse their position on a legal question just to move things along? Or did the force of Justice Kennedy's analysis persuade them in a way the government's argument had not and lead them to repudiate an argument they earlier had approved?

The choice for the majority was not simply between a narrower and a broader ground of decision. It was between a narrower ground and an *incompatible* broader ground. All members of the Court agreed that they could not properly address the broader ground if the narrower ground sufficed, as some or all members of the majority once might have voted to say that it did.

100. *Citizens United*, 558 U.S. at 365–66.

101. *Id.* at 346; *see also id.* at 347 ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity.").

102. *Id.* at 340.

103. *Id.* at 341.

104. *Id.* at 340.

forbid corporations from speaking or from making political expenditures fully resolved the case before the Court—yet the Court did not stop.

*Citizens United* mentioned the two prongs of the “strict” scrutiny standard the Court previously had applied to expenditure restrictions—requiring both a “compelling interest” and “narrow[] tailor[ing]”<sup>105</sup>—but its analysis did not clearly separate these prongs. The Court’s principal holding apparently concerned “tailoring,” or the means Congress had chosen to achieve its goals. However important Congress’s objectives might have been, it could not achieve them through prohibiting speech by corporations alone. Once the Court had explained this holding,<sup>106</sup> it had little reason to discuss the strength of the government’s regulatory interests, but it discussed them anyway.<sup>107</sup>

The Court noted that *Buckley v. Valeo* had regarded only one interest as “sufficiently important” to justify limiting campaign contributions—“the prevention of corruption and the appearance of corruption.”<sup>108</sup> *Austin* had held that Congress also could prevent “immense aggregations of [corporate] wealth” from distorting election results,<sup>109</sup> but *Citizens United* returned to *Buckley*’s position. It noted, “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>110</sup> The Court said that “[t]he practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved.”<sup>111</sup> It added, “Ingratiation and access . . . are not corruption.”<sup>112</sup> After offering its narrow view of corruption, the Court concluded, “The anticorruption interest is not sufficient to displace the speech here in question.”<sup>113</sup> This statement fully resolved the case before the Court a second time.

The familiar principle that a court should not decide constitutional issues in advance of necessity<sup>114</sup> means, among other things, that it should not make two constitutional rulings when one will do. As Chief Justice Roberts observed before becoming Chief Justice, “[I]f it is not

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105. *Id.* (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotation marks omitted).

106. *See id.* at 336–49.

107. *See id.* at 349–62.

108. *See id.* at 345 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1975)) (internal quotation marks omitted).

109. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659–60 (1990).

110. *Citizens United*, 558 U.S. at 359.

111. *Id.* at 356 (citation to 18 U.S.C. § 201, a federal bribery statute, omitted).

112. *Id.* at 360.

113. *Id.* at 357.

114. *See, e.g., Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring).

necessary to decide more, it is necessary not to decide more.”<sup>115</sup> Either branch of the *Citizens United* opinion would have sufficed without the other. Once the Court held that the government may not restrict independent expenditures on the basis of corporate identity, there was no reason for it to consider whether the government may not restrict these expenditures at all. And if the Court had said initially that independent expenditures are insufficiently corrupting for Congress ever to restrict them, there would have been no reason to consider whether this speech-related activity may be restricted on the basis of corporate identity.

Even after resolving the case before it twice, the Court did not stop. Three sentences after it declared that “[t]he anticorruption interest is not sufficient to displace the speech here in question,” it went farther by offering the sentence that drove the D.C. Circuit’s decision in *SpeechNow*: “[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>116</sup> The Court’s first formulation declared the anticorruption interest *insufficient* to support any restriction of political expenditures. The second declared this interest *nonexistent*. A declaration that independent expenditures do not corrupt at all went far, far, far beyond the necessities of the case.

The Court slipped easily from one formulation to the other, but the difference between them is great. If the Court had merely declared the anticorruption interest insufficient, *Citizens United* would have said nothing about the validity of Congress’s limitation of contributions to super PACs. Under the Court’s two-tiered standard of review, an interest can be strong enough to justify a limitation of contributions even when it is not strong enough to justify a limitation of expenditures.

Since *Buckley* in 1976, the Court has struck down every expenditure limitation to come before it, but it has upheld most contribution limits.<sup>117</sup>

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115. *PKD Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

116. *Citizens United*, 558 U.S. at 357.

117. The Court struck down expenditure limits in *Citizens United v. FEC*, 558 U.S. 310, 357–58 (2010); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 608 (1996) (*Colorado I*); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 482–83 (1985); *First National Bank of Boston v. Belotti*, 435 U.S. 765, 767 (1978); and *Buckley v. Valeo*, 424 U.S. 1, 51 (1976) (per curiam).

The Court upheld contribution limits in *FEC v. Beaumont*, 539 U.S. 146, 149 (2003); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *California Medical Association v. FEC*, 453 U.S. 182, 184–85 (1981); and *Buckley*, 424 U.S. at 29. It struck down contribution limits in *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (invalidating Vermont’s extremely low limits); *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981) (declaring limits on contributions to groups supporting or opposing referendums unconstitutional because these contributions pose no risk of corrupting public officials); and

If, in *Citizens United*, the Court had decided the case before it only twice and then stopped, one might have anticipated a repetition of the pattern: Although Congress could not limit super PAC expenditures, it could limit contributions to these groups. A nonexistent interest, however, cannot justify anything. The Court's declaration that the government had no regulatory interest whatsoever was dictum or perhaps double dictum (a statement unnecessary to a discussion that itself was unnecessary).<sup>118</sup>

The Court's off-hand transition from labeling the government's regulatory interest inadequate to labeling it nonexistent suggests the Justices might not have been attuned to the important difference between these formulations that *Buckley*'s two-tiered standard of review created. This Article will note other indications that the Court did not mean its broader declaration quite the way it sounds.

Other broad formulations offered by the *Citizens United* opinion have not fared well. Although the Court announced that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others,"<sup>119</sup> the majority opinion itself revealed that this declaration was not as unqualified as it seemed. The Court acknowledged that it had upheld limits on speech simply because the speaker was a student, a prisoner, a civil servant, or a member of the military.<sup>120</sup> It explained that "these rulings were based on an interest in allowing governmental entities to perform their functions."<sup>121</sup> What the Court apparently meant was that limitations of speech may not distinguish among speakers *unless* these limitations enable the government to perform some function.<sup>122</sup>

Two years after *Citizens United*, however, the Court abandoned even this narrower proposition. It summarily upheld a ban on campaign

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*McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014) (invalidating the BCRA's "aggregate" contribution limits).

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), the Court held that when a group's expenditures are not "independent" of a campaign, they must be treated as contributions to the campaign. *Id.* at 438. It said, "[W]e have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits." *Id.* at 441 (citations omitted).

118. See OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/obiter-dictum](http://www.oxforddictionaries.com/us/definition/american_english/obiter-dictum) (defining "obiter dictum" as "a judge's incidental expression of opinion, not essential to the decision and not establishing precedent"). The dissenters in *McCutcheon* declared that *Citizens United*'s "statements . . . about the proper contours of the corruption rationale" should be regarded "as dictum, as . . . overstatement, or as limited to the context in which [they] appear[]." *McCutcheon*, 134 S. Ct. at 1471 (Breyer, J., dissenting).

119. *Citizens United*, 558 U.S. at 340.

120. *See id.* at 341.

121. *Id.*

122. The Court seemed to conclude that the government may distinguish among speakers only when it occupies a special supervisory role over the speakers it restricts.

contributions by noncitizens who were not permanent residents of the United States.<sup>123</sup> The declaration that the government may not restrict speech on the basis of a speaker's identity evidently had become inoperative.<sup>124</sup>

The Supreme Court did not disavow its statement that “the Government cannot restrict political speech based on the speaker's corporate identity”<sup>125</sup>—the statement that had appeared to be *Citizens United*'s principal holding. The federal courts of appeals, however, have not taken this statement seriously. The only four to rule on the question have held that Congress's total prohibition of corporate contributions to election campaigns survives *Citizens United*, and the Supreme Court denied certiorari in two of these cases.<sup>126</sup>

Seven years before *Citizens United*, the Supreme Court had upheld the prohibition of corporate contributions to candidates,<sup>127</sup> and the majority opinion in *Citizens United* did not expressly overrule this decision. The courts of appeals relied in part on the Court's declarations that when one of its precedents applies directly, lower courts “should . . . leav[e] to this Court the prerogative of overruling its own decisions.”<sup>128</sup> These courts also insisted, however, that *Citizens United* had no application to contribution limits. The Second Circuit declared, for example:

In *Citizens United*, the Supreme Court held that the government cannot prohibit independent expenditures in support of a political candidate based on the source's corporate identity. Contrary to Appellants' exhortations, however, *Citizens United* applies only to independent corporate expenditures. . . . It therefore has no impact on

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123. See *Bluman v. FEC*, 132 S. Ct. 1087 (2012), *aff'g* 800 F. Supp. 2d 281, 282–83 (D.D.C. 2011).

124. See WILLIAM SAFIRE, *SAFIRE'S NEW POLITICAL DICTIONARY* 346 (rev. 4th ed. 2008) (defining “inoperative” as “[a] correction without an apology, leaving the corrector in a deep hole”).

*Citizens United* itself had said, “We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.” 558 U.S. at 362. Even leaving this question open indicated that, despite the Court's broad language, it was not committed to the proposition that all distinctions among speakers are invalid.

125. *Citizens United*, 558 U.S. at 346 (emphasis added).

126. See *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877–79 (8th Cir. 2012) (en banc); *United States v. Danielczyk*, 683 F.3d 611, 617 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013); *Ognibene v. Parkes*, 671 F.3d 174, 183–84, 184 n.10 (2d Cir.), *cert. denied*, 133 S. Ct. 28 (2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1126 (9th Cir. 2011); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010).

127. *FEC v. Beaumont*, 539 U.S. 146, 149 (2003).

128. *E.g.*, *Minn. Citizens Concerned for Life*, 692 F.3d at 879 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted)).

the issues before us in this case.<sup>129</sup>

The courts of appeals and the Supreme Court itself have deflated *Citizens United*'s declarations that legislatures may not restrict speech on the basis of the speaker's identity. They have done so despite the fact that the Court's declaration that government may not limit speech on the basis of corporate identity appeared to be its principal holding. Although *Citizens United*'s declaration that independent expenditures do not corrupt was dictum, and although the Court offered several indications that it did not mean this statement to be as sweeping as it seemed, the courts of appeals have not deflated it.<sup>130</sup> To the contrary, following the lead of the D.C. Circuit, they have read it for all it might be worth.

The D.C. Circuit said in *SpeechNow* that, if expenditures by super PACs do not corrupt, contributions to these groups cannot corrupt either.<sup>131</sup> These contributions can influence public officials only through the expenditures that the Supreme Court has declared non-corrupting as a matter of law.<sup>132</sup> Although contribution limits are judged by a less demanding standard than expenditure limits, the D.C. Circuit said that the standard of review did not matter. "[S]omething . . . outweighs nothing every time."<sup>133</sup> Acknowledging even a smidgen, soupçon, or scintilla of regulatory interest would have undercut the court's analysis entirely.

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129. *Ognibene*, 671 F.3d at 183 (internal citation omitted).

130. Describing a Supreme Court holding narrowly and refusing to consider its implications for other situations is bad judging. The courts of appeals, however, could have made this move to deflate the Supreme Court's statement that independent expenditures do not corrupt at least as easily as they used it to deflate the Court's statements that government may not restrict speech on the basis of corporate identity. In fact, the declaration that independent expenditures do not corrupt addressed only expenditures, while the declarations that government may not restrict speech on the basis of corporate identity apparently referred to both expenditures and contributions. By insisting that *Citizens United* concerned only expenditures, the courts of appeals disregarded more than the *implications* of the Supreme Court's declarations that government may not restrict speech on the basis of corporate identity; they disregarded what these declarations *said*. Taking the Court's language seriously, however, would have produced unfortunate consequences the Court probably did not intend. *See infra* Subsection IV.B.2.a.i.

131. *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc).

132. *See id.* at 694–95.

133. *Id.* at 695 (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)) (internal quotation marks omitted). The court added, "All that matters is that the First Amendment cannot be encroached upon for naught." *Id.*

### III. HOW *CITIZENS UNITED* AND *SPEECHNOW* CHANGED ELECTION FINANCING

On the day the Supreme Court decided *Citizens United*, President Obama described it as “a major victory for big oil, Wall Street banks, health insurance companies and . . . other powerful interests.”<sup>134</sup> Critics of the decision spoke of “corporate dominance of politics.”<sup>135</sup> The practical significance of the Court’s judgment that large business organizations may themselves make independent expenditures on behalf of candidates for office, however, has been close to nonexistent. The creation of super PACs and the authorization of limitless contributions to these groups, however, transformed American politics.

A stunning increase in outside spending in federal election campaigns followed *Citizens United* and *SpeechNow*.<sup>136</sup> The first post-*Citizens United* congressional elections came in 2010, ten months after the Supreme Court’s ruling. In the campaign leading up to the preceding nonpresidential federal election in 2006, outside spending totaled \$69 million.<sup>137</sup> In 2010, it was \$309 million.<sup>138</sup> In 2014, at the time of the second non-presidential election following *Citizens United* and *SpeechNow*, it was \$585 million.<sup>139</sup>

The first presidential election following *Citizens United* and *SpeechNow* occurred in 2012. During the preceding 2008 campaign, outside groups spent \$338 million on all federal races.<sup>140</sup> In 2012, they spent nearly \$1.04 billion.<sup>141</sup> The 1310 super PACs that participated in the 2012 campaign accounted for more than half of the total outside spending—\$609 million.<sup>142</sup> They collected far more than that in

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134. Press Release, The White House Office of the Press Sec’y, Statement from the President on Today’s Supreme Court Decision (Jan. 21, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0>.

135. See, e.g., Fran Korten, *10 Ways to Stop Corporate Dominance of Politics*, YES! MAGAZINE (Jan. 25, 2010), <http://www.yesmagazine.org/people-power/10-ways-to-stop-corporate-dominance-of-politics>.

136. By outside spending, I mean spending controlled neither by candidates nor by party committees.

137. *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2012&view=A&chart=N#viewpt](http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=A&chart=N#viewpt) (last visited Feb. 3, 2015).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* For an argument that some of the “exponential leap in political spending” following *Citizens United* might have occurred anyway, see Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES (July 17, 2012), <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html>.

142. See *2012 Outside Spending, by Super PAC*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (last visited Feb. 3, 2015).

contributions—\$828 million.<sup>143</sup>

About 70% of all contributions to super PACs came from individuals rather than collective entities of any sort—corporations, labor unions, nonprofits, and political action committees.<sup>144</sup> Only about 9% of the contributions came from corporations.<sup>145</sup> More than 25% of these corporate contributions came, not from true business enterprises, but from “shell corporations used by individuals . . . to cloak their donations.”<sup>146</sup>

In the 2012 election cycle, not a single Fortune 500 company made any independent expenditure to support or oppose a candidate for federal office.<sup>147</sup> Only ten contributed to super PACs.<sup>148</sup> Of these ten, only one contributed more than \$1 million—Chevron Corporation, which donated \$2.5 million to a super PAC close to House Speaker John Boehner.<sup>149</sup> In other words, all 500 of the Fortune 500 companies declined the invitation offered by *Citizens United* to make independent expenditures, and 490 of the 500 declined the invitation offered by *SpeechNow* to contribute to super PACs.<sup>150</sup>

143. *See id.*

144. *See* Anu Narayanswamy, *Corporate, Union and Nonprofit Giving to Super PACs Tops \$167 Million*, SUNLIGHT FOUND. (Oct. 22, 2012, 2:33 PM), <http://reporting.sunlightfoundation.com/2012/organizational-giving/>.

145. *See* Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives* 1, app. A & tbl.1 (June 20, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2313232> [hereinafter Bonica 2014] (reporting that corporations gave a total of \$75 million to independent expenditure groups during the 2012 election cycle).

146. *See id.* app. A (noting that nearly \$20 million of the \$75 million contributed by corporations was attributable to these shells).

147. Wendy Hansen, Michael S. Rocca & Brittany Ortiz, *The Effects of Citizens United on Corporate Contributions in the 2012 Presidential Election* 20 (Aug. 22, 2013) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300930](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300930).

148. *See id.* Although the cited paper reported that only nine Fortune 500 companies contributed to super PACs, *id.*, its authors later discovered one additional contributor. E-mail from Michael S. Rocca to author (Jan. 17, 2014, 12:36 AM EST) (on file with author).

149. *See* Hansen et al., *supra* note 147, at 20, 36 tbl.3 (citing Dan Eggen, *Chevron Donates \$2.5 Million to GOP Super PAC*, WASH. POST (Oct. 26, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/26/chevron-donates-2-5-million-to-gop-super-pac/>).

150. Wendy Hansen and her co-authors comment, “Over 500 of the world’s largest and most powerful companies opted to stay away from donating to SuperPACs during an election where SuperPACs spent over \$600 million . . . .” Hansen et al., *supra* note 147, at 21. The authors refer to “over” 500 corporations because they examined the expenditures of 545 companies in order to include all that made the Fortune 500 list in either 2008 or 2012. *Id.* at 11.

Some of the business corporations that neither made independent expenditures nor contributed to super PACs undoubtedly contributed to 501(c)(4) groups and 501(c)(6) trade associations—particularly the U.S. Chamber of Commerce. In 2012, the Chamber began sponsoring ads expressly urging the election or defeat of particular candidates, and it spent



The misperception that corporations dominate political campaigns stems partly from media descriptions of the amounts contributed by “business interests” and by specified industries like “the energy industry” and “the financial services industry.” These statements are likely to convey the impression that the contributions were made by businesses. Almost invariably, however, the statements are traceable to the Center for Responsive Politics, which includes individual contributions in its compilations of interest-group donations.<sup>151</sup> The Center attributes a contribution to a group by noting the occupation and employer listed by the individual contributor.<sup>152</sup>

Excluding individual donations would be misleading; some individual donations are made for the purpose of advancing their donors’ business interests. As the following discussion will indicate, however, including these donations may be even more misleading.<sup>153</sup>

Corporate executives have contributed a remarkable amount to political campaigns—well over \$1 billion in each of the most recent election cycles.<sup>154</sup> As Adam Bonica recently discovered, 83% of all Fortune 500 directors and CEOs have made political contributions at some point in their careers.<sup>155</sup> Moreover, many of those who have not contributed are foreign nationals barred from doing so.<sup>156</sup> The contribution rate of the nearly 4500 top-firm executives Bonica studied greatly exceeds that of doctors (15% to 20%) and lawyers (45% to 50%).<sup>157</sup> The average amount a contributing executive had given to

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\$35.7 million influencing federal elections. *U.S. Chamber of Commerce, Outside Spending Summary 2012*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=US+Chamber+of+Commerce> (last visited Feb. 3, 2015). Contributions to 501(c)(4) and 501(c)(6) groups need not be reported publically. See Hansen et al., *supra* note 147, at 12.

About two-thirds of the Fortune 500 companies have established conventional PACs. The electoral spending of these PACs increased 15% between 2008 and 2012. This amount was “about half the percentage increase over the same period of major *non*-corporate PACs.” *Id.* at 15. Neither *Citizens United* nor *Speech Now* affected the ability of conventional PACs to make political donations.

151. See *2014 Overview: Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs, and Outside Spending Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/overview/blio.php> (last visited Feb. 3, 2015) [hereinafter *2014 Overview*].

152. See *id.* The Center for Responsive Politics is a respected nonpartisan group that, among other things, analyzes campaign-finance statistics and makes them readily accessible. See *Our Mission*, OPENSECRETS.ORG, <http://www.opensecrets.org/about/>.

153. The Center itself clearly divides interest group contributions into those made by individuals and those made by PACs. See *2014 Overview, supra* note 151.

154. Bonica 2014, *supra* note 145, at 11–12.

155. *Id.* at 11.

156. *Id.*

157. See Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives* 32–33 (Aug. 20, 2013) (unpublished

campaigns over the years was \$197,000.<sup>158</sup> The median was \$38,000.<sup>159</sup> These figures do not include the amounts given by spouses.<sup>160</sup>

Despite a common perception of the corporate world as a fortress of conservatism, “the typical board [of a publically traded Fortune 500 company] includes donors from across the ideological spectrum,”<sup>161</sup> and “ideologically homogenous firms are quite rare.”<sup>162</sup> The distribution of campaign contributions by Fortune 500 executives skews to the right and to the Republican Party but only moderately.<sup>163</sup> This tilt could “as easily be explained as a function of [the] demographics [of a group disproportionately composed of white males over 50] as it could by the supposed link between the corporate interests and Republican policies.”<sup>164</sup>

The contributions of business executives seem less strategic and more the product of ideology than those of their businesses’ PACs. Executives rarely hedge by contributing to both candidates in a single race.<sup>165</sup> Executives are also less likely than corporate PACs to tilt their contributions toward the party in power.<sup>166</sup> If the contributions of business executives are made to advance “business interests,” the donors have differing ideas of how best to advance these interests. Candidates and office holders may not assign individual contributions to interests in the same way the Center for Responsive Politics does.

When a Fortune 500 company’s endorsement of a candidate would alienate many of its directors, executives, and shareholders, the company is unlikely to make an endorsement. The company may have other reasons for declining to contribute to super PACs as well. About half the customers of a business corporation that markets to the public would be likely to support the opponent of whichever candidate the corporation endorsed. Unlike lobbying on an issue affecting the corporation’s interests,<sup>167</sup> participation in a general election campaign is

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manuscript), *available at* <http://www.princeton.edu/csdp/events/Bonica11072013/SSRN-id2313232.pdf> [hereinafter Bonica 2013].

158. Bonica 2014, *supra* note 145, at 11.

159. *Id.*

160. *Id.* at 11 n.4.

161. *Id.* at 23.

162. *Id.* at 21. An exception is the energy industry, which “stands out for the conservatism of its management and work force.” Bonica 2013, *supra* note 157, at 35.

163. Bonica 2014, *supra* note 145, at 18, 32 fig.5.

164. Bonica 2013, *supra* note 157, at 29.

165. *See* Bonica 2014, *supra* note 145, app. B. Forty-three executives, however—3% of all contributors—did give to both presidential nominees in 2012, and 114 did so in 2008. *Id.* at app. B & tbl.2.

166. *Id.* at 14.

167. “[C]orporate lobbying expenditures have historically eclipsed PAC contributions by ratios of more than ten to one.” *Id.* at 2.

often bad for business.<sup>168</sup> Entities that do not market to the public (labor unions and trade associations in particular) are more likely to make large contributions. Richard Epstein calls electoral spending a constitutional right that large corporations do not want.<sup>169</sup>

Ninety-five individuals or couples and fifty-six organizations contributed \$1 million or more to outside spending groups in 2012.<sup>170</sup> Together they contributed almost 60% of the total amount collected by these groups.<sup>171</sup> At the top of the list were Sheldon and Miriam Adelson, who together gave \$92.8 million.<sup>172</sup> Following them were one couple and two individuals (Harold and Annette Simons, who contributed \$26.9 million; Robert Perry, who gave \$23.9 million; and Fred Eychaner, who gave \$14.1 million).<sup>173</sup> Then came a labor union (the United Auto Workers, \$14 million); an individual (Michael Bloomberg, \$13.7 million); another union (Service Employees International, \$13.3 million); another individual (Joe Ricketts, \$13.1 million); and another union (the National Educational Association, \$13 million).<sup>174</sup>

The top corporate contributor finally appears at number ten on the list—Specialty Group Inc., a mysterious enterprise that filed its incorporation papers less than a week before contributing its first \$5 million and that ultimately contributed \$10.6 million.<sup>175</sup> One must go

168. See, e.g., Jia Lynn Yang & Dan Eggen, *Exercising New Ability to Spend on Campaigns, Target Finds Itself a Bull's-Eye*, WASH. POST (Aug. 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/18/AR2010081806759.html> (describing the national boycott that followed Target's contribution to a gubernatorial candidate in Minnesota who opposed same-sex marriage).

169. Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639, 640 (2011). Apart from the fact that a corporation's participation in an election campaign may be bad for business, permitting corporate contributions exposes businesses to implicit extortion—the unspoken threat that rejecting a request for funds may lead to reduced access or less favorable treatment. See *id.* at 640, 658.

170. See *2012 Top Individual Donors*, *supra* note 19; *2012 Top Organizational Donors*, *supra* note 19. An OpenSecrets.org website menu enables a viewer to toggle from one of these lists to the other, and the discussion that follows draws from a merger of the two lists.

171. See Keenan Steiner & Jacob Fenton, *The 2012 Super PAC Million Dollar Club*, SUNLIGHT FOUND. BLOG (Dec. 7, 2012, 2:00 PM), <http://reporting.sunlightfoundation.com/2012/2012-super-pac-million-dollar-club/> (using figures slightly different from those reported by the Center for Responsive Politics).

172. *2012 Top Individual Donors*, *supra* note 19.

173. *Id.*

174. See *id.*; *2012 Top Organizational Donors*, *supra* note 19.

175. See *2012 Top Organizational Donors*, *supra* note 19; Jack Gillum, *Specialty Group Inc., Mystery Firm, Formed Days Before \$5 Million Campaign Gift*, HUFFINGTON POST (Oct. 27, 2012, 4:22 PM), [http://www.huffingtonpost.com/2012/10/27/specialty-group-inc-donation\\_n\\_2031207.html](http://www.huffingtonpost.com/2012/10/27/specialty-group-inc-donation_n_2031207.html); see also Press Release, William Rose (Nov. 3, 2012), available at [http://archive.wbir.com/pdf/11512\\_william\\_rose.pdf](http://archive.wbir.com/pdf/11512_william_rose.pdf) (statement by Knoxville resident William

past five more individuals and six more unions before encountering a second business corporation—Oxbow Corp.,<sup>176</sup> an energy development holding company founded by Bill Koch,<sup>177</sup> a brother of Charles and David Koch,<sup>178</sup> which contributed \$4.4 million.<sup>179</sup>

The business corporations that contributed \$1 million or more (twenty-two) slightly outnumbered the unions that did (twenty-one),<sup>180</sup> but the amount contributed by the twenty-one unions (about \$100 million) was more than double that contributed by the twenty-two corporations (about \$50 million).<sup>181</sup> Most of the corporations that gave \$1 million or more appeared to be closely held by one or a few owners. Several in fact seemed to be straw companies created for the purpose of masking their owners' contributions.<sup>182</sup>

Wendy Hansen, Michael Rocca, and Brittany Ortiz, the authors of a study of political spending by Fortune 500 companies, concluded, "Corporate political spending changed very little following the *Citizens United* ruling."<sup>183</sup> Adam Bonica's bottom line was similar: "In a careful accounting of corporate political expenditures, I find [little evidence] that the recent Supreme Court ruling in *Citizens United* has had any practical effect on how corporations spend on politics."<sup>184</sup> But large contributions by individuals have skyrocketed.

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Rose declaring that he is "the CEO, President and General Counsel of Specialty Group," that the company is developing land his family has owned for fifty years, and that "[o]ver the past several weeks, the failings of the Obama administration . . . have been hidden by the mainstream news media, with Fox News leading the lonely path towards the truth").

176. See *2012 Top Individual Donors*, *supra* note 19; *2012 Top Organizational Donors*, *supra* note 19.

177. See *William Koch*, OXBOW, [http://www.oxbow.com/About\\_Us\\_Leadership\\_Founder\\_&\\_Chief\\_Executive\\_Officer.html](http://www.oxbow.com/About_Us_Leadership_Founder_&_Chief_Executive_Officer.html) (last visited Feb. 3, 2015).

178. See *William Koch*, FORBES, <http://www.forbes.com/profile/william-koch/> (last visited Feb. 3, 2015).

179. *2012 Top Organizational Donors*, *supra* note 19.

180. See *id.* The organizations contributing \$1 million or more that were neither labor unions nor business corporations were mostly political groups—for example, the Republican Governors Association and the League of Conservation Voters. See *id.*

181. See *id.*

182. See *Corporations or People? Let's Ask Romney About Eli Publishing, F8 LLC, Spann LLC and Paying Taxes*, MN POL. ROUNDTABLE (Aug. 13, 2011), <http://mnpoliticalroundtable.com/2011/08/13/corporations-or-people-let's-ask-romney-about-eli-publishing-f8-llc-spann-llc-and-paying-taxes/> (noting that W Spann LLC filed incorporation papers in March, contributed \$1 million to Restore Our Future in April, and was dissolved in July); Michael Beckel & Reity O'Brien, *Mystery Firm is Election's Top Corporate Donor at \$5.3 Million*, OPENSECRETS.ORG (Nov. 5, 2012), <http://www.opensecrets.org/news/2012/11/mystery-firm-is-elections-top-corporo.html>.

183. Hansen et al., *supra* note 147, at 18.

184. Bonica 2014, *supra* note 145, at 22.

## IV. REFLECTIONS ON A BUMPER STICKER

A bumper sticker marketed to people offended by the *Citizens United* decision proclaims, “MONEY IS NOT SPEECH! Corporations are not People!”<sup>185</sup> Justice Alito has called it “very frustrating” for a Supreme Court opinion to be “reduced to a slogan that you put on a bumper sticker.”<sup>186</sup> The bumper sticker, however, provides a place to start. This Part assesses some basic campaign-finance issues by considering what’s wrong and what’s right about the sticker’s two assertions.

## A. “Money Is Not Speech”

## 1. Why the Bumper Sticker Gets It Wrong (Mostly): The First Amendment Protects the Use of Money to Bring Speech to an Audience

The declaration that “money is not speech” appears not only on bumper stickers but also on refrigerator magnets, T-shirts,<sup>187</sup> and a proposed constitutional amendment endorsed by more than 370,000 petition signers.<sup>188</sup> The city councils of Los Angeles, California and Portland, Oregon have passed resolutions declaring that money is not speech, and voters in Boulder, Colorado and Madison, Wisconsin have approved referenda saying the same thing.<sup>189</sup>

It is true that money is not speech, but the First Amendment could not protect speech unless it also protected other things. As Geoffrey Stone has observed, a bus is not speech, but a law forbidding bus rides to political rallies would violate the First Amendment.<sup>190</sup> Although money is not speech, Congress could not prohibit the use of money to buy a book. In *Buckley v. Valeo*, the Supreme Court rejected the D.C. Circuit’s conclusion that contribution and expenditure limitations

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185. See *Money Is Not Speech Bumper Sticker*, CAFE PRESS, [http://www.cafepress.com/mf/70462926/money-is-not-speech\\_bumper-sticker?productId=758086923](http://www.cafepress.com/mf/70462926/money-is-not-speech_bumper-sticker?productId=758086923) (last visited Feb. 3, 2015).

186. See LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 96 (2014); Michelle R. Smith, *Alito Says Supreme Court Misunderstood by Media*, DESERET NEWS (Sept. 14, 2012, 4:35 PM), <http://www.deseretnews.com/article/765604212/Alito-says-Supreme-Court-misunderstood-by-media.html>.

187. See *Money Is Not Speech Bumper Sticker*, ZAZZLE, [http://www.zazzle.com/money\\_is\\_not\\_speech\\_bumper\\_sticker-128314648852904232](http://www.zazzle.com/money_is_not_speech_bumper_sticker-128314648852904232) (last visited Feb. 3, 2015); *MoneySpeechCorpPerson Fridge Magnet*, ZAZZLE, [http://www.zazzle.com/moneyspeechcorpperson\\_fridge\\_magnet-147993051250725513](http://www.zazzle.com/moneyspeechcorpperson_fridge_magnet-147993051250725513) (last visited Feb. 3, 2015); *Money Not Equal to Speech T-Shirt*, ZAZZLE, [http://www.zazzle.com/money\\_not\\_equal\\_to\\_speech\\_t\\_shirt-235995578836445369](http://www.zazzle.com/money_not_equal_to_speech_t_shirt-235995578836445369) (last visited Feb. 3, 2015).

188. See *Motion to Amend the US Constitution—Sign the Petition*, MOVE TO AMEND, <http://movetoamend.nationbuilder.com/petition> (last visited Feb. 3, 2015).

189. See Geoffrey R. Stone, *Is Money Speech?*, HUFFINGTON POST (Feb. 5, 2012, 12:29 PM), [http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech\\_b\\_1255787.html](http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech_b_1255787.html).

190. *Id.*

“should be viewed as regulating conduct not speech.”<sup>191</sup> As the Court observed, one cannot send a telegram or publish a newspaper without spending money.<sup>192</sup> Unless critics of *Citizens United* would allow Congress to suppress newspapers by prohibiting the expenditures needed to publish them, they cannot resolve the First Amendment issues posed by campaign-finance regulations simply by proclaiming that money is not speech.

## 2. Why the Bumper Sticker Gets It Right (Partly): Unlike Other Funds Used to Bring Speech to an Audience, Campaign Contributions and Expenditures are Conflict-Creating Gifts to Candidates

The Constitution protects the expenditures needed to bring speech to an audience, but that is not the only thing campaign contributions and expenditures do. These contributions and expenditures also have harmful effects not produced by the messages they deliver. They differ greatly from the spending necessary to publish a newspaper or send a telegram.

Unlike the funds used to publish a newspaper or send a telegram, political contributions and expenditures are intended to influence, and do influence, two audiences. From the perspective of one of these audiences—the public—they look like speech. Their purpose is to persuade the audience of some proposition (“vote Obama”). American democracy could not function without them.

From the perspective of a second audience, however—the favored candidate—political contributions and expenditures look like other corrupting gifts. They do not persuade the candidate to support his own candidacy. Instead, they may persuade him to provide favors to the contributors and the spenders. When they do, they persuade him in the same way that an expense-paid trip to an old golf course in Scotland might persuade him.<sup>193</sup> Campaign cash is just as good as money.<sup>194</sup>

The principal reason for restricting the receipt of political contributions and expenditures does not differ from the reason for restricting the receipt of golf outings, honoraria, tickets to sporting

191. 424 U.S. 1, 15–16 (1976).

192. See *id.* at 16–17. Western Union sent its last telegram in 2006, thirty years after *Buckley*. See Dan Tynan, *10 Technologies That Should Be Extinct (but Aren't)*, PC WORLD (July 4, 2010, 6:40 PM), [http://www.pcworld.com/article/200325/10\\_technologies\\_that\\_should\\_be\\_extinct.html](http://www.pcworld.com/article/200325/10_technologies_that_should_be_extinct.html). One can still send a telegram through iTelegram, which recommends using the service for, among other things, weddings, special occasions, sympathy, and fun and romance. See ITELEGRAM, <http://www.itelegram.com> (last visited Feb. 3, 2014).

193. See Massimo Calabresi, *The Golf Junket That Haunts Abramoff and Friends*, TIME (May 11, 2006), <http://content.time.com/time/nation/article/0,8599,1193223,00.html>.

194. See *Royalty Payments: “As Good as Money,”* THE LEDGER (Sept. 30, 2009), <http://www.theledger.com/article/20090930/NEWS/909305007> (noting Yogi Berra’s statement in an AFLAC commercial, “They give you cash, which is just as good as money”).

events, Christmas baskets, and private employment. Campaign contributions and expenditures corrupt just as much as these other valued benefits. Because providing these benefits serves an important public purpose, however, there is greater reason for tolerating the corruption.

The codes of conduct that limit the ability of public officials to accept gifts are described as curbing conflicts of interest.<sup>195</sup> The Supreme Court's campaign-finance decisions consume more than 1000 pages of the reports, however, and the words "conflict of interest" do not appear. The Supreme Court speaks more obscurely of "the actuality and appearance of corruption."<sup>196</sup>

Speaking of conflicts of interest would be better.<sup>197</sup> To be sure, this language would sound less grand. "Corruption" has an ominous ring, and curbing it sounds like a more compelling governmental interest. Speaking of conflicts of interest, however, would underscore the need to draw a line between permissible and impermissible conflicts. The Supreme Court sometimes has seemed hesitant to recognize this necessity.

Attempting to eliminate all conflicts of interest would be a fool's errand. Conflicts are ubiquitous. An effort to stamp all of them out would leave public officials without any social life, family life, religious life, or political life. This effort also would violate the First Amendment. Congress could not prohibit a \$100 contribution simply because it might make its beneficiary somewhat more receptive to the contributor's entreaties.

Strong conflicts of interest, however, are appropriately forbidden. The interest in preventing them is both important and compelling.<sup>198</sup> The Lincoln bedroom,<sup>199</sup> the ambassadorship to Luxembourg,<sup>200</sup> and pardons

195. The United States Office of Government Ethics, for example, interprets and implements most federal ethics laws and regulations. It takes as its motto "Preventing Conflicts of Interest in the Executive Branch." See U.S. OFFICE OF GOV'T ETHICS, <http://www.oge.gov/home.aspx> (last visited Apr. 27, 2015).

196. *Buckley*, 424 U.S. at 26.

197. More than twenty-five years ago, Daniel Lowenstein noted, "[T]he question of campaign finance is a question of conflict of interest." See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 323 (1989).

198. When the Constitution is read to safeguard unlimited contributions to super PACs, laboring over a code of government conduct looks like rearranging deck chairs on the Titanic. A code might prohibit a lobbyist from sending a legislator a \$100 Christmas gift, but the restriction would hardly matter. The lobbyist would have a simpler and easier way to buy influence.

199. During the 2000 presidential campaign, candidate George W. Bush accused President Clinton of "virtually renting out the Lincoln bedroom to big campaign donors." Helen Thomas, *Selling Lincoln Bedroom Disrespectful*, HEARST NEWSPAPERS (Sept. 28, 2002), <http://www.seattlepi.com/news/article/Selling-Lincoln-bedroom-disrespectful-1097153.php>. He condemned using this "hallowed" chamber for political purposes. *Id.* Later, however, Bush, like his predecessor, hosted many major contributors as overnight guests in the White House. *Id.* A presidential spokesman refused to say in which bedrooms they slept. *Id.*

200. See *infra* app. E, "The Appointment of Ambassadors."

for the friends and families of major donors<sup>201</sup> need not remain up for grabs. Small political contributions usually are motivated by a desire to persuade the public rather than buy influence, but large contributions often are motivated by both a desire to persuade the public and the hope of gaining clout.<sup>202</sup> Forbidding some conflicts of interest is an excellent idea.

In *Citizens United*, the Supreme Court cited the impossibility of drawing a principled line between large and small conflicts of interest as its reason—its only reason—for excluding from its concept of corruption every conflict of interest except those created by bribes. Justice Kennedy’s opinion for the Court quoted an earlier opinion he authored, noting that this earlier opinion was a separate opinion but not that it was a dissent. He wrote, “Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.”<sup>203</sup> Moreover, a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”<sup>204</sup> Justice Kennedy apparently saw no alternative to leaving the ambassadorship to Luxembourg and much more up for grabs.

The Supreme Court, however, often draws “unprincipled” lines of the sort *Citizens United* declined to draw. In *Nixon v. Shrink Missouri Government PAC*,<sup>205</sup> for example, the Court upheld Missouri’s low contribution limits,<sup>206</sup> and then, in *Randall v. Sorrell*,<sup>207</sup> it invalidated Vermont’s even lower limits.<sup>208</sup> The Court has recognized that

201. See *infra* app. D, “Executive Clemency.”

202. Laurence Tribe once posed the following thought experiment to his First Amendment class: Imagine a high-tech information filter that can reveal information to one audience while blocking it from another. Imagine further that the law mandates the use of this device to make the sources of campaign financing transparent to the public but anonymous to the benefitted candidates. Then consider how many contributors would still pour millions of dollars into campaigns. E-mail from Laurence Tribe to author (Sept. 29, 2012, 9:26 AM) (on file with author). For less hypothetical proposals to conceal the identity of donors from candidates, see BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 48–50, 102–04 (2002); Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 *STAN. L. REV.* 837, 852–55 (1998).

203. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

204. *Id.* (alteration in original) (again quoting *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

205. 528 U.S. 377 (2000).

206. *Id.* at 397–98.

207. 548 U.S. 230 (2006).

208. See *id.* at 262.



legislatures must make judgment calls and that courts charged with safeguarding the First Amendment must review the reasonableness of these calls.

The distinction between the two audiences and the two different ways of persuading them has been lost on some Supreme Court Justices. The dissenters in *Citizens United* cited the scholarship of Zephyr Teachout—scholarship showing that the Framers of the Constitution “‘were obsessed with corruption,’ . . . which they understood to encompass the dependency of public officeholders on private interests.”<sup>209</sup> In a concurring opinion joined by Justices Thomas and Alito, Justice Scalia objected that the Framers’ concept of corruption could not justify restricting speech: “[I]f speech can be prohibited because, in the view of Government, it leads to ‘moral decay’ or does not serve ‘public ends,’ then there is no limit to the Government’s censorship power.”<sup>210</sup>

Limiting contributions and expenditures because the political messages they send could persuade viewers, listeners, and readers to favor selfish interests or because these messages might cause moral decay among their audiences certainly would offend the First Amendment. No one, however, has proposed limiting contributions and expenditures because the *messages* they send corrupt their audiences. Providing valued gifts to governmental officials to encourage them to disregard the public interest is not entitled to any First Amendment protection.

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209. *Citizens United*, 558 U.S. at 452 (Stevens, J., concurring in part and dissenting in part) (quoting Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 348 (2009)).

Teachout’s scholarship sometimes produces a surprisingly uncomprehending response. Critics note the ubiquity of the kind of corruption she describes, the impossibility of eliminating this corruption, and the unfairness of calling every official who considers anything but the public good “corrupt.”

Teachout, however, did not suggest that the Constitution allows Congress to prohibit all speech that creates conflicts of interest and that diverts officials from serving the public. She did not set forth a standard for separating protected from unprotected speech. She simply emphasized an interest to be weighed against the expressive value of speech and showed how important this interest was to the Framers of the Constitution. Moreover, Teachout would not call officials who fail to focus entirely on the public good dishonest; her point was that the word “corruption” sometimes refers, not to dishonesty, but to falling away from an Aristotelian ideal of public service. See Teachout, *supra*, at 374; see also ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO *CITIZENS UNITED* 9, 38–41 (2014). Corruption in the sense most often invoked by the Framers is a matter of more or less, not yes or no.

Teachout argued that the interest in minimizing conflicts of interest is *sometimes* strong enough to justify limiting speech. For an examination of where the contrary view would lead, see *infra* Part X.

210. *Citizens United*, 558 U.S. at 391 (Scalia, J., concurring).

The plurality in *McCutcheon* also seemed oblivious to the difference between campaign contributions and speech that sends a message to only one audience. It wrote:

Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.<sup>211</sup>

The public, however, does not seek to suppress campaign contributions for the same reason legislators once sought to suppress flag burning and Nazi marches. Its quarrel is not with the content of the advertisements broadcast by Democrats and Republicans. What makes money in politics repugnant to many is the ability of backers of both Republicans and Democrats to secure official favors. The messages Republican and Democratic donors send the public differ, but the conflicts of interest created by their contributions look a lot alike. The *McCutcheon* majority seemed slow to recognize the difference between limiting conflicts of interest and censoring repugnant speech. It was too quick to claim the anticensorship mantle of Milton, Mill, Holmes, and Brandeis.

The defenders of *Citizens United* and the critics of this decision sometimes have seemed like the blind men describing the elephant.<sup>212</sup> The defenders have failed to acknowledge the extent to which political contributions and expenditures differ from other funds used to bring speech to audiences. The critics, however, have seen these contributions as corrupting without acknowledging the crucial role they play in enabling speech. Both sides have been wrong and both right.<sup>213</sup>

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211. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

212. This Article is headed toward a record in the use of hackneyed metaphors. Readers are requested to envision an elephant in a stateroom on the Titanic unnoticed except by a group of blind passengers who describe it to an orphaned murderer in a deck chair after the ship has left the station.

213. Some critics' concern about conflicting interests is mixed with concern about buying elections and distorting election results—a concern that does raise questions about censorship. See *infra* text accompanying notes 241–44.

## B. “Corporations Are Not People”

### 1. Why the Bumper Sticker Gets It Wrong (Mostly): The First Amendment Affords Speakers the Same Right as Non-Speakers to Use the Corporate Form of Organization

Some of the constitutional amendments proposed to “overrule” *Citizens United* declare, “The rights protected by the Constitution of the United States are the rights of natural persons only.”<sup>214</sup> Justice Stevens wrote for the dissenters in *Citizens United*, “[The Framers] had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.”<sup>215</sup> Delegates to the 2012 Democratic Convention cheered Elizabeth Warren when she told them, “[C]orporations are not people. People have hearts, they have kids, they get jobs, they get sick, they cry, they dance. They live, they love, and they die. And that matters. That matters because we don’t run this country for corporations, we run it for people.”<sup>216</sup>

Even the motorists whose bumper stickers decry *Citizens United*, however, might not deny corporations all constitutional rights. One doubts, for example, that they would convict these entities of crimes without affording them the right to counsel and the right to jury trial.<sup>217</sup> At the same time, no one has proposed affording corporations the right to vote. It apparently is necessary to distinguish some constitutional rights from others, something that cannot be done on a bumper sticker.

In 2011, Mitt Romney responded to an audience member’s repeated shouts of the word “corporations” by saying, “Corporations are people, my friend.”<sup>218</sup> This answer prompted widespread ridicule. The

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214. See *We the People Amendment*, MOVE TO AMEND, <https://movetoamend.org/sites/default/files/mta-wethepeopleamendment.pdf> (last visited Feb. 3, 2015) (favoring a constitutional amendment with the language quoted in text); accord S.J. Res. 18, 113th Cong. (2013), available at <https://www.congress.gov/113/bills/sjres/18/BILLS-113sjres18is.pdf> (presenting the text of a constitutional amendment sponsored by Senators Jon Tester and Chris Murphy: “We the people who ordain and establish this Constitution intend the rights protected by this Constitution to be the rights of natural persons.”).

215. *Citizens United*, 558 U.S. at 428 (Stevens, J., concurring in part and dissenting in part).

216. See Elizabeth Warren, Speech at Democratic Nat’l Convention: The System is Rigged (Sept. 5, 2012), available at [http://www.realclearpolitics.com/ideo/2012/09/05/elizabeth\\_warren\\_addresses\\_dnc\\_the\\_system\\_is\\_rigged.html](http://www.realclearpolitics.com/ideo/2012/09/05/elizabeth_warren_addresses_dnc_the_system_is_rigged.html).

217. Affording these rights to corporations seems uncontroversial. Nevertheless, “[f]or ever-shifting reasons, all of them bad, the Supreme Court has held the privilege against self-incrimination inapplicable to corporations.” Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1366 (2009).

218. See Philip Rucker, *Mitt Romney Says “Corporations Are People,”* WASH. POST (Aug. 11, 2011), [http://articles.washingtonpost.com/2011-08-11/politics/35270239\\_1\\_romney-supporters-mitt-romney-private-sector-experience](http://articles.washingtonpost.com/2011-08-11/politics/35270239_1_romney-supporters-mitt-romney-private-sector-experience).

Chairperson of the Democratic National Committee called it a “shocking admission,”<sup>219</sup> and a poster portrayed Romney as declaring, “Of course corporations are people. Some of my best friends are corporations!”

People probably would not have seen Romney as ridiculous, however, if he had said, “baseball teams are people, my friend,” “church congregations are people,” or “labor unions are people.” Indeed, if Romney had seemed ridiculous after making one of these other comments, it might have been because he saw the need to verbalize something so obvious.

Why might listeners have accepted descriptions of labor unions as people while rejecting similar descriptions of corporations? Was it just that some people consider corporations more beastly? Or does the statement that “unions are people” sound like an obvious truth—simply a recognition that members comprise these organizations—while the statement that “corporations are people” sounds like an obvious falsehood—a preposterous statement about corporate entities themselves? Romney probably meant only to remind his audience of the human beings who consider themselves part of corporate organizations and without whom these organizations would not exist, but some listeners heard him deny that a fictional entity was fictional.<sup>220</sup>

The *Citizens United* majority and its critics appeared to make the same error. Both took a legal fiction seriously and envisioned a corporation owned by many people simply as a single entity. The majority insisted that this entity should be treated as though it were an individual speaker, while critics saw it as a nonhuman thing without rights. Analogizing a corporation to a single person or a single thing, however, is usually a mistake.<sup>221</sup> What might be called the Romney move—piercing the corporate veil and focusing on the human beings behind it—sharpens the issues.<sup>222</sup>

Agreeing that only human beings have First Amendment rights begs the question: What rights do they have? Does the Constitution guarantee them not only the right to speak as individuals but also the right to join with others for the purpose of speaking? And if the First Amendment entitles people to form “speech groups,” why should the groups they

219. *Id.*

220. Romney had no hope of correcting the misunderstanding. Although Justice Brandeis famously declared that the remedy for falsehood and fallacies is “more speech,” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), he never ran for office.

221. See Alschuler, *supra* note 217, at 1367, 1392 (arguing that blaming corporations for the crimes committed by their employees is comparable to blaming animals and inanimate objects and commenting, “The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty”).

222. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (“When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of” the “people (including shareholders, officers, and employees) who are associated with [the] corporation in one way or another.”).

form be denied the benefits of corporate organization? Should only nonspeaking business entities be allowed to incorporate? Should these nonhuman (or, if you prefer, subhuman) organizations have special privileges denied to groups that speak?

Just as the government may not prohibit using a bus to ride to a political rally, it should not be allowed to prohibit the use of a common and beneficial form of organization simply because organizers wish to engage in protected speech. A widely available organizational tool cannot constitutionally be denied to speakers alone. Like a bus, incorporation can help speakers get where they are going. It would be more precise to say that people have a right to use the corporate form when they speak than to say that corporations have a right to speak, but it is difficult to see an important difference between the two formulations.<sup>223</sup>

*Citizens United* was not the first Supreme Court decision to recognize the right of speakers to employ the corporate form of organization. The Court cited no fewer than twenty-five earlier decisions in which it had recognized the First Amendment rights of incorporated groups.<sup>224</sup>

In fact, the Supreme Court had decided a case very much like *Citizens United* twenty-four years earlier. In *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>225</sup> a nonprofit corporation sought to broadly distribute a newsletter headlined “EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE.”<sup>226</sup> The Court recognized the group’s right to distribute this newsletter. In an opinion by Justice Brennan, it held that Congress’s prohibition of corporate expenditures “in connection with” federal election campaigns was unconstitutional as applied to nonprofit corporations formed for the sole purpose of expressing political ideas.<sup>227</sup>

*Citizens United* differed from *Massachusetts Citizens for Life* in only one respect. The plaintiff in *Citizens United*, unlike the plaintiff in *Massachusetts Citizens for Life*, accepted donations from for-profit corporations.<sup>228</sup> The Supreme Court, however, has recognized the First Amendment rights of for-profit as well as nonprofit corporations. As Michael McConnell observed, “The vast majority of the Court’s press

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223. Because the right ultimately belongs to individuals, the government should be allowed to take reasonable steps to ensure that they wish to exercise this right—in other words, to ensure that the people on the bus want to go where it’s going.

224. See *Citizens United v. FEC*, 558 U.S. 310, 342 (2010).

225. 479 U.S. 238 (1986).

226. *Id.* at 243.

227. See *id.* at 241.

228. Compare *Citizens United*, 558 U.S. at 319, with *Mass. Citizens*, 479 U.S. at 242.

cases involve for-profit corporations . . . and no one, even in dissent, has ever suggested that corporate status mattered in those cases.”<sup>229</sup>

The Sierra Club is a nonprofit corporation, and the *New York Times* is a for-profit corporation. Unless the critics of *Citizens United* would deny the right to speak and publish to the Sierra Club and the *Times*, they cannot plausibly maintain that only “human beings, not corporations, are persons entitled to constitutional rights.”<sup>230</sup>

*Citizens United* held Congress’s prohibition of independent electoral expenditures by unions and corporations unconstitutional sixty-four years after its enactment. One year after this prohibition’s enactment, however, Justices Rutledge, Black, Douglas, and Murphy declared in a concurring opinion that they would hold it unconstitutional.<sup>231</sup> They did so in a case in which the majority found it unnecessary to reach the question but did say that it would have “the gravest doubt” about the prohibition’s constitutionality if it were construed to prevent internal distribution of a list of union endorsements.<sup>232</sup> Nine years later, in another case in which the majority found it unnecessary to resolve the question,<sup>233</sup> Chief Justice Warren joined a dissenting opinion in which Justices Douglas and Black reiterated their view that the prohibition was unconstitutional.<sup>234</sup>

At the time when Chief Justice Warren and Justices Black, Douglas, Murphy, and Rutledge declared that they would hold Congress’s prohibition of independent expenditures by unions and corporations unconstitutional, Congress had enacted only token restrictions on contributions by individuals.<sup>235</sup> When people were effectively free to give as much as they liked to whichever candidates they liked, there was no substantial reason to limit their ability to join others in making and coordinating contributions and expenditures—and no substantial reason to deny the groups they formed the benefits of corporate organization.

Once Congress had limited individual contributions and the Supreme Court had recognized Congress’s power to do so, however, the appropriate analysis changed. The government then had a strong interest

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229. See McConnell, *supra* note 36, at 417.

230. MOVE TO AMEND, <http://movetoamend.org> (last visited Feb. 3, 2015).

231. *United States v. CIO*, 335 U.S. 106, 143 (1948) (Rutledge, J., concurring).

232. See *id.* at 121, 124 (majority opinion).

233. *United States v. UAW*, 352 U.S. 567, 591 (1957).

234. *Id.* at 591 (Douglas, J., dissenting).

235. The Hatch Political Activity Act amendments of 1940 limited individual contributions to a federal candidate or political committee to \$5000 per year. These amendments did not, however, prevent a donor from giving that amount to multiple committees working for the same candidate and coordinating their electoral efforts. See ch. 640, § 13, 54 Stat. 767, 770 (1940); THOMAS J. BALDINO & KYLE L. KREIDER, U.S. ELECTION CAMPAIGNS: A DOCUMENTARY AND REFERENCE GUIDE 99 (2011) (“The inability of the Hatch amendments to restrict contributions was patently obvious.”).

in preventing the use of organizations to circumvent individual contribution limits. Neither the majority nor the dissenters in *Citizens United* seemed to notice the change.

## 2. Why the Bumper Sticker Gets It Right (Partly): The First Amendment Affords No Right to Make Corporate Contributions and Expenditures That Circumvent Valid Limits on Individual Contributions

### a. Contributions

One morning, Mr. Hyde donated the maximum allowable amount to Senator Claghorn's reelection campaign.<sup>236</sup> He said to the senator, "Of course there's no quid pro quo, but I hope you'll support subsidies for the widget industry, which would create thousands of jobs." Mr. Hyde later donned dark glasses, a fedora, and a false mustache. That afternoon, he again contributed the maximum amount to Senator Claghorn's campaign. "I am not Mr. Hyde," he told the senator in a falsetto voice. "I am the Jeekyll Corporation, a leading manufacturer of widgets. Like my friend Hyde, however, I hope you'll support enormous subsidies for our industry." The case of Mr. Hyde and the Jeekyll Corporation prompts the following observations.

### i. Corporate Entities Are Not People

As noted above, every federal court of appeals to address the issue has held that Congress's prohibition of corporate contributions to election campaigns survives *Citizens United*.<sup>237</sup> If the lower courts had taken more seriously the Supreme Court's declaration that "the Government cannot restrict political speech based on the speaker's corporate identity,"<sup>238</sup> however, they would have afforded corporations the same right as individuals to make political contributions. Every corporation then could donate \$2700 per candidate per election during the 2015–2016 election cycle.<sup>239</sup>

The number of corporations an individual can form is unlimited. If, after donating \$2700 to Senator Claghorn himself, Mr. Hyde created 100 corporations, each of these corporations could contribute \$2700 to

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236. Senator Beauregard Claghorn, an invention of radio comedian Fred Allen, is remembered today, not for his legislative accomplishments, which were nonexistent, but for his devotion to the South—devotion so deep that he refused to wear a union suit or drive through the Lincoln Tunnel. See HAL ERICKSON, FROM RADIO TO THE BIG SCREEN: HOLLYWOOD FILMS FEATURING BROADCAST PERSONALITIES AND PROGRAMS 230 (2014).

237. See *supra* note 126 and accompanying text.

238. *Citizens United v. FEC*, 558 U.S. 310, 346 (2010).

239. See 52 U.S.C.A. § 30116(a)(1)(A) (West 2014); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

the senator's campaign. By making contributions through these corporations, Mr. Hyde would gain more clout than he should have—101 times more. At the same time, Koch Industries, with 60,000 employees and annual revenues of \$115 billion,<sup>240</sup> could contribute a total of \$2700. The fearsome corporate mountain could give birth to a mouse. As the bumper sticker insists, analogizing corporate entities to individual speakers is misguided. The number of artificial legal entities people create should not affect what they can give.

The people who own corporations are not artificial entities. In Elizabeth Warren's words, they live, love, and die. The reason some corporate contributions are appropriately forbidden is not that corporations are subhuman, demonic entities entitled to no constitutional rights. Rather, the reason is the opposite: "Corporations are people, my friend." The people who comprise a corporation are entitled to only their fair share of clout. Their contributions to particular candidates should be subject to effective limitation.

## ii. Limiting and Equalizing Clout

This Article maintains that campaign contributions are hybrids of protected speech and unprotected, influence-generating gifts to candidates. The limits on contributions upheld by *Buckley v. Valeo* mark the point at which the danger of conflicting interests appears to outweigh the benefits of electoral speech.

When people aggregate small contributions, however, they can create large conflicts of interest. One thousand members of the National Widget Association, for example, might each contribute the maximum amount to Senator Claghorn's campaign, and each might accompany his contribution with a note thanking the senator for his unwavering support of the right to bear widgets. Senator Claghorn later might vote against a proposed widget-control measure, not because he or most of his constituents disapproved of the measure, but because he hoped to keep the Widget Association members' cash flowing. The persuasion achieved by these members' contributions would not have been the kind the First Amendment protects, but no constitutional regime of campaign-finance regulation could have blocked it.

This Article endorses a scheme of campaign-finance regulation in which organizations may bundle contributions and act as the contributors' spending agents. A bundling group—call it a political action committee—could collect a large enough war chest that candidates might be wary of offending it.

The situation obviously differs when Mr. Hyde, wearing 1000

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240. See *America's Largest Companies*, FORBES, <http://www.forbes.com/largest-private-companies/list/> (last visited Feb. 3, 2015).



disguises, has contributed 1000 times more than the law allows. Although the aggregate amount of improper influence he purchased might have been no different from that purchased by 1000 lawful contributions, Mr. Hyde would have gained an unfair advantage. He is entitled to no more than his fair share of clout. Even when limits on individual contributions do not block the creation of conflicts of interest, they limit people to their proportionate share of clout.

The Supreme Court has rejected a different equalization claim—that the government may prevent the political contributions of the wealthy from “distorting” election results.<sup>241</sup> Although *Austin* embraced a variation of this claim,<sup>242</sup> *Buckley*, *Citizens United*, and *McCutcheon* firmly repudiated it. In each of these cases, the Supreme Court observed that restricting the speech of some in order to equalize the speech of others is “wholly foreign to the First Amendment.”<sup>243</sup>

The government could not block a wealthy person from writing and distributing a pamphlet on a political issue (or from publishing the pamphlet as a full-page advertisement in the *New York Times*) simply because opponents of his position were less wealthy and less able to disseminate their views. Equalizing electoral speech seems similarly objectionable.

Equalizing clout differs, however, from equalizing speech and is not “foreign to the First Amendment.” Although the First Amendment guarantees a marketplace of ideas,<sup>244</sup> it does not guarantee a marketplace in clout. The argument for equalizing clout does not focus at all on the advantage that wealth may provide in conveying messages to the public or on distorted election results. It focuses on a kind of influence the First Amendment does not protect.

### iii. Anonymous Clout

In *McCutcheon*, the plurality maintained that, even if funds donated to a group unassociated with a candidate might find their way into this candidate’s coffers, “it is hard to see how a candidate today could receive a massive amount[] of money that could be traced back to a particular contributor.”<sup>245</sup> It observed that when “the chain of attribution

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241. See *Citizens United*, 558 U.S. at 349–56.

242. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (declaring that Congress may prevent “immense aggregations of [corporate] wealth” from distorting election results).

243. See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam); see also *Citizens United*, 558 U.S. at 349–50 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014).

244. See *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

245. *McCutcheon*, 134 S. Ct. at 1452 (alteration in original) (internal quotation marks omitted).

grows longer, . . . any credit must be shared among the various actors along the way.”<sup>246</sup> The plurality spoke of the hurdles election law poses “for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.”<sup>247</sup> It apparently assumed that a donor could have illegitimate influence only when the recipient knew his identity.

When Mr. Hyde, disguised as the Jeckyll Corporation, contributed a second time to Senator Claghorn’s campaign, however, the influence he gained did not depend on Senator Claghorn’s ability to see through his disguise (that is, to pierce his corporate veil). In both of Mr. Hyde’s personae, he made Senator Claghorn aware of the amount of his contribution and what he wanted. When the amount contributed is large enough, these two conditions can create campaign-cash clout. Mr. Hyde believed that his two contributions together would reinforce the senator’s appreciation of the central role of widgets in our economy—and not because they would persuade the senator of anything. Clout need not be *personal* clout; someone who remains anonymous but contributes to an influence-buying fund has clout too. To block improper influence, one must obscure both the identity and the objectives of a donor.

#### b. Expenditures

All corporations—not just shell corporations, one-person corporations, and closely held corporations—offer paths around contribution limits. Moreover, corporate expenditures may provide a broader circumvention path than corporate contributions.

Although no Fortune 500 company has yet accepted *Citizens United*’s invitation to make an independent expenditure to advocate a federal candidate’s election,<sup>248</sup> suppose that one does. The massive Jeckyll Corporation spends \$1 million to create and broadcast an advertisement urging Senator Claghorn’s reelection. Suppose that, prior to this expenditure, Mr. Hyde, the owner of 5% of the outstanding shares of Jeckyll Corporation, had contributed as much as the law allowed to Senator Claghorn’s campaign. The corporation’s independent expenditure on behalf of Senator Claghorn was not Mr. Hyde’s independent expenditure.

When the Supreme Court first distinguished between contributions and expenditures, it explained, “[T]he transformation of contributions into political debate involves speech by someone other than the

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246. *Id.*

247. *Id.* at 1446.

248. *See* text accompanying *supra* note 147.

contributor.”<sup>249</sup> When one person funds another’s speech, the First Amendment protects his contribution less than the speech it finances. The distinction between contributions and expenditures may proceed from the same intuition that prompted the bumper sticker’s declaration that money is not speech: Writing checks is something less than speaking.<sup>250</sup>

Although political contributors usually write checks, Mr. Hyde did less. Funds that he and others owned were already in the Jeckyll Corporation treasury for managers to use to promote the reelection of Senator Claghorn if they liked. Five percent of the corporation’s \$1 million expenditure (\$50,000) was attributable to Mr. Hyde’s share of these funds. This cash bought Mr. Hyde more than his fair share of clout.<sup>251</sup>

Perhaps one can presume an identity of interest between corporate managers and shareholders. If one cannot, protecting shareholders from the use of their funds to support candidates they oppose supplies a strong reason for forbidding political spending by corporations.<sup>252</sup> The candidates backed by a corporation are likely to be the same candidates its shareholders support through their own contributions. Many shareholders are likely to give enough as individuals that allowing them to provide additional support through their corporations would put their total contributions beyond the limit.

This Article proposes a mechanism for allowing political contributions and expenditures through corporations, unions, and other

249. See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam).

250. The Court’s distinction expresses this intuition in a considerably milder form than the bumper sticker. It treats the money a speaker uses to bring speech to an audience (the speaker’s own expenditures) like speech itself, and it treats writing a check to the speaker, not as nonspeech, but as low-value speech. The Court nevertheless agrees with its bumper-sticker critics that the First Amendment does not protect check writing as much as it protects full-fledged speech.

251. For one thing, Mr. Hyde had more clout than his equally wealthy twin sister, a strong opponent of widge subsidies. Mr. Hyde’s sister had invested her wealth, not in a business corporation, but in art and precious metals. The law blocked her from contributing more than other individuals could contribute.

252. See *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (recognizing the government’s interest in protecting “individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed”); *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (same). *But see* *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010) (observing that the procedures of corporate democracy allow shareholders to protect their interests). Richard Briffault argues powerfully that political spending by corporations often advances the interests of managers rather than shareholders and that current law does not give shareholders an effective way to protect their interests. See Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban* 25–33 (July 25, 2014) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2475908](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475908).

groups while ensuring individual compliance with contribution limits. If neither this mechanism nor an alternative seems workable, however, the bumper sticker's bottom line begins to look good: corporate contributions and expenditures should be forbidden. If the answer must be either yes or no, it should be no.

The reason the bumper sticker gets it partly right is again the opposite of the reason it gives. No principled objection to corporate electoral expenditures is persuasive. People should be allowed to contribute as much through unions and corporations as they can as individuals. But they should not be allowed to contribute more. Contributions and expenditures by corporations allow their shareholders to give when everyone else has been required to stop. Piercing the veil exposes the double counting. Mr. Hyde and the Jeckyll Corporation turn out to be the same person.<sup>253</sup>

Neither the majority nor the dissenters in *Citizens United* mentioned the government interest in preventing the circumvention of individual contribution limits. The government's briefs never asked the Court to consider this interest. Seven years before *Citizens United*, however, in *FEC v. Beaumont*,<sup>254</sup> the Supreme Court relied in part on the anti-circumvention interest when it upheld Congress's prohibition of corporate campaign contributions.<sup>255</sup> Although the Court spoke only of contributions and not expenditures, its analysis had implications for both:

Quite aside from war-chest corruption and the interests of contributors and owners, . . . another reason for regulating corporate electoral involvement has emerged with restrictions on individual contributions, and recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for "circumvention of [valid] contribution limits." To the degree that a corporation could contribute to political candidates, the individuals "who created it, who own it, or whom it employs," could exceed the bounds on their own contributions by diverting money through the corporation.<sup>256</sup>

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253. *Cf.* L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* 183 (1900) ("[T]hey saw, standing in just the spot the screen had hidden, a little old man, with a bald head and a wrinkled face, who seemed to be as much surprised as they were.").

254. 539 U.S. 146 (2003).

255. *See id.* at 162–63.

256. *Id.* at 155 (second alteration in original) (internal citations omitted); *see* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("[A]ll members of the Court agree that circumvention is a valid theory of corruption.").

*Citizens United* should not be read as rejecting *Beaumont's* analysis or as resolving an issue the Supreme Court did not discuss.

### c. Other Regulations

Just as corporate contributions and expenditures provide a way around contribution limits, they provide a way around other regulations—in particular, the BCRA's disclosure requirements<sup>257</sup> and its prohibition of contributions by foreign nationals.<sup>258</sup>

Wealthy individuals responded to *SpeechNow* by forming shell corporations whose only purpose was to make multimillion dollar contributions to super PACs—contributions whose human sources these donors wished to conceal.<sup>259</sup> And although federal law bars Kim Jong-un, the Supreme Leader of North Korea, from contributing to Senator Claghorn's reelection campaign, nothing blocks his investment in a corporation likely to use its funds to support the senator.<sup>260</sup> If, like Mr. Hyde, the Supreme Leader owned 5% of the publically traded Jeckyll Corporation, he would effectively have contributed \$50,000 to Senator Claghorn's campaign.<sup>261</sup>

Both the critics and the defenders of *Citizens United* again resemble the blind men describing the elephant. The critics fail to see the legitimate interests of the human beings behind the corporate veil while the defenders fail to see the ways in which the people behind this veil can use the corporate form to evade appropriate regulation. Once more, both sides have been wrong, and both have been right.

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257. See, e.g., 52 U.S.C.A. § 30104(b)(3) (West 2014).

258. See 52 U.S.C.A. § 30121 (West 2014).

259. See *supra* note 146 and accompanying text. See generally Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337 (2011).

260. Kim Jong-un could not himself participate in the “decision making process” that produced the corporation's political expenditures. See 11 C.F.R. § 110.20(i) (2005).

261. Although *Citizens United* did not discuss using corporations to circumvent the BCRA's base limits, it did note the possibility of circumventing the BCRA's prohibition of contributions by foreign nationals:

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominantly by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.

*Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (internal citations omitted). The Court did not explain its apparent assumption that only corporations created in foreign countries or funded predominantly by foreign shareholders pose a risk of circumvention. If the Court would uphold § 441b's application to corporations funded in part by foreign shareholders, few if any publically traded corporations could make electoral expenditures.

## V. A FRAMEWORK FOR ANALYZING THE CONSTITUTIONALITY OF CAMPAIGN-FINANCE REGULATIONS

### A. *John Hart Ely's Variation on a Theme by O'Brien*

This Article has maintained that campaign contributions and expenditures combine valued speech and corrupting gifts in a single package. The Supreme Court's leading decision on hybrids of protected speech and unprotected conduct is *United States v. O'Brien*,<sup>262</sup> in which the Court upheld the convictions of war protestors for destroying their draft cards.<sup>263</sup> It said:

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; 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.<sup>264</sup>

As John Hart Ely observed, the distinction between speech and conduct does not fully capture what made *O'Brien* distinct from most other First Amendment cases.<sup>265</sup> Arguments for limiting speech usually focus on the message a speaker delivers. They maintain that this message deceives, defames, persuades listeners to harm others, prompts violent retaliation, offends unwilling audiences, injures some audiences (particularly children), or generates long-range cultural harm.

The First Amendment creates strong barriers to limiting speech because its message offends or injures. When the harm produced by speech does not proceed from its message, however, Ely maintained that a strong presumption against regulation is inappropriate.<sup>266</sup> The important distinction is not between speech and conduct but between

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262. 391 U.S. 367 (1968).

263. *Id.* at 385–86.

264. *Id.* at 376–77.

265. See John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1491–1502 (1975). Accord LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 829–30 (2d ed. 1988); Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 242 (1978).

266. See Ely, *supra* note 265, at 1488 n.26.

harms produced by a speaker's message and harms that do not proceed from this message. The Supreme Court came closer to the mark when it spoke of a "governmental interest . . . unrelated to the suppression of free expression"<sup>267</sup> than when it spoke of conduct that combines "speech" and "nonspeech" elements.<sup>268</sup> The corrupting influence of campaign funds on a candidate does not depend on the message these funds send the public.<sup>269</sup>

### B. *Can Campaign Speeches Be Hybrids Too?*

As this Article has noted, conflicts of interest are ubiquitous. Conflicts can arise from any favor, including one that takes the form of verbal speech. A president's campaign appearances with a candidate, for example, might create a stronger sense of indebtedness than a \$50,000 contribution to the candidate's campaign.

Although speeches endorsing a candidate can combine protected speech to the public with unprotected clout-seeking, endorsement speeches merit categorical protection.<sup>270</sup> These speeches differ from campaign contributions and expenditures in several ways, and when balancing could not justify restriction, there is no reason to balance.

First, forbidding an endorsement speech would require someone who favors a candidate to keep his thoughts secret and would deprive the public of important information.<sup>271</sup> Campaign-finance regulation does not require anyone to conceal his thoughts or suppress relevant information.

267. *O'Brien*, 391 U.S. at 377.

268. *Id.* at 376.

269. Of course campaign contributions would have no value to a candidate if the messages they sent could not persuade a larger audience. That proposition would be true even of contributions given in return for explicit promises of favorable government action—contributions that could lead to 15-year sentences for bribery. *See* 18 U.S.C. § 201(c) (2012); *McCormick v. United States*, 500 U.S. 257 (1991). Hardly anyone would argue that the harm worked by a bribe given in the form of a campaign contribution proceeds from or has anything to do with the message to the public the bribe may be used to send.

270. The Supreme Court, however, has upheld a restriction of purely verbal political speech simply because this speech might prompt the sort of favoritism that campaign contributions generate. In *United Public Workers of Am. v. Mitchell*, 330 U.S. 75 (1947), the Court upheld a provision of the Hatch Act that bars executive branch employees other than the President and other high-level officials from engaging in partisan political activity. *Id.* at 103. The challengers of this provision argued that the justifications offered for it did not extend to a federal employee who worked as a roller in the mint and neither interacted with the public nor determined policy. *See id.* at 101. The Court replied, "[I]f in free time he is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors." *Id.*

271. An endorsement speech supplies information about the speaker's state of mind. Only the person who makes the endorsement can supply the information it provides.

Second, the only way to block the conflicts of interest created by endorsement speeches is to forbid them. The conflicts created by campaign contributions and expenditures can be controlled simply by limiting contributions and expenditures to reasonable amounts. Outlawing them altogether would be unconstitutional.

Third, even on the implausible assumption that some conflicts of interest could justify forbidding endorsement speeches, no legislator or judge could be trusted to determine which speeches pose a sufficient danger. With campaign contributions and expenditures, no ad hoc evaluation is necessary. Lawgivers can use the metric provided by money to mark the point at which the likelihood of serious conflicts justifies limiting speech. They can draw a bright, workable line to separate the contributions and expenditures that merit protection from those that do not.

Finally, the sense that gifts of money are more corrupting than other favors seems pervasive. This sentiment may inform both the bumper-sticker declaration that money is not speech and the Supreme Court's judgment that the First Amendment protects campaign contributions less than other speech.

The law of bribery in fact distinguishes payments of cash (and of goods and services with ascertainable market value) from non-monetizable personal and political favors. Offering cash to a legislator for his vote is bribery, and so is offering him free yard service for a year. But logrolling—offering to support a proposed bridge in exchange for a legislator's support of widget subsidies—is not bribery. The statement, “I'll contribute to your campaign if you agree to support widget subsidies,” is likely to send the speaker to prison.<sup>272</sup> No one, however, has gone to prison for saying, “I'll make public speeches on your behalf if you agree to support widget subsidies.”<sup>273</sup>

### C. *How Deeply Did Buckley Bury O'Brien?*

When the D.C. Circuit decided *Buckley v. Valeo*, it declared that *O'Brien* provided “the pertinent standard” for reviewing campaign-

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272. See *McCormick*, 500 U.S. at 274. The supposed bribe that led to the imprisonment of Don Siegelman, a former governor of Alabama now serving a 6½-year prison term, consisted of a contribution to a group supporting a referendum he favored. Possibly pursuant to an understanding that preceded the contribution, the governor appointed the contributor to a state board. See *United States v. Siegelman*, 640 F.3d 1159, 1164–66 (11th Cir. 2011); *Former Alabama Governor Going Back to Prison for Bribery*, FOX NEWS (Aug. 3, 2012), <http://www.foxnews.com/politics/2012/08/03/former-alabama-governor-going-back-to-prison-for-bribery/>.

273. Cf. *United States v. Singleton*, 165 F.3d 1297, 1299, 1301–02 (10th Cir. 1999) (en banc) (holding that a prosecutor did not violate a federal bribery statute by offering leniency to a criminal defendant in return for his testimony against an alleged coconspirator).



finance regulations.<sup>274</sup> The Supreme Court, however, reversed the D.C. Circuit and declared this standard inapplicable.

The D.C. Circuit offered, and the Supreme Court considered, only one argument for applying *O'Brien*—“that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”<sup>275</sup> As the Supreme Court noted, this argument would have made *O'Brien* the relevant standard for judging a limitation of the funds that may be used to publish a newspaper. It would have afforded less protection to the spending needed to bring speech to an audience than to the speech itself.

The Court failed to notice that campaign contributions and expenditures differ from the funds used to publish a newspaper. As this Article has observed more than a few times, these contributions and expenditures affect two audiences in two different ways, one of them beneficial and protected by the First Amendment and the other harmful and unprotected. *Buckley* should not be read as rejecting an argument the Court did not consider.

I am not fond of the *O'Brien* standard. Just as some of the language of *Citizens United* might lead the Supreme Court to protect \$10 million contributions,<sup>276</sup> some of *O'Brien*'s language might allow legislatures to prohibit \$200 contributions.<sup>277</sup> When speech is combined with conduct (or, better, when it produces harms unrelated to the message it sends), an open, untilted balance would be better. Nevertheless, courts should

274. See *Buckley v. Valeo*, 519 F.2d 821, 840 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

275. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam).

276. See *supra* text accompanying notes 204–09.

277. The *O'Brien* standard has four parts. See 391 U.S. at 376–77.

First, a regulation of speech–conduct must be “within the constitutional power of government.” Of course all legislation must be within the constitutional power of government. Whether a regulation falls within the limited powers granted the federal government is a different question from whether it violates the First Amendment. This portion of the test has no purpose except to sound grand.

Second, the regulation must “further[] an important or substantial governmental interest.” Prohibiting a \$200 campaign contribution does further a substantial governmental interest—the same interest that has led federal and state governments to prohibit \$200 gratuities to public officials.

Third, the government interest must be “unrelated to the suppression of free expression.” As argued in the text, it is.

Fourth, the “incidental restriction on alleged First Amendment freedoms” must be “no greater than is essential to the furtherance of [the government’s] interest.” The only way to eliminate conflicts of interest is to forbid conflicts of interest.

Perhaps the *O'Brien* standard is flexible enough that a court could apply it differently. Especially as applied to campaign-finance regulation, however, this test seems insufficiently protective of expression.

recognize that large political contributions do combine speech with conduct or, in the better language proposed by John Hart Ely, that the harm these contributions produce is unrelated to the message they deliver.<sup>278</sup>

*O'Brien* holds that acts combining “speech” and “nonspeech” elements are subject to restriction upon a showing of “an important or substantial governmental interest.”<sup>279</sup> Under *Buckley*, the standard of justification for restricting campaign contributions is similar—a “sufficiently important interest.”<sup>280</sup> Recognizing the relevance of *O'Brien* would be unlikely to affect the Supreme Court’s analysis of campaign contributions, but it might alter the Court’s analysis of independent electoral expenditures.

This Article focuses on contributions. It proposes no restriction of independent expenditures. The remainder of this Article will consider only how best to apply the Supreme Court’s current standards.

## VI. A PROPOSED SCHEME OF CAMPAIGN-FINANCE REGULATION

This Part suggests a scheme for limiting political contributions that would comply with *Citizens United* and the Supreme Court’s other campaign-finance decisions. Although the prospect of enacting this scheme in the foreseeable future is no doubt miniscule,<sup>281</sup> exploring its virtues, defects, and limitations may clarify a number of regulatory and constitutional issues. The proposed scheme would block the circumvention of contribution limits, but only by imposing burdensome accounting requirements. The challenges of implementing this scheme do not seem insuperable, but they might lead one to favor less precise and less speech-protective anti-circumvention measures, including the unqualified prohibition of electoral contributions and expenditures by unions, incorporated businesses, unincorporated businesses, churches, and other groups.

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278. As *Buckley* noted, one harm allegedly produced by large campaign contributions—the distortion of election results—may not be independent of the messages the contributions deliver. *Buckley*, 424 U.S. at 17. With that possible harm set aside, however, the justification for limiting contributions does not focus on the messages they deliver.

279. See *O'Brien*, 391 U.S. at 376–77.

280. See *Buckley*, 424 U.S. at 25.

281. Today’s polarized and largely immobilized Congress seems unwilling or unable to do much to improve America’s campaign-finance system. The Supreme Court’s campaign-finance decisions pose no obstacle, for example, to ending the ability of donors to conceal their identities by routing political contributions through § 501(c)(4) groups. See *infra* note 316. But Congress seems no more likely to block the evasion of the BCRA’s disclosure requirements than it does to abolish these requirements. The status quo seems both incoherent and frozen.

### A. Tracking Individual Contributions

According to *Buckley*, a constitutional regime of campaign-finance regulation may not restrict independent expenditures by either individuals or groups. According to *Citizens United*, such a regime may not limit expenditures on the basis of corporate identity. According to *McCutcheon*, aggregate contribution limits are generally impermissible; an individual must be allowed to contribute the maximum amount to every candidate in every race.

Nevertheless, the Supreme Court has repeatedly upheld limits on what an individual may contribute to particular candidates, and it has held that measures necessary to enforce these limits are valid as well. Justice Thomas would overrule these precedents, but, in *McCutcheon*, every other Justice proceeded on the assumption that base contribution limits and suitably tailored anti-circumvention measures remain valid.

Campaign-finance regulations consistent with these principles would allow individuals and groups to make independent expenditures without restriction. These regulations, however, might limit the amount an individual could contribute to any entity in order to influence the outcome of a single election.<sup>282</sup> Within this limit, the regulations might allow an individual to allocate his contributions as he liked among whatever groups he liked—campaign committees, party committees, PACs, super PACs, non-profit corporations, for-profit corporations, partnerships, unions, and even biker gangs and churches.

An organization's ability to accept contributions and make electoral expenditures would be subject to one limitation. It would be required to provide an accounting of which individuals had provided the funds it spent and how the funds each individual contributed had been allocated to particular races.

An individual could authorize as many organizations as he liked to spend his funds, but he could not authorize them to spend more together to influence any race than the law allowed. His failure to limit the use of his funds to comply with contribution limits would be subject to sanction, and so would an organization's failure to observe limits it had accepted on the use of a contributor's funds.

People whose total contributions would not exceed the limit for a single race (most people) would have no difficulty allocating their contributions among as many organizations as they liked. Their contributions could be unrestricted. Moreover, a wealthy donor who wished to contribute the maximum amount to, say, every Democratic candidate for federal office could do so, either by contributing this

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282. Unlike current election law, which limits the amount an individual may contribute to a group engaged in electioneering, the proposal would limit what an individual may contribute to influence the outcome of a particular election.

amount to every candidate himself or by making a large contribution to a party organization that would allocate his funds.<sup>283</sup>

Other wealthy donors might make more elaborate arrangements. A donor, for example, might contribute the maximum amount to the candidates he most wished to support and then make an additional contribution to a party committee or other political group with instructions to use his funds to support any candidates other than those to whom he had already given. Or he might contribute to two political groups with instructions to each of them not to use his funds to give to any single candidate more than 50% of the maximum an individual might contribute. Conceivably he might instruct a group not to allocate any of his funds to a candidate without checking the public record of his contributions to be sure that this group's allocation would not send his contributions beyond the limit when added to the allocations already made by other groups.<sup>284</sup> A computer could flag unlawful allocations and contributions.

Although the proposed scheme would not have been feasible prior to the computer era, it seems feasible today. Nevertheless, this scheme does pose administrative difficulties. The following Sections will discuss some of these difficulties as well as the need to exempt some communications and expenditures from the proposed regulations.

### B. *Tracking the Money Coming In*

Many organizations cannot trace expenditures from their general treasuries to particular funding sources. The ownership of a publically traded corporation, for example, changes day by day, and many of its shareholders are likely to be collective entities themselves. Moreover, if a publically traded corporation could determine which individuals owned it at the moment it made a particular electoral expenditure, it undoubtedly would find that some of these people had contributed the maximum amount to whatever candidate it supported.

Should the managers of an organization like the Jeckyll Corporation be allowed to find shareholders who have not contributed to Senator Claghorn's campaign and, with their permission, allocate the

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283. *McCutcheon* rejected the argument that a multi-million-dollar contribution to a party organization or other group supporting multiple candidates itself poses a danger of quid pro quo corruption. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014). The plurality called this argument a "new rationale" for aggregate limits and said that it "dangerously broadens the circumscribed definition of *quid pro quo* corruption articulated in our prior cases." *Id.* at 1460.

284. The feasibility of this arrangement would depend on whether expenditures could be reported when they were made rather than at the conclusion of a reporting period. There is no apparent reason why a group making expenditures could not update the public record at the same time it updated its own. The public record then would provide a running tally of an individual's contributions to particular candidates. See 52 U.S.C.A. § 30104(a)(12)(A) (West 2014) (contemplating a computerized tally for contributions made directly to candidate committees).

corporation's expenditure on the senator's behalf to their allowances? The difficulty is that the corporation's expenditure would not reduce these shareholders' wealth by the amount of their supposed contribution. This expenditure would instead diminish the value of every share of the corporation—probably by a trivial amount.<sup>285</sup> The corporation's expenditure on Senator Claghorn's behalf would proceed from all of its owners, many of whom might have reached their contribution limits.

When the accounting required by the proposed scheme would disable an organization from making electoral expenditures from its general treasury, it could establish a separate political action committee to receive, spend, and account for individual contributions. An organization could pay the administrative expenses of its PAC and could control this PAC's expenditures and contributions.

Proposing the use of PACs may sound both familiar and unpromising. *Citizens United* held that the ability of corporations to establish PACs did not justify Congress's prohibition of corporate speech. The Court noted that a PAC is distinct from its creator and added, "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."<sup>286</sup> The Court recited many of the regulations applicable to PACs without indicating what, if any, purpose they might serve.<sup>287</sup>

The scheme proposed by this Article, however, differs from the one struck down in *Citizens United*. It would not prohibit speech on the basis of corporate identity. Any corporation that could comply with the scheme's accounting requirements could make political expenditures from its treasury, and some business corporations (those that could in fact attribute expenditures to individual owners) might do so. In addition, most of the political organizations that tracked individual contributions undoubtedly would be organized as corporations.

Moreover, the burdens imposed by this scheme's accounting requirements would serve a clear and important purpose. They would provide a more straightforward anti-circumvention mechanism than the aggregate limits struck down in *McCutcheon*. These accounting requirements would, in fact, constitute the less restrictive alternative

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285. Of course, if Senator Claghorn were to win reelection and then vote for widget subsidies, the investment in his reelection might prove profitable—just as a contribution by an individual donor might prove profitable. The ultimate profitability or unprofitability of a contribution—whether the contribution ultimately turns out to be funded by us taxpayers—does not bear on who made it for purposes of election law. A contribution from the general treasury of a corporation should be seen as proceeding in proportional shares from each of the corporation's human owners.

286. *Citizens United v. FEC*, 558 U.S. 310, 337 (2010).

287. *Id.* at 337–39.

*McCutcheon* demanded. No more direct way of forbidding the circumvention of contribution limits can be imagined than forbidding the circumvention of contribution limits. A court could not strike down the proposed tracking requirements without abandoning the idea of enforceable contribution limits and without overruling decades of precedent.

Although *Citizens United* permitted large corporations to make independent electoral expenditures from their general treasuries, they have shown no interest in doing so.<sup>288</sup> The fact that this Article's proposal would effectively require these corporations (along with churches and many other organizations that cannot trace expenditures to particular funding sources) to use separate PACs would not change much, but it might reassure *Citizens United*'s critics.

The proposed scheme might reassure these critics in other ways as well. It would bring the demise of the alter-ego super PAC—a PAC formed simply to further a single candidacy. Such a PAC serves no purpose other than facilitating the evasion of contribution limits. Were these limits enforced, almost every donor would prefer to make his donation directly to a candidate. Similarly, the scheme would bring an end to the shadow-party super PAC (a PAC formed to further the interests of a particular party). Again almost everyone would prefer to make his contribution to the real thing.

PACs furthering special interests like the Widget Rights Victory Fund would persist, but they would no longer enable a few wealthy people to pour millions of dollars into particular races. A special interest PAC could swamp its opposition in a particular race only if it received support from a large number of donors.

While allaying the concerns of *Citizens United*'s critics, this proposal would satisfy all of the constitutional requirements articulated by the Supreme Court. Individuals would be allowed to make unlimited electoral expenditures,<sup>289</sup> and group expenditures also would be unrestricted. As long as a group provided assurance that individual donors had adhered to their own limits, it could spend as much as it could collect. The proposal would not restrict speech on the basis of corporate identity, and it would not impose an aggregate limit on contributions. Anyone with sufficient wealth could contribute the maximum amount to every candidate.

### C. Tracking the Money Going Out

Under this proposal, a group that distributed an electoral communication urging voters to support multiple candidates in multiple

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288. See *supra* text accompanying note 147.

289. For a discussion of whether these expenditures would greatly reduce the value of the scheme, see *infra* Subsection VI.E.2.b.

votes (“vote Republican” or “support these pro-widget candidates”) would be required to apportion the cost of producing and distributing this communication among the candidates. If the communication featured some candidates more prominently than others, the group might be required to apportion costs on the basis of the airtime or print space allocated to each.

Apportioning a group’s general administrative expenses among the candidates it supported (and between the group’s electoral and nonelectoral activities) also might be necessary,<sup>290</sup> but the effectiveness of the scheme would not be greatly diminished if these expenses were simply exempted from contribution limits and tracking requirements.

#### D. Exemptions

The proposed regime of campaign-finance regulation would be unconstitutional without at least one exemption. Its restrictions should not apply to the funds used to produce and disseminate “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication.”<sup>291</sup> A newspaper publisher should be allowed to print an editorial endorsing a candidate without supplying an account of how much the publication cost and what each of the newspaper’s shareholders had contributed to this expenditure.

The exemption of the institutional press from campaign-finance regulations would not rest on an interpretation of the First Amendment that afforded the press special privileges. It would rest instead on the factual differences between editorial endorsements and the electoral communications that warrant restriction.<sup>292</sup>

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290. The proration of general administrative expenses seems feasible. See *Carey v. FEC*, 791 F. Supp. 2d 121, 136 (D.D.C. 2011) (holding that a single group may operate as both a conventional PAC and a super PAC if it segregates the funds it uses for contributions to candidates from those it uses to place advertisements of its own and if it apportions administrative expenses between these two activities).

291. The suggested language comes from a statutory exemption to the regulations that *Citizens United* struck down. 52 U.S.C.A. § 30101(9)(B)(i) (West 2014). A publication owned or controlled by a political party, PAC, or candidate was not entitled to this exemption. *Id.*

292. Michael McConnell’s recent defense of the result in *Citizens United* consisted of two propositions: (1) The First Amendment affords a newspaper publisher the right to print an editorial endorsing a candidate; and (2) the First Amendment affords no greater right to the newspaper publisher than to the rest of us, including the plaintiff in *Citizens United*. McConnell, *supra* note 36, at 446. The *Citizens United* dissenters briefly questioned the second proposition. They wrote that when corporations “are part of the press,” they may be entitled to “special First Amendment status.” *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., dissenting). The majority responded, “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” *Id.* at 352 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)) (internal quotation marks omitted).

McConnell and the *Citizens United* majority had the better of this argument. The First Amendment affords all of us the right to speak and publish. It does not give the press special

Although electoral advocacy is what campaign committees and super PACs do, it is a small part of what most regularly published newspapers and television stations do. Because electoral advocacy is central to the mission of campaign committees and super PACs, wealthy people contribute to these organizations in the hope of gaining influence over elected officials. Wealthy people may sometimes buy newspapers or television stations to further their political agendas, but they rarely do so in order to gain clout by benefiting specific officials.

Moreover, newspaper endorsements generally evaluate a candidate's positions on many issues. They usually are unaccompanied by an indication of a personal or organizational interest they hope the favored candidate will support. A newspaper publisher is unlikely to follow an editorial endorsement with a request for a meeting so that it can urge the candidate it endorsed to take an action it favors. The publisher is also unlikely to hire a lobbyist. A newspaper's endorsement differs greatly in both purpose and effect from the advertisements placed by campaign committees and super PACs.

Feature films, books, and monographs (defined, perhaps, as written communications of more than 10,000 words or spoken and film communications of longer than one hour) also might be exempted from campaign-finance regulations. During the initial argument of *Citizens United*, a Deputy Solicitor General responded to questions from the bench by saying that a corporation could be prohibited from publishing a book if the book's last sentence endorsed a candidate.<sup>293</sup> This answer did not advance his cause.<sup>294</sup>

Even without an exemption for books, films, and monographs, the regulatory scheme proposed in this Article would not prohibit anyone from publishing anything. It would merely limit how much an individual could contribute to a group for the purpose of publishing books and other things that qualified as electoral communications.

There would be almost as little reason, however, to restrict the financing of books, feature films, and monographs as there is to restrict the publication of newspapers. The suggested scheme would remain effective if it reached only more familiar sorts of campaign

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privileges. *See Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (“The liberty of the press is not confined to newspapers and periodicals. . . . [It] comprehends every sort of publication which affords a vehicle of information and opinion.”); *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) (“[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as utter it.”).

All speech, however, is subject to restriction when it poses a sufficient danger of corrupting public officials. Large contributions to candidates and super PACs pose a sufficient danger; newspaper editorials do not.

293. Toobin, *supra* note 99.

294. *See id.* (describing counsel's argument as “an epic disaster”).



communications—broadcast and print advertisements, billboards and other signs, direct mailings, and pamphlets or recordings distributed on the street or door-to-door. Books, films, and monographs ordinarily are distributed to purchasers or others who have indicated an interest in receiving their messages. Because effective electioneering requires reaching less involved audiences, political campaigns rely almost entirely on other media.<sup>295</sup>

### E. *Independent Expenditures*

Daniel Ortiz has observed that the “distinction between contributions and independent expenditures [is the] most troubling [and most] often criticized” aspect of the Supreme Court’s campaign-finance jurisprudence.<sup>296</sup> Michael McConnell has commented that this distinction “pleases no one.”<sup>297</sup> Six Justices of the Supreme Court would in fact abandon the distinction. The distinction persists only because three of these Justices would abolish it by increasing the protections afforded contributions while three would abolish it by reducing the protections afforded expenditures.<sup>298</sup>

Although the Supreme Court’s arguments for distinguishing contributions from expenditures may not convince many,<sup>299</sup> the distinction expresses the common intuition that writing a check is less worthy of protection than actually speaking.<sup>300</sup> It also highlights in a rough way where serious conflicts of interest are likely to arise. It is the check-writers, not the speakers or the spenders, who may have given America its intricate tax code, its sugar subsidies, its armaments approved by Congress despite opposition by the Pentagon, and a public health care system shaped to accommodate the interests of pharmaceutical and insurance companies as well as the public.<sup>301</sup>

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295. Other exemptions from the scheme might be designed to reduce its administrative burdens. For example, a group whose treasury included individual membership dues of no more than, say, \$75 per year should not be required to include these dues in its account of individual contributions.

296. Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1223 (1999).

297. McConnell, *supra* note 36, at 451.

298. McConnell makes this point. He cites *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 409–10 (2000) (Kennedy, J., dissenting); *id.* at 410 (Thomas & Scalia, JJ., dissenting); and *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491–92 (2012) (Breyer, Ginsburg, Sotomayor, & Kagan, JJ., dissenting). See McConnell, *supra* note 36, at 456 & nn. 184 & 185.

299. See *infra* Subsection VI.E.1 (reviewing these arguments and noting that all but one of them apply to super PAC contributions in the same way they apply to contributions to a candidate’s own campaign organization).

300. See *supra* Subsection IV.A.1.

301. The political operatives who collect and spend donated funds rarely seek more for themselves than new political jobs.

This Section will consider how to draw the line between contributions and expenditures. It then will consider whether independent expenditures would seriously diminish the effectiveness of the proposed regulatory scheme.

### 1. Drawing the Line

The distinction between contributions and expenditures rests on the premise that financing speech differs from speaking. The financing may be restricted even when the speech may not. When Person A writes a check and Person B determines what speech the check will finance, Person A's activity may be limited, but Person B's may not. As the plurality opinion observed in *California Medical Association v. FEC*,<sup>302</sup> “[S]peech by proxy” . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.”<sup>303</sup>

The Supreme Court has not indicated how much separation between financier and speaker is necessary before the financier's activity may be restricted. Under *Buckley*'s analysis, a wealthy person's purchase of space in a newspaper to publish his own list of reasons for supporting a candidate would be a paradigmatic independent expenditure and would be fully protected by the First Amendment.<sup>304</sup> Moreover, his expenditure would remain independent and protected if other people joined him in composing the list and buying the space. Something more than writing a check to a group is required, however, and the “something more” probably cannot be merely symbolic (something like filling out a questionnaire that super PAC managers might or might not take into account). When “the transformation of contributions into political debate involves speech by someone other than the contributor,” *Buckley* indicates the contributions may be limited.<sup>305</sup>

Assessing the degree of separation between speaker and financier on a highly fact-specific basis would be impractical. A wealthy person might pay a veteran campaign operative to write and place advertisements supporting a candidate and might give this person funds to spend as he chose. If the financier did not supervise the work of this operative at all, he would look like a contributor rather than a speaker. He would have funded “speech by someone other than” himself. If, however, the campaign veteran served only as an advisor to the wealthy person, the wealthy person's expenditures would remain independent. Drawing the line between contribution and expenditure by determining which person was the “real” speaker does not seem feasible.

A more workable system would resolve the separation issue formally.

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302. 453 U.S. 182 (1981) (plurality opinion).

303. *Id.* at 196.

304. *See Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam).

305. *See id.*

Under this regime, any use of a person or legal entity other than the financier himself to make an expenditure would put his spending in the “contribution” rather than the “expenditure” category. If the financier ultimately made the expenditures himself, he could hire as many people as he liked to help him prepare and disseminate his messages. The financier, however, would be required to take public responsibility for these messages: “I’m Pierpont Mogul, and I approved this message.”<sup>306</sup>

## 2. How Big Is the Loophole?

### a. Groups

If the amount individuals could contribute to organizations to influence the outcome of particular elections were effectively limited, capping expenditures by the organizations themselves would serve no important purpose. Even if it did not accept any contributions at all, the National Widget Association or its PAC could advise members to include reminders of their association membership when they sent their individual checks to candidates. It also could advise them where their contributions would be most likely to advance the cause of widget rights. Regulations forbidding the Association to accept, bundle, and spend its members’ contributions would merely make members who sought to coordinate their contributions less efficient in doing so.

Limiting the Widget Association’s expenditures, moreover, would not notably impede its members’ ability to coordinate their contributions. It simply would lead to the formation of a second PAC to receive and spend the contributions the first PAC could not spend. Little would be gained by mandating the formation of two groups, the National Widget Association Political Action Committee and the Widget Rights Victory Fund.

### b. Individuals

Dissenting in *FEC v. National Conservative Political Action Committee*<sup>307</sup> eight years after *Buckley*, Justice Marshall confessed that he had erred in *Buckley* when he endorsed the distinction between contributions and expenditures. He wrote:

It does not take great imagination . . . to see that, when the possibility for direct financial assistance is severely limited, as it is in light of *Buckley*’s decision to uphold the

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306. See *id.* at 68 (upholding disclosure requirements); *Citizens United v. FEC*, 358 U.S. 310, 366–77 (2010) (same). Nothing would prevent a financier from acting jointly with others, but each of the joint actors would be required to take responsibility as an individual for the group’s message. If these actors were to form a distinct legal entity to make their expenditures, they would all become contributors, and their contributions would be subject to reasonable limitations.

307. 470 U.S. 480 (1985).

contribution limitation, . . . an individual [seeking favor] will find other ways to financially benefit the candidate's campaign. It simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available.<sup>308</sup>

The Supreme Court later observed in *McConnell v. FEC*, “Money, like water, will always find an outlet.”<sup>309</sup>

Experience, however, has not validated the hydraulic hypothesis.<sup>310</sup> Justice Marshall provided no illustrations of clout-seeking individuals who had made “massive” individual expenditures to evade contribution limits, and illustrations are almost as rare today.<sup>311</sup>

Two other ways around contribution limits, both predating *Citizens United*, might have made independent expenditures by individuals unnecessary. Unlike independent expenditures, donations to 527 and 501(c)(4) groups demanded no more of a favor seeker than that he write a check.<sup>312</sup> A check to one of these groups, however, was likely to be less effective than a check to an official campaign committee in producing clout.<sup>313</sup> Before *Citizens United*, money given to either sort of group could not be used to advocate a candidate's election directly.<sup>314</sup> The group was required to cast its advocacy as commentary on a political issue,<sup>315</sup> and half of the money given to a 501(c)(4) group could

308. *Id.* at 519 (Marshall, J., dissenting).

309. 540 U.S. 93, 224 (2003).

310. *But see* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (“First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem.”).

311. Don Blankenship, the chairman and chief executive officer of the Massey Coal Company, did spend \$500,000 from his own pocket to influence the outcome of a West Virginia judicial election, but he donated five times more—\$2.5 million—to a PAC to influence the same election. *See* Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 873 (2009); *infra* text accompanying notes 400–404. I am unaware of anyone other than Blankenship who has made a \$500,000 independent expenditure to support a candidacy other than his own, and a candidate who uses his own wealth to advance his campaign does not corrupt himself. *See* Buckley v. Valeo, 424 U.S. 1, 54 (1976) (per curiam) (striking down a statutory limit on independent expenditures by candidates).

312. *See* 26 U.S.C. §§ 527, 501(c)(4) (2012).

313. It was also likely to be less effective in persuading the public.

314. *See, e.g.*, Cory G. Kalanick, Note, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform*, 95 MINN. L. REV. 2254, 2263–64 (2011).

315. During John Kerry's 2004 presidential campaign, Swift Boat Veterans for Truth registered as a 527 group. The FEC later concluded, however, that it did not qualify and had violated election laws by failing to observe contribution limits. *See* Press Release, Federal Election Commission, FEC Collects \$630,000 in Civil Penalties from Three 527 Organizations (Dec. 16, 2006), available at <http://www.fec.gov/press/press2006/20061213murs.html>. Today,

not be used even for issue advertisements if they were intended to influence an election.<sup>316</sup>

*Citizens United* and *SpeechNow* cast aside the limitations of earlier work-arounds. These decisions together created a new way of evading contribution limits that did not differ much from blowing up the limits altogether. And after *SpeechNow* came the deluge.

The enormous increase in large individual contributions that followed *SpeechNow* revealed that campaign-finance law makes a difference.<sup>317</sup> The amount of political money devoted to influence buying is not fixed. Some loopholes are larger than others. Before *Citizens United* and *SpeechNow*, some cynics pointed to leakage and called the dam useless. They were proven to have exaggerated when *SpeechNow* demolished the dam.

Independent expenditures are a particularly unlikely and unattractive work-around. Even someone willing to write a \$10 million check to a super PAC probably would balk when invited to support a campaign by using the same funds to hire and manage a satellite campaign staff of his own and by taking personal responsibility for the messages it sent. If (remarkably) this financier did agree to make independent personal expenditures on behalf of a candidate, one of the dubious things *Buckley* said about these expenditures might become true: “Unlike contributions, . . . independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”<sup>318</sup> Although independent expenditures provide a

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following *Citizens United* and *SpeechNow*, there are no limits. A group like Swift Boat Veterans for Truth would have no reason to mask its electoral purpose even slightly.

316. Section 501(c)(4) or “dark money” groups are tax-exempt organizations whose earnings are devoted to charitable, educational, or recreational purposes. See 26 U.S.C. § 501(c)(4) (2012). The Internal Revenue Service has ruled that these groups “may intervene in political campaigns as long as [their] primary activity is the promotion of social welfare.” IRM 7.25.4.7 (Feb. 8, 1999). Like the super PACs that devote all of their efforts and funds to campaigning, 501(c)(4) groups may operate as “independent expenditure groups.” See ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL7-500, 501(C)(4)S AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 12–13 (2013), available at <http://fas.org/sgp/crs/misc/R40183.pdf>. When they do, *SpeechNow* allows them to collect and spend unlimited amounts supporting and opposing candidates. See *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). Unlike PACs and 527 groups, 501(c)(4) groups need not report publically the identity of their contributors. See James A. Kahl, *Citizens United, Super PACs, and Corporate Spending on Political Campaigns: How Did We Get Here and Where Are We Going?*, FED. LAW., June 2012, at 40, 44; *Outside Spending: Frequently Asked Questions About 501(c)(4) Groups*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/faq.php> (last visited Feb. 3, 2015).

317. See *supra* Part III.

318. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam). Living rooms in battleground states might resound with the voices of Sheldon Adelson, Charles and David Koch (in unison), and George Soros noting their approval of political advertisements.

path around individual contribution limits, few contributors would be likely to take it.

## VII. CONCEPTS OF CORRUPTION<sup>319</sup>

### A. *Two-Part Typologies*

In *Citizens United*, the Supreme Court noted that *Buckley v. Valeo* had treated only one interest as “sufficiently important” to justify a restriction of campaign contributions—“the prevention of corruption and the appearance of corruption.”<sup>320</sup> The Court added, “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>321</sup>

The Court explained what *quid pro quo* corruption is not: “Ingratiation and access . . . are not corruption,”<sup>322</sup> and “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”<sup>323</sup> The Court also offered a positive definition: “The practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved.”<sup>324</sup> This statement indicated that *quid pro quo* corruption meant bribery and nothing else.

Corruption in its classic sense describes something that has become impure or perverted. When people speak of corrupted computer files and corrupted chemical solutions, for example, they do not mean that the computer files and chemical solutions take bribes.

Plato, Aristotle, and other ancient philosophers spoke of corrupted government in a similar way. Corruption meant departure from an imagined state of perfection. Corruption was a matter of degree, and

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319. The Supreme Court allows limitations of speech in order to reduce either corruption or the appearance of corruption, and the word “appearance” has myriad meanings. See Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1573 (2012). Presumably the appearance of corruption is not “anything that smells a bit like corruption”; it is instead “something that is believed or suspected to be corruption.” Moreover, the corruption that is suspected must be of the kind that justifies regulation, and an unreasonable belief or suspicion in the existence of this corruption probably cannot justify limiting speech. The appropriate remedy for an unfounded belief is usually “more speech.” Thus the “appearance of corruption” probably means “something that is reasonably believed or suspected to be corruption of the sort that justifies regulation” or “something that might in fact be corruption of the sort that justifies regulation.”

320. *Citizens United v. FEC*, 558 U.S. 310, 345 (2010) (quoting *Buckley*, 424 U.S. at 25) (internal quotation marks omitted).

321. *Id.* at 359.

322. *Id.* at 360.

323. *Id.* at 359.

324. *Id.* at 356 (citation to 18 U.S.C. § 201, a federal bribery statute, omitted).

every real-world government was to some degree corrupt.<sup>325</sup> Aristotle described the most common type of corruption: “The true forms of government . . . are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest . . . are perversions.”<sup>326</sup> On the assumption that a public official’s duty is to advance the public good,<sup>327</sup> everything that diverts him from serving the public—every conflict of interest—corrupts.

As Zephyr Teachout has shown, the Framers of the Constitution often used the word “corruption” in its classic sense.<sup>328</sup> They regarded limiting the corruption that arises from the private interests of both elected officials and the voters who choose them as one of their central missions.<sup>329</sup>

Today’s dictionaries, however, do not place the classic definition first on their list. Their first definition of “corrupt” usually is: “guilty of dishonest practices, as bribery; without integrity, crooked: *a corrupt judge*.”<sup>330</sup>

Scholars like Zephyr Teachout and Lawrence Lessig have regarded the Supreme Court’s distinction between quid pro quo corruption and

325. Richard Mulgan nicely develops this point in Richard Mulgan, *Aristotle on Legality and Corruption*, in CORRUPTION 25, 31 (Manuhua Barcham, Barry Hindess & Peter Lamour, eds., 2012).

326. ARISTOTLE’S POLITICS 114 (Benjamin Jowett, trans. 1920).

327. Sadly, some political theorists dismiss Aristotle’s concept of the public good. They not only embrace pluralism as a description of how American politics operates but also romanticize group greed. An influential early work encouraging this perspective is ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908).

328. See Teachout, *supra* note 209, at 347.

329. *Id.* The Constitution structured the federal government to minimize the temptation and ability of officials to subvert the public good. See, e.g., THE FEDERALIST No. 57, at 345 (James Madison) (Isaac Kramnick ed., 1987) (declaring that “the genius of the whole system” would limit “legal discriminations in favor of . . . a particular class of the society”); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 302 (Jonathan Elliot ed., 2d ed., J.B. Lippincott Co. 1901) (remarks of Charles Pinckney) (“[C]orruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed.”).

In addition, the Constitution forbade a few specific conflicts of interest. It barred the appointment of present and former members of Congress to offices that had been created or whose compensation had been increased while they were in office, U.S. CONST., art. I, § 6, cl. 2, and it prohibited office holders from accepting gifts or titles “of any kind whatever” from kings, princes, and foreign governments without the consent of Congress. U.S. CONST., art. I, § 9, cl. 8. The foreign emoluments clause has no exception for campaign contributions.

330. THE RANDOM HOUSE COLLEGE DICTIONARY 302 (rev. ed. 1975); see also OXFORD DICTIONARIES ONLINE (U.S. ENGLISH), [http://www.oxforddictionaries.com/definition/american\\_english/corrupt](http://www.oxforddictionaries.com/definition/american_english/corrupt) (defining *corrupt* as “having or showing a willingness to act dishonestly in return for money or personal gain”); LESSIG, *supra* note 80, at 226 (“The ordinary meaning of *corruption*—at least when we’re speaking of government officials, or public institutions—is clear enough. *Corruption* means bribery.”).

all other corruption as matching roughly the distinction between dishonest-conduct corruption and classic corruption.<sup>331</sup> Further disaggregation, however, might be instructive. *Quid pro quo* corruption is less than classic corruption, but, despite a sentence in *Citizens United* that appears to say the contrary, it might encompass more than bribery.

## B. *Understanding Quid Pro Quo Corruption*

### 1. A Four-Part Typology

Consider four types of behavior that proponents of campaign-finance regulation might call corrupt: (1) the explicit exchange of favorable governmental action for campaign contributions (explicit agreement); (2) the implicit understanding that favorable action will follow contributions (implicit agreement); (3) the conscious taking of favorable action in response to contributions without any prior agreement or understanding (conscious favoritism); and (4) affording gratitude and access to contributors without consciously favoring them in making more substantial decisions (preferential access).

*Citizens United's* concept of *quid pro quo* corruption unmistakably includes explicit agreement and almost certainly includes implicit agreement as well. It unmistakably excludes preferential access. Whether it includes conscious favoritism, however, is problematic. Although the Court's signals were conflicting, this Article argues that the Court's concept of *quid pro quo* corruption should be understood to encompass this favoritism. A public official who deliberately provides a governmental benefit because he has received a private benefit should be seen as returning "this for that" (or *quid pro quo*) despite the absence of an earlier agreement to do so. Whether or not the payoff was arranged in advance, the deliberate use of public dollars to repay private favors is a kind of corruption that Congress may address through reasonable campaign-finance regulation.

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331. Lessig distinguishes dishonest-conduct corruption from what he calls "dependence corruption." LESSIG, *supra* note 80, at 17. "Dependence corruption" looks a lot like classic corruption, but it may not encompass everything that diverts public officials from advancing the public good. It may refer only to substantial conflicts of interest that create long-term dependencies. Lessig argues that the Framers of the Constitution intended elected officials to be dependent only on the people. *Id.* at 231. Today, he says, candidates must survive a money primary, and they have become dependent on a narrow class of wealthy donors as well. *Id.* at 244–45; see also Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. 1, 11 (2013); Teachout, *supra* note 209, at 388; Lawrence Lessig, "Corruption," *Originally*, TUMBLR, <http://ocorruption.tumblr.com> (last visited Feb. 3, 2015) ("A blog collecting every use of the term 'corruption' among the records of the Framers. Submitted to the Supreme Court as an appendix to an amicus brief by Lawrence Lessig for the Constitutional Accountability Center.").



## 2. Preferential Access

Selling access is not good government. Aristotle and the framers of the Constitution would not have balked at calling it corrupt. As Representative Romano Mazzoli observed, “Access is power. Access is clout.”<sup>332</sup> Campaign contributors do not seek access simply because they enjoy chatting. They seek it because it produces outcomes they like. Officials cannot be persuaded by arguments they do not hear. Moreover, it is difficult for officials to refuse the requests of people who have placed them in office. Officials may strive earnestly to benefit the public, but unconscious favoritism is still favoritism.

Affording special access to contributors is nevertheless a routine and acknowledged feature of American politics. Barack Obama wrote of the “people of means” he met at Democratic fundraisers, “As a rule, they were smart, interesting people . . . expecting nothing more than a hearing of their opinions in exchange for their checks.”<sup>333</sup> An email sent by the Mitt Romney presidential campaign declared:

The campaign is asking people who are able to make a \$50,000 contribution to do so today and become a “Founding Member” of Romney Victory. These donors will be invited to a special retreat with Governor Romney in late June in California and will have preferred status at the first Presidential Inaugural retreat as well as yet to be determined access at the Republican National Convention in Tampa in August.<sup>334</sup>

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332. *What Do Elected Officials Think About the Role of Money in Politics?*, DEMOCRACY MATTERS, <http://www.democracymatters.org/what-you-need-to-know-about-money-in-politics-2/overview/what-do-elected-officials-think-about-the-role-of-money-in-politics/> (last visited Feb. 3, 2015).

333. BARACK OBAMA, *THE AUDACITY OF HOPE* 113–14 (2006).

334. Jonathon M. Seidl, *Report: Romney Already Selling Access to “Inaugural Retreat” for \$50K*, YAHOO! NEWS (Apr. 16, 2012, 11:40 AM), <http://news.yahoo.com/report-romney-already-selling-access-inaugural-retreat-50k-154017057.html> (reprinting the email in full); see also DEMOCRACY MATTERS, *supra* note 332 (reciting public acknowledgements by Members of Congress that they afford special access to contributors).

In *United States v. Carpenter*, 961 F.2d 824 (9th Cir. 1992), the Ninth Circuit rejected the government’s claim that a state legislator violated the Hobbs Act by affording access in exchange for campaign contributions. It wrote:

[T]here are several times as many lobbyists in Sacramento as there are state legislators. Elected officials must ration their time among those who seek access to them and they commonly consider campaign contributions when deciding how to ration their time. This practice “has long been thought to be well within the law [and] in a very real sense is unavoidable.” Accordingly, we hold that granting or denying access to lobbyists based on levels of campaign contributions is not an “official act” . . . and cannot, by itself, form the basis for a charge of extortion or attempted extortion under the Hobbs Act.

One need not applaud affording special access to contributors to conclude that this practice is now ingrained and that the interest in preventing it cannot justify any limitation of political contributions and expenditures. *Citizens United*'s position on the least troubling of the four types of corruption was clear and plausible. As the *McCutcheon* plurality reiterated, “[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford.”<sup>335</sup>

### 3. Explicit and Implicit Agreement

An implicit understanding or agreement to trade campaign cash for government benefits does not constitute criminal bribery. The Supreme Court held in *McCormick v. United States*<sup>336</sup> that, unlike other payments, campaign contributions may be treated as bribes only when “the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”<sup>337</sup> Although the Eleventh Circuit has concluded (dubiously) that a later Supreme Court decision modified *McCormick*,<sup>338</sup> at least six other courts of appeals insist that an explicit agreement remains necessary.<sup>339</sup> If *Citizens United*'s statement that quid pro quo corruption means criminal bribery were to be taken literally, an implicit understanding that government favors would follow a campaign contribution would be insufficient.

The majority opinion in *Citizens United*, however, included several statements that probably should not be read literally, and the declaration that “[t]he practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved”<sup>340</sup> is one of them.

Justice Kennedy, the author of the *Citizens United* opinion, would in fact abandon *McCormick* as a measure of criminal bribery. In a concurring opinion one year after *McCormick*, he wrote that a public official and his benefactor “need not state the *quid pro quo* in express

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*Id.* at 827 (second alteration in original) (citations omitted) (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991)).

335. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

336. 500 U.S. 257 (1991).

337. *Id.* at 273.

338. See *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (discussing *Evans v. United States*, 504 U.S. 255, 258 (1992)).

339. See *United States v. Turner*, 684 F.3d 244, 253–54, 258 (1st Cir. 2012); *United States v. Abbey*, 560 F.3d 513, 516–17 (6th Cir. 2009); *United States v. Kincaid–Chauncey*, 556 F.3d 923, 936–37 (9th Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 142–43 (2d Cir. 2007); *United States v. Antico*, 275 F.3d 245, 256–57 (3d Cir. 2001); *United States v. Giles*, 246 F.3d 966, 971–72 (7th Cir. 2001).

340. *Citizens United v. FEC*, 558 U.S. 310, 356 (2010) (citation omitted).

terms, for otherwise the law's effect could be frustrated by knowing winks and nods."<sup>341</sup> It seems unlikely that *Citizens United* meant to exclude from the category of quid pro quo corruption conduct that Justice Kennedy himself would treat as felonious.

Moreover, the reasons for applying a special standard of bribery to campaign contributions do not apply to campaign-finance regulations. Whenever an elected official adheres to the positions that prompted voters and contributors to support him, he exhibits a pattern of favoritism for these supporters. This pattern may bespeak conviction, not corruption. Ambitious prosecutors and cynical jurors, however, can easily infer a corrupt agreement from the common pattern. When an official has supported widget subsidies after accepting large contributions from widget manufacturers, for example, prosecutors and jurors may infer that there must have been an implicit understanding. Allowing inferences of this sort whenever officials have acted to benefit contributors could make public life intolerable.<sup>342</sup> As Justice Kennedy's reference to winks and nods suggests, it grates that *McCormick* places a premium on indirection, but the alternative probably would be worse.

When legislatures address the risk of corruption by enacting specific ex ante regulations rather than by inviting jurors to draw ex post inferences of unspoken agreement, the concerns that justify *McCormick* disappear. In the context of ex ante regulation, it is difficult to fathom any reason for excluding wink-and-nod agreements from the concept of quid pro quo corruption, and the Supreme Court probably did not mean to exclude them.

#### 4. Conscious Favoritism

Did the Court mean to exclude conscious favoritism? Again, the statement that quid pro quo corruption means bribery suggests that it did. Conscious favoritism does not constitute bribery even when the alleged bribe consists of something other than a campaign contribution. Bribery requires at least an implicit agreement at the time the alleged bribe is received.<sup>343</sup>

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341. *Evans*, 504 U.S. at 274 (Kennedy, J., concurring).

342. See Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse* 20–21 (Chi. Pub. L. & Legal Theory, Working Paper No. 502, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2555912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555912) (suggesting that, absent *McCormick*'s narrow construction of federal bribery statutes, a prosecutor could convict Aristotle himself of violating these statutes if the incorruptible ancient philosopher were resurrected and elected Governor of New Jersey); Brief of Amici Curiae of Former Attorneys General in Support of Petitioner at 4–5, *Siegelman v. United States*, 561 U.S. 1040 (2010) (“The Eleventh Circuit’s implicit *quid pro quo* standard exposes every government official who acts to the benefit of a contributor, knowing that the contributor desired such an act to take place, to criminal prosecution.”).

343. See, e.g., *Evans*, 504 U.S. at 268 (“[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts.”).

The Court reinforced the sense that conscious favoritism was “out” when it wrote, “[F]ew if any contributions to candidates will involve *quid pro quo* arrangements.”<sup>344</sup> Favoritism, unlike bribery, requires no “arrangement” and does not appear to be rare.<sup>345</sup> The Court also spoke directly of favoritism, declaring that “[f]avoritism and influence are not . . . avoidable in representative politics” and that a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”<sup>346</sup> These statements all indicated that deliberate favoritism for donors did not constitute the kind of corruption that could justify limiting campaign contributions and expenditures.

*Citizens United* might have pointed in the other direction when it said, “If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.”<sup>347</sup> The import of this statement, however, was unclear. Did it indicate that reducing improper influence was an appropriate goal of campaign-finance regulation? Or did the Court merely say, “Be concerned about improper influence, but don’t imagine that you can do anything about it. The First Amendment as we understand it declares every cure for the favoritism produced by political contributions and expenditures worse than the disease?”<sup>348</sup> After the Court acknowledged that concern was appropriate, it said, “The remedies enacted by law . . . must comply with the First Amendment; and, it is our law and our tradition that more speech, not less is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.”<sup>349</sup>

If conscious favoritism is “out,” then not only bans of corporate speech but also all other remedies that limit contributions and

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Bribery also includes what might be called attempted agreements—solicitations by a single party and transactions in which one party merely feigns agreement. Favoritism, however, is insufficient. *See, e.g.*, 18 U.S.C. § 201(b) (2012).

344. *Citizens United*, 558 U.S. at 357.

345. *See infra* apps. B–E.

346. *Citizens United*, 558 U.S. at 359 (second and third alterations in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 296, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

347. *Id.* at 361.

348. Or perhaps: “Don’t imagine that you can do anything about it except elect saints to office.”

349. *Citizens United*, 558 U.S. at 361. Note the Court’s failure to recognize the difference between the two sorts of persuasion emphasized by this Article. “More speech” is not a plausible remedy for the favoritism that political contributions and expenditures produce, for this harm is not produced by speech. In the absence of a governmental corrective, the only plausible remedy for the purchase of favoritism with cash is *more cash*.

expenditures are impermissible. The Court's view is that only the actuality or appearance of quid pro quo corruption can justify any limitation of speech.<sup>350</sup> *Citizens United* might have disabled Congress from addressing the favoritism generated by contributions and expenditures in the only appropriate way—through specific ex ante regulation.

Definitions of bribery exclude conscious favoritism, not because the practice is legitimate, but because turning fifteen-year prison sentences on ex post assessments of motive would be frightening. Inferring favoritism is even easier than inferring unexpressed agreement. If an official were subject to lengthy imprisonment whenever a jury could be persuaded that he had acted deliberately to benefit a campaign contributor or other benefactor rather than the public, only a fool would take the job.

But the judgment that favoritism should not be regulated through ex post judgments of motive does not imply that it should not be regulated at all. When ex ante campaign-finance regulation is forbidden, legislators, prosecutors, and lower federal courts may press for the expansion of less satisfactory criminal remedies. For example, they may widen the bribery net to include practices with ominous names that, as defined (or as left undefined), are likely to sweep in legitimate conduct—undisclosed conflicts of interest, deprivations of the intangible right to honest services, and undisclosed self-dealing.<sup>351</sup> If precise ex ante regulations were to wane while ex post judgments of motive waxed, the law would get things backwards.

Concluding that conscious favoritism does not qualify as quid pro quo corruption not only would block the most appropriate way of curbing this practice; it also would narrow the government's regulatory interest to the point that it might not justify even the limits on contributions the Court left intact.

The interest in combatting bribery cannot justify campaign-finance regulations because that's not the way things are done. Campaign contributions rarely buy promises of favorable governmental action; they buy *influence*. Moreover, even the interest in preventing the appearance of bribery cannot justify campaign-finance regulations because everyone knows that's not the way it's done.

The problem is not that donors and candidates fail to spell everything out. It is not that their agreements usually are left to winks, nods, and implication. The problem is that, with rare exceptions, there are no agreements, express or implied. Contributions are accompanied by hope but not by an understanding that a candidate will provide

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350. See *id.* at 356.

351. See Albert W. Alschuler, *Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix" Skilling v. United States*, 67 SMU L. REV. 501 (2014).

anything in return. The hope may turn out to be justified often enough to make the contributions good investments. *Citizens United* observed, “[F]ew if any contributions to candidates will involve *quid pro quo* arrangements.”<sup>352</sup> Criminal “arrangements” are rare both because they are criminal and because they are unnecessary. A rare or nonexistent practice cannot justify a sweeping restriction of speech.<sup>353</sup>

Even if bribery were more frequent than it is, campaign-finance regulations would do little to stop it. People willing to violate bribery laws are willing to violate campaign-finance regulations too. Enforcing the campaign-finance regulations is usually not much easier than enforcing the law against bribery.<sup>354</sup> A small tail would wag a huge mastiff if reducing bribery were to become the only permissible reason for campaign-finance regulation.

Excluding conscious favoritism from the realm of *quid pro quo* corruption not only might block the most appropriate form of regulation and narrow the government’s regulatory interest to the point that it could not justify anything; it also would depart from the common understanding of the words “corruption” and “*quid pro quo*.” When an official has deliberately used public dollars to return private favors, those words seem to fit. If, after attending a religious revival, a legislator were to confess to supporting widget subsidies simply to please major contributors to his campaign, just about everyone would conclude that he had confessed to giving a *quid* for a *quo* even if he had made no promise, explicit or implicit, in advance. Only a few people might dissent—all of them Justices of the Supreme Court.

Perhaps, however, there would be no dissenters. Despite the contrary indications discussed above, conscious favoritism may be “in.”

#### a. The Significance of *Buckley v. Valeo*

In *Citizens United*, the Supreme Court emphasized that it drew its concept of corruption from *Buckley*. It wrote, “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>355</sup> One should not interpret *Citizens United* in a way that would overrule *Buckley* rather than follow it, and *Buckley* clearly

352. *Citizens United*, 558 U.S. at 357.

353. See *NAACP v. Button*, 371 U.S. 415, 438 (1963) (“Broad prophylactic rules in the area of free expression are suspect.”).

354. To be sure, it sometimes is easier to prove that someone gave or accepted an unreported donation or a donation above the limit than to establish that he gave or accepted this payment as a bribe. Both the enforcement of campaign-finance regulations and the enforcement of bribery laws, however, typically require proof of what happened between consenting parties in private, and when officials can prove what happened between consenting parties in private, they might as well enforce the law against bribery.

355. *Citizens United*, 558 U.S. at 359.

regarded conscious favoritism as the kind of corruption that can justify campaign-finance regulation.<sup>356</sup>

Immediately after declaring that preventing corruption provided a sufficient justification for limiting campaign contributions, the Court wrote in *Buckley*, “To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>357</sup> The Court used the words “quid pro quo” four more times in its opinion.<sup>358</sup> Someone who noticed those words and nothing else might assume that the words meant in *Buckley* what they mean today in a different legal context.

Today, when the Supreme Court uses the words “quid pro quo” in a bribery case, it refers to an actual or contemplated agreement: “[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.”<sup>359</sup> *Buckley*’s use of these words, however, came fifteen years before the Court first used them in a bribery case.<sup>360</sup> At the time *Buckley* was decided, its language did not track the definition of a crime, and the Court clearly used the term “quid pro quo” differently from the way it now uses this term in bribery cases.

*Buckley* in fact rejected the argument that “contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with ‘proven and suspected quid pro quo arrangements.’”<sup>361</sup> The Court explained that “laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.”<sup>362</sup> In the Court’s view, campaign-contribution limits were appropriate, not because they prevented bribery that might be difficult to prove, but because they blocked influences less “blatant and specific” than bribes. The evil addressed by Congress was the “attempt[] of those with money to influence governmental action”<sup>363</sup> by subtle as well as blatant means. The Court spoke repeatedly of “undue influence,”<sup>364</sup> “improper influence,”<sup>365</sup> and “post-election special favors.”<sup>366</sup>

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356. One could in fact make a plausible case that *Buckley* regarded even preferential access as “in.”

357. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam).

358. *Id.* at 27 (twice), 45, 47.

359. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999).

360. *See McCormick v. United States*, 500 U.S. 257, 274 (1991).

361. *Buckley*, 424 U.S. at 27.

362. *Id.* at 27–28.

363. *Id.* at 28.

364. *Id.* at 53, 70, 76.

365. *Id.* at 29, 30, 45, 58, 96.

*Buckley* pointed to three illustrations of what it regarded as quid pro quo corruption, and these illustrations consisted of favoritism, not bribery. Immediately after noting that the integrity of “our system of representative democracy” can be undermined by large contributions “given to secure a political quid pro quo,” the Court observed, “Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.”<sup>367</sup> It then cited the D.C. Circuit’s recitation of these examples in its own *Buckley v. Valeo* opinion.<sup>368</sup>

The first of the practices described by the D.C. Circuit—the practices the Supreme Court called “deeply disturbing” and “pernicious”—was “the revelation [of] the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports.”<sup>369</sup> Following this meeting, President Nixon approved higher price supports for milk producers, and the D.C. Circuit commented, “It is not material, for present purposes, to review . . . the controverted issue of whether the President’s decision was in fact, or was represented to be, conditioned upon or ‘linked’ to the reaffirmation of [a \$2 million campaign] pledge.”<sup>370</sup> If favoritism did not constitute quid pro quo corruption, however, and if only bribery counted, the resolution of this issue would have mattered.

The D.C. Circuit’s second illustration consisted of “lavish contributions by groups or individuals with special interests to legislators from both parties, e.g., . . . by H. Ross Perot, whose company supplies data processing for Medicare and Medicaid programs, to members of the House Ways and Means and Senate Finance Committees.”<sup>371</sup> Large contributions to incumbents of both parties by people affected by their decisions strongly suggest that the contributors hope to curry favor rather than persuade the public. People who do no more than contribute to incumbents of both parties in order to gain favor, however, are not guilty of bribery.

The court’s final illustration was the appointment of campaign

366. *Id.* at 67.

367. *Id.* at 26–27.

368. *Id.* at 27 n.28 (citing *Buckley v. Valeo*, 519 F.2d 821, 839–40 & nn.36–38 (D.C. Cir. 1975) (per curiam)). Surprisingly, *Citizens United* cited the same material to support its claim that “[t]he practices *Buckley* noted would be covered by bribery laws, if a *quid pro quo* arrangement were proved.” *Citizens United v. FEC*, 558 U.S. 310, 356–57 (2010) (citation omitted). This material in fact constituted the only support *Citizens United* offered.

369. *Buckley*, 519 F.2d at 839 n.36.

370. *Id.*

371. *Id.* at 839 n.37.



contributors as ambassadors. Referring to a Senate committee report, the D.C. Circuit said, “As for ambassadorships, while the appointment of large contributors is not novel, the Committee’s Report exposed scale and volume, and the widespread understanding that such contributions were a means of obtaining the recognition needed to be actively considered.”<sup>372</sup> Again, a practice that deeply disturbed the *Buckley* Court and that it cited as an example of a political quid pro quo was favoritism, not bribery.<sup>373</sup>

#### b. Decisions Following *Buckley*

In 1985, in *FEC v. National Conservative Political Action Committee*,<sup>374</sup> the Supreme Court used the term “quid pro quo” again: “The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”<sup>375</sup> *SpeechNow* read this sentence as a statement that the legitimate goals of campaign-finance regulation did not include reducing undue influence.<sup>376</sup> Like *Buckley*, however, *National Conservative Political Action Committee* preceded by several years the earliest of the Supreme Court decisions articulating the quid pro quo requirement in bribery cases, and the sentences immediately preceding the “hallmark” statement sounded a lot like Aristotle: “Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”<sup>377</sup> These sentences indicated that reducing undue influence was “in.”

Supreme Court decisions following *National Conservative Political Action Committee*, moreover, were entirely unambiguous. In 2000, in *Nixon v. Shrink Missouri Government Political Action Committee*,<sup>378</sup> the Court wrote that its concern was “not confined to bribery of public officials, but extend[ed] to the broader threat from politicians too compliant with the wishes of large contributors.”<sup>379</sup> One year later in *FEC v. Colorado Republican Federal Campaign Committee*,<sup>380</sup> the Court declared that corruption must be “understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder’s

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372. *Id.* at 840 n.38; see THE FINAL REPORT OF THE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 93-981, at 492–95 (1974).

373. *Buckley*, 424 U.S. at 27.

374. 470 U.S. 480 (1985).

375. *Id.* at 497.

376. See *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc), cert. denied, 562 U.S. 1003 (2010).

377. *Nat’l Conservative Political Action Comm.*, 470 U.S. at 497.

378. 528 U.S. 377 (2000).

379. *Id.* at 389. The Court added, “[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system.” *Id.* at 395.

380. 533 U.S. 431 (2001).

judgment.”<sup>381</sup> And in 2003, in a passage of *McConnell v. FEC*<sup>382</sup> that *Citizens United* did not repudiate, the Court wrote, “Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence.’”<sup>383</sup> The Court noted that it was “not only plausible, but likely, that candidates would feel grateful for . . . donations and that donors would seek to exploit that gratitude.”<sup>384</sup> If *Citizens United* overruled any of these decisions, it did so *sub silentio*.

### c. *McCutcheon*

The *McCutcheon* plurality, which included all but one of the members of the *Citizens United* majority, offered this explanation of why *Buckley* had upheld base contribution limits: “The propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators’ actions.”<sup>385</sup>

*McCutcheon* thus reaffirmed that the propriety of a large contribution depended on the donor’s intent rather than the existence of a quid pro quo “arrangement.” It reiterated that seeking improper influence was the kind of corruption that, according to *Buckley*, could justify a limitation of speech. Because there was no practical way to determine when this intent existed, Congress could prohibit contributions large enough to pose a significant risk of this improper motivation.

A better one-sentence explanation of why contribution limits are permissible than *McCutcheon*’s is difficult to imagine, and this explanation is flatly inconsistent with the suggestion that an explicit or implicit agreement is necessary. The Supreme Court’s conflicting signals suggest that *Citizens United* might not have focused clearly on the issue and that, despite some statements that seem to exclude conscious favoritism from the realm of quid pro quo corruption, the issue at least remains open.

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Upholding campaign-finance regulations for a questionable reason—because they are believed to reduce bribery—could make immaterial the Supreme Court’s rejection of a better reason—because they reduce deliberate favoritism. If the regulations remained in place, they could

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381. *Id.* at 441.

382. 540 U.S. 93 (2003).

383. *Id.* at 150 (quoting *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441).

384. *Id.* at 145.

385. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1447 (2014).

serve the appropriate purpose as well as the dubious one. Recognizing that deliberately using public dollars to repay private favors is corrupt, however, would make clear that large super PAC contributions are corrupting.<sup>386</sup>

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386. The Supreme Court has suggested that super PAC expenditures cannot be bribes—a proposition that might imply, at least to the D.C. Circuit, that contributions to super PACs also cannot be bribes. *But see* Indictment at 16–17, *United States v. Menendez*, No. 15 CR 155 (D.N.J. Apr. 1, 2015), available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/01/menendez\\_and\\_melgen\\_indictment.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/01/menendez_and_melgen_indictment.pdf) (alleging that two \$300,000 contributions to a super PAC were bribes given to a U.S. Senator). One year after *Citizens United*, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), the Court declared, “The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned.” *Id.* at 2826–27. The Court actually said “negates the possibility.” Much more modestly, *Buckley* had said, “The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam).

The Court’s argument seemed to be that people who obey the rules forbidding prearrangement and coordination will have little opportunity to reach explicit and implicit agreements. If, however, it is appropriate to assume that people obey campaign-finance restrictions, it seems equally appropriate to assume that they obey the laws against bribery. Perhaps the Court’s assumption was that, while the laws against bribery are difficult to enforce, candidates and their benefactors will obey the rules requiring the separation of candidates from independent expenditure groups for the same reason that adventurers climb mountains—because they are there. Independent expenditures cannot be bribes, for if they were bribes, they would not be independent. As Thomas Reed Powell is said to have remarked, “If you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind.” Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 *YALE L.J.* 53, 58 (1930) (quoting an unpublished manuscript by Powell).

The rules requiring the independence of independent expenditures do not bar the people who make them from having lunch with candidates or from sitting next to them at official campaign functions. There and elsewhere, they can whisper about coordinating expenditures, bribes, and, if they like, robbing banks. They also can pass thick envelopes under the table. Of course the candidates and their benefactors are rarely so criminal; there is no reason for them to be. But if bribery were the way things were done, the rules forbidding coordinated expenditures would not stop them.

In fact, a sensible bribe taker does not speak directly to a bribe giver. He uses an intermediary called a bagman. The use of this intermediary makes it difficult for the bribe giver to implicate the bribe taker, and if the bagman himself attempts to incriminate the bribe taker, the bribe taker denies everything and accuses the bagman of defrauding the bribe giver of his money. Someone soliciting funds for either an independent expenditure group or an official election campaign might be an ideal bagman.

## VIII. WHY *SPEECHNOW* ERRED BY STRIKING DOWN LIMITS ON CONTRIBUTIONS TO SUPER PACS

### A. *An Inappropriate Premise*

When the D.C. Circuit struck down the BCRA's limits on contributions to super PACs in *SpeechNow.org v. FEC*,<sup>387</sup> its decision rested on the view that quid pro quo corruption included explicit and implicit agreements and nothing else.<sup>388</sup> The court could not have claimed with a straight face that contributions to super PACs do not generate what *Buckley* called “post-election special favors.”<sup>389</sup>

Even more clearly, *SpeechNow* rested on *Citizens United*'s declaration that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>390</sup> The *SpeechNow* court reasoned that contributions to super PACs influence public officials only when they are spent, and if, as a matter of law, the money going out does not corrupt, the money coming in cannot corrupt either.<sup>391</sup> The court said that the standard of review did not matter because “something . . . outweighs nothing every time.”<sup>392</sup> The *SpeechNow* court's analysis depended on the proposition that the government had no cognizable interest—none whatsoever—in limiting either expenditures by super PACs or contributions to these groups.<sup>393</sup>

As an earlier Part of this Article explained, the statement upon which the D.C. Circuit relied was dictum and perhaps double dictum.<sup>394</sup>

387. 599 F.3d 686 (D.C. Cir. 2010) (en banc).

388. *See id.* at 694 (acknowledging that the Supreme Court took a broader view of the government's anticorruption interest in several prior cases but claiming that *Citizens United* repudiated this view).

389. *See Buckley*, 424 U.S. at 67.

390. *SpeechNow*, 599 F.3d at 694 (quoting *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)).

391. *Id.* at 694–95.

392. *Id.* at 695 (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)) (internal quotation marks omitted).

393. *See id.* The court did not discuss *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), in which the Supreme Court upheld a limit on contributions to a political action committee, *id.* at 184–85, and in which a four-Justice plurality opinion rejected the argument that “because the contributions here flow to a political committee, rather than to a candidate, the danger of actual or apparent corruption of the political process . . . is not present.” *Id.* at 195 (plurality opinion). *California Medical Ass'n* was distinguishable from *SpeechNow* because the PAC in question contributed to candidates; it was not an independent expenditure group. But the argument that contributions cannot be corrupting unless they ultimately flow to the candidate himself (rather than to his mother, brother, or alter-ego super PAC) is silly. No one would contend that bribes cannot corrupt unless they ultimately reach the pocket of a public official himself. *See, e.g., supra* note 272 (describing the conviction of former Alabama Governor Don Siegelman).

394. *See supra* text accompanying notes 98–118.

Moreover, the ease with which the Supreme Court slipped from declaring the government's regulatory interest insufficient<sup>395</sup> to declaring this interest nonexistent suggested that the Court might not have noticed the crucial difference between its two formulations. Stopping with the Court's narrower and more appropriate statement would have precluded the D.C. Circuit's analysis in *SpeechNow*.<sup>396</sup>

The sense that the Supreme Court might not have recognized the import of its dictum is reinforced by the Court's failure to recognize the difference between this dictum and what *Buckley* had said thirty-four years earlier. *Citizens United* attributed its judgment that independent expenditures do not corrupt at all to *Buckley*: "This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."<sup>397</sup> But *Buckley* did not say that. It merely held the anticorruption interest *insufficient* to support expenditure limits: "We find that the governmental interest in preventing corruption and the appearance of corruption is *inadequate* to justify § 608(e)(1)'s ceiling on independent expenditures."<sup>398</sup>

A final indication that the Court might not have meant its dictum literally is that this statement, if taken literally, would be inconsistent with a ruling the Court had made less than a year earlier—one in which its opinion was written by Justice Kennedy, the same Justice who wrote the Court's opinion in *Citizens United*.<sup>399</sup> *Caperton v. A.T. Massey Coal Co.*<sup>400</sup> examined the combined effect of campaign contributions, PAC contributions, and independent expenditures by the chairman and chief executive officer of the Massey Coal Company, Don Blankenship.<sup>401</sup>

After a jury returned a \$50 million verdict against Massey, Blankenship spent more than \$3 million to prevent the reelection of a justice of the state supreme court that would hear Massey's appeal. He

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395. See *Citizens United*, 558 U.S. at 357 ("The anticorruption interest is not sufficient to displace the speech here in question.").

396. See *supra* text accompanying notes 114–31.

397. *Citizens United*, 558 U.S. at 360.

398. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam) (emphasis added). The Court added, "[T]he independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. The statement that independent advocacy did not appear to be as corrupting as large campaign contributions did not suggest that independent advocacy posed no danger of corruption at all.

399. Justice Kennedy was in fact the only Justice to join both 5–4 decisions.

400. 556 U.S. 868 (2009).

401. The Court lumped all of Blankenship's electoral efforts together and repeatedly called them "contributions." See, e.g., *id.* at 873 (referring to "Blankenship's \$3 million in contributions") & 885 ("Blankenship's campaign contributions . . . had a significant and disproportionate influence on the electoral outcome."). By disregarding the distinction between contributions and expenditures drawn by *Buckley* and other campaign-finance decisions, the Court made this distinction seem insubstantial.

contributed the maximum amount the law allowed to the campaign of this justice's opponent—a meager \$1000. He also contributed \$2.5 million to a PAC supporting the justice's opponent and spent another \$500,000 directly. The opponent won the election and provided the decisive vote for reversing the \$50 million verdict against Massey.<sup>402</sup>

The Supreme Court held that the newly elected justice's refusal to recuse himself from Massey's appeal violated the due process clause. Justice Kennedy wrote for the Court, “We conclude that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent.”<sup>403</sup> *Citizens United* declared *Caperton* irrelevant, noting that “*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.”<sup>404</sup>

*Caperton* concluded that a particular remedy for the “risk of actual bias”—recusal—was required by the Constitution. *Citizens United* concluded that another remedy—restricting independent expenditures—was precluded by the Constitution. *Citizens United* observed correctly that these two remedies, the required one and the precluded one, differed. If Blankenship's PAC contributions and independent expenditures did “not give rise to corruption or the appearance of corruption,” however, why was any remedy required?

*Caperton* recognized the public interest in preventing the “serious risk of actual bias” posed by Blankenship's expenditures. Does this interest differ from the public interest in preventing “the appearance of corruption”? Is it less weighty? Is this interest neither sufficiently “compelling” to justify a restriction of high-value speech nor sufficiently “important” to justify a restriction of low-value speech?

*Caperton* holds that the public interest in limiting the effect of independent electoral expenditures on the decisions of public officials exists. Because this interest is more than “nothing,” “something” does not automatically trump it. A near army of commentators have concluded that *Caperton*'s holding is inconsistent with *Citizens United*'s dictum that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>405</sup>

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402. *See id.* at 872–74.

403. *Id.* at 884.

404. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

405. *Id.* at 357. *See, e.g.*, Briffault, *supra* note 90, at 659–60; Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584 (2011); Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 MONT. L. REV. 25, 54–57 (2012); Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 437–38 (2012); Michael S. Kang, *The End of Campaign Finance*

Speculating that the Supreme Court might not have meant this declaration quite the way it sounds does not flatter the Court, but the alternative hypothesis would be worse. *Citizens United*'s move from a declaration of inadequacy to a declaration of non-existence might have been carefully calculated—an effort by a five-Justice majority to resolve issues not presented by the case before the Court while the votes to resolve them the majority's way were at hand. On this hypothesis, lower courts would have had even less reason to regard the Court's dictum as controlling.

### B. *A Better Starting Place*

The D.C. Circuit should have emphasized a different statement of the *Citizens United* opinion: “[C]ontribution limits, unlike limits on independent expenditures, have been an accepted means of preventing *quid pro quo* corruption.”<sup>406</sup> It should have focused on *Buckley*'s holding that limits on contributions to official election campaigns are permissible and should have asked whether limits on contributions to super PACs can reasonably be treated differently. That question would have been easy to answer.

*Buckley* offered five reasons for upholding contribution limits while striking down expenditure limits. Three of them suggested that campaign contributions have less communicative value than expenditures. The other two suggested that contributions are more corrupting. The reasons the Supreme Court gave for treating contributions to official election campaigns as low-value speech all apply equally to super PAC contributions.

First, the Court declared that a campaign contribution “serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”<sup>407</sup> Equally, a check written to a super PAC does not convey the underlying basis for the check-writer's support.

Second, the Court noted that “the transformation of contributions into political debate involves speech by someone other than the

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*Law*, 98 VA. L. REV. 1, 45–47 (2012); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 230 (2010); Adam Liptak, *Foreword: Funding Justice*, 52 ARIZ. L. REV. 203, 203 (2010); Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 659–60 (2011); Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. COLLOQUY 203, 221–22 (2011); James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 772–73 (2011).

406. *Citizens United*, 558 U.S. at 359 (citation omitted).

407. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam).

contributor.”<sup>408</sup> Transforming a check to a super PAC into political debate also “involves speech by someone other than the contributor.”

Third, the Court said that limiting the amount of an individual’s contribution “permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.”<sup>409</sup> Contributors might be surprised to learn that writing a check for the maximum permissible amount to a political campaign—a check for thousands of dollars—is merely “symbolic support.”<sup>410</sup> If it is, however, so is writing a check for the same amount to a super PAC. Moreover, restricting super PAC contributions leaves a contributor free to communicate his views of candidates and issues in other ways—for example, by making truly “independent” expenditures to advocate the candidate’s election.<sup>411</sup>

Super PAC contributions have no greater communicative value than campaign contributions. In addition, one of the two reasons *Buckley* offered for viewing independent expenditures as less corrupting than campaign contributions does not apply to super PAC contributions. The Court stated, “The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>412</sup>

The rules forbidding the coordination of expenditures do not prevent a candidate from discussing anything at all with a *contributor* to a super PAC (although the contributor may not then act as an “agent” of the candidate by conveying talk of *expenditures* to those who will determine how the super PAC’s funds are spent<sup>413</sup>). If the candidate and the donor wish to speak improperly about how large a super PAC contribution will guarantee the donor’s appointment as ambassador to Belize, the rules against coordinating campaign expenditures do nothing whatever to stop them.<sup>414</sup>

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408. *Id.*

409. *Id.*

410. The Court’s characterization of campaign contributions as symbolic speech was unfortunate. It wrote, “The quantity of the communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.” *Id.* Contributions deserve some First Amendment protection, however, not because check writing is a symbolic gesture, but because these contributions make political speech possible. The larger the contributions, the more speech (as well as the more illegitimate clout) they generate.

411. This Article discussed what it takes to make an expenditure independent in *supra* Section VI.E.

412. *Buckley*, 424 U.S. at 47.

413. *See* 11 C.F.R. §§ 109.20(a), .21(a) (2014).

414. I have suggested that the laws forbidding prearrangement and coordination do not alleviate the danger of bribery in any situation. *See supra* note 386. But I have a power not



*Buckley*'s second reason for viewing independent expenditures as less corrupting than campaign contributions was that independent expenditures are of less value to a candidate. Experience in the years since *Buckley* has called this empirical judgment into question, but it remains endorsed by the Supreme Court.<sup>415</sup> Unlike any of the Court's other reasons for privileging expenditures over contributions, this reason may apply to contributions to super PACs. Super PAC contributions may also have less value to a candidate.

Because campaign contributions and super PAC contributions can be distinguished on this ground, *Buckley*'s holding that Congress may limit campaign contributions did not control the decision in *SpeechNow*. The judgment that remained, however, would not have been difficult.

A candidate might value a \$3000 contribution to a super PAC less than a \$3000 contribution to his campaign, but he would not value a \$10 million contribution to an "alter ego" super PAC less than a \$3000 contribution to his campaign. In *McCutcheon*, after reiterating that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the

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granted to the D.C. Circuit—the power to declare that *Buckley*'s analysis makes no sense. At this point in the text, the discussion does not question *Buckley*'s analysis. Like *Buckley*, it assumes that everyone will obey election laws simply because they are there. Even on this assumption—that the laws forbidding prearrangement and coordination will be fully observed—they do nothing to prevent quid pro quo bargains between candidates and super PAC donors.

415. *Buckley*'s judgment that independent expenditures are of less value to a candidate was tentative. The Court observed, "Unlike contributions, . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley*, 424 U.S. at 47. Note the use of the word *may*. The Court also stated that "independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. Note the words *does not presently appear*.

Post-*Buckley* experiences suggest that the Court's provisional judgment was erroneous and perhaps backwards. All other things equal, a candidate might prefer to control expenditures himself, but there is a strong advantage to having messages sent on one's behalf for which one need take no responsibility. *See supra* notes 28–36 and accompanying text. One lobbyist has testified, "An effective advertising campaign may have far more effect on a member [of Congress] than a direct campaign contribution." *See* *McConnell v. FEC*, 251 F. Supp. 2d 176, 555–56 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.) (reciting "[t]he uncontroverted testimony of lobbyist Wright Andrews"). A former senator has noted, "Politicians especially love when a negative 'issue ad' airs against their opponents." *Id.* at 556 (reciting the testimony of former U.S. Senator Dale Bumpers).

*Citizens United* did not consider what America's experience since *Buckley* has taught. Instead, it swept aside *Buckley*'s qualifications and hesitancy with the declaration, "Independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). As explained above, this statement was dictum, but the Court's reaffirmation of *Buckley*'s judgment that independent expenditures are *insufficiently* corrupting to warrant any limitation was arguably holding. At least it was not *double dictum*. The D.C. Circuit could not properly have undertaken a reassessment of the provisional empirical judgment *Buckley* had made thirty-four years earlier.

candidate,” the plurality acknowledged, “But probably not by 95 percent.”<sup>416</sup> A \$10 million super PAC contribution produces in spades whatever corruption or appearance of corruption a \$3000 campaign contribution can produce. If Congress may prohibit the campaign contribution (as it may and has), it should be allowed to prohibit the super PAC contribution as well. If *Buckley* still stands (and *Citizens United* says it does), *SpeechNow* was wrongly decided.

#### IX. SUPER PACS AND AGGREGATE CONTRIBUTION LIMITS

*Citizens United* allowed large business organizations to use funds from their general treasuries to support the election of favored candidates, but most business organizations did not do it. *SpeechNow* permitted individuals to make five-, six-, seven-, and even eight-figure contributions to super PACs, and many individuals did. More than *Citizens United*, *SpeechNow* transformed American politics. It did so by drawing broad implications from a dictum in *Citizens United*, and it made no effort to reconcile its ruling with the decision on which *Citizens United* purported to rely, *Buckley*.

If the Supreme Court were to reach a conclusion different from that of the D.C. Circuit in *SpeechNow*, its decision might not restore the situation that existed prior to *SpeechNow*. The Supreme Court’s intervening decision in *McCutcheon* might have changed the landscape.

In 2012, as noted above, Sheldon and Miriam Adelson gave \$30 million to Restore Our Future, a super PAC supporting Mitt Romney’s presidential campaign.<sup>417</sup> If the Supreme Court were to reject *SpeechNow* and uphold the BCRA’s limits on contributions to super PACs, the amount an individual could give to a group like Restore Our Future in a single year would be considerably less—\$5000.<sup>418</sup>

A candidate’s supporters, however, could create an unlimited number of super PACs, and a donor could give \$5000 to each of these PACs. Moreover, although a super PAC may not coordinate its expenditures with those of a candidate, it may coordinate its expenditures with those of other super PACs.<sup>419</sup> The many super PACs supporting one candidate might all have the same manager.

Even if multiplying super PACs could provide a lawful way for a contributor to donate \$30 million to support a single candidate, repudiating *SpeechNow* might not be an empty gesture. Enabling

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416. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1454 (2014) (plurality opinion) (alterations in original) (internal quotation marks omitted).

417. See text at *supra* notes 14–17 and accompanying text.

418. See 52 U.S.C.A. § 30116(a)(1)(C) (West 2014).

419. See Jeremy W. Peters, *Conservative “Super PACs” Synchronize Their Messages*, N.Y. TIMES (Sept. 25, 2012), <http://www.nytimes.com/2012/09/25/us/politics/conservative-super-pacs-sharpen-their-synchronized-message.html>.

someone to contribute \$30 million in \$5000 portions would require the creation of 6000 super PACs, something that probably would not happen. Moreover, the risk of developing carpal tunnel syndrome could deter a contributor from writing 6000 checks.<sup>420</sup>

Still, multiplying super PACs to receive the contributions that a single super PAC could not receive looks like an easy way to circumvent the \$5000 base contribution limit. The regime of campaign-finance regulation proposed by this Article would address this difficulty by allowing an individual to contribute as much money to as many PACs as he liked while requiring him to take steps to ensure that no more of his funds were used to influence a single election than the law allowed.<sup>421</sup>

The BCRA addressed the multi-PAC circumvention strategy in a different way by establishing aggregate contribution limits.<sup>422</sup> An individual could contribute no more than \$48,600 to all PACs during a two-year election cycle. The BCRA's aggregate limit on contribution to PACs was distinct from its aggregate limits on contributions to candidates and national political parties.<sup>423</sup> A court could uphold this limit while striking down the statute's other aggregate limits. In other words, a court could strike down the provision that prevents an individual from contributing the maximum amount to as many candidates as he likes while upholding the provision that prevents an individual from giving \$5000 to each of 6000 alter ego super PACs all supporting the same candidate.

The creation of multiple super PACs was not among the circumvention strategies the Supreme Court considered in *McCutcheon*. *SpeechNow* was unchallenged, and when an individual could donate \$30 million to a single group, cloning PACs would have been pointless. Rejecting *SpeechNow* and upholding the BCRA's base limit on PAC contributions, however, would bring the multi-PAC circumvention strategy to the fore.

In *McCutcheon*, the Supreme Court called the circumvention strategies that it considered "implausible"<sup>424</sup> and "divorced from reality."<sup>425</sup> But there is nothing at all implausible about the prospect of cloning multiple PACs to enable donors to evade the limit on contributions to a single PAC. If the BCRA's base limit on PAC

420. See *Donors Unchained*, DAILY SHOW WITH JON STEWART (Apr. 3, 2014), <http://thedailyshow.cc.com/videos/74yxyf/donors-unchained> ("The last great hope of preserving our democracy from the corrupting influence of money is carpal tunnel syndrome.").

421. See *supra* Section VI.A.

422. See 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:14.80 (2014).

423. See *id.* ("For the 2013–2014 election cycle, the aggregate limits in BCRA permitted an individual to contribute a total of \$48,600 to federal candidates and a total of \$74,600 to other political committees. Of that \$74,600, only \$48,600 could be contributed to state or local party committees and PACs, as opposed to national party committees.").

424. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1453 (2014) (plurality opinion).

425. *Id.* at 1456.

contributions were upheld and the statute's aggregate limit struck down, this cloning would happen.

An aggregate contribution limit probably is not the least restrictive way of blocking the multi-PAC circumvention strategy. This Article has in fact proposed a less restrictive way. The tracking and accounting requirements proposed by this Article would be burdensome, however, and a critic could plausibly maintain that the proposed tracking would not be feasible at all. The *McCutcheon* plurality observed that a contribution limitation is sufficiently "closely drawn" when it supplies "a fit that is . . . reasonable; that represents not necessarily . . . the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."<sup>426</sup>

*McCutcheon* was a fact-specific decision premised on the assumption that measures truly necessary to prevent the circumvention of valid base limits are constitutional. If the Supreme Court were to uphold the BCRA's base limit on PAC contributions, the statute's aggregate limit might be judged necessary to prevent circumvention. *McCutcheon* did not resolve this issue.

#### X. STORY TIME: OTTO'S FRIENDS EXERCISE THEIR RIGHTS

This Part presents a hypothetical case to show where the reasoning of *SpeechNow* might lead.

Being a state legislator is a full-time job in only ten states,<sup>427</sup> and the hypothetical state of Kenduckety is not among them. Otto, the President of the Kenduckety Senate, receives a small salary from the state, but he obtains most of his income from a used car dealership he owns and manages, Otto's Autos. Kenduckety recently enacted a tough code of government ethics. Under this code, Libby, a registered lobbyist, may not buy an automobile from Otto's Autos and may not hire Otto's wife as her real estate agent. In fact, she may not even buy Otto a hamburger.

One day, however, as Otto read the *Kenduckety Clarion*, he discovered an advertisement for Otto's Autos he had not placed. This advertisement not only praised Otto's but called the owner of a rival dealership a deadbeat dad. A note at the bottom of the advertisement revealed that Libby had approved the message and purchased the ad. A delighted Otto telephoned Libby and expressed his gratitude.

Other people who were or wished to be friends of the President of the Kenduckety Senate followed Libby's lead. Within weeks, countless billboards, direct mailings, and radio and television advertisements

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426. *Id.* at 1456–57 (third alteration in original) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)) (internal quotation marks omitted).

427. See *Full- and Part-Time Legislatures*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 1, 2014), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx>.

urged the public to buy autos from Otto's and to loathe its competitors. A few weeks after the barrage began, Otto's advertising manager resigned to form a PAC. This PAC was not a political action committee. It was a placement of advertising committee. A more conventional super PAC organized by one of Otto's former campaign managers already supported his political efforts.

The mission of the new PAC, Kenduckians Drive Forward, was to ensure that advertising purchased by the friends of Otto's Autos would be distributed among appropriate media outlets and would remain on point and effective. With the establishment of this PAC, Libby made a large contribution and stopped placing advertisements on her own. Libby was confident that both her independent expenditures on behalf of Otto's Autos and her contributions to the new PAC were constitutionally protected. Unlike the lunches at McDonald's she could no longer buy Otto, these expenditures and contributions were *speech*.

Libby in fact consulted a lawyer. At their first meeting, he cautioned Libby that she had engaged in commercial rather than political speech and that commercial speech usually is less protected.

Libby then cast some of her favors in the form of political speech. Under Kenduckety's new Code of Government Ethics, she could no longer give bottles of Scotch and fruit baskets as birthday presents to elected officials. She concluded, however, that the code could not block her from retaining high-priced political satirists to appear at their birthday parties. In accordance with a contract Libby then negotiated with Bill Maher's agent, Maher knocked at the doors of progressive officials while their birthday parties were in progress and offered to deliver a monologue. Dennis Miller knocked at the doors of conservatives. Libby's birthday gifts were a hit with everyone.<sup>428</sup>

When Libby met her lawyer again, the lawyer reported that he had done some research. Commercial speech was indeed judged by a different standard than political speech, but in the lawyer's view, even Libby's commercial speech on behalf of Otto's Autos was constitutionally protected.

The lawyer explained that a limitation of commercial speech must advance a "substantial" governmental interest and be no more extensive than necessary to advance this interest.<sup>429</sup> Similarly, he said a limit on political contributions must be "closely drawn to match a sufficiently important interest."<sup>430</sup> Unlike political speech, which is fully protected, both commercial speech and political contributions land one tier down.

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428. Libby kept her birthday presents a surprise and never coordinated her expenditures with anyone.

429. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002).

430. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)) (internal quotation marks omitted).

Because the D.C. Circuit held in *SpeechNow* that super PAC contributions were protected, the lawyer concluded that Libby's independent expenditures on behalf of Otto's Autos must be protected as well.

The lawyer was somewhat more troubled by Libby's contributions to Kenduckians Drive Forward. These contributions were doubly devalued because they were (1) commercial rather than political and (2) contributions rather than independent expenditures. The lawyer suggested that these contributions might land, not one, but two tiers down on the protected-speech terrace.<sup>431</sup> He noted, however, that when no interest at all supports a restriction of speech, the standard of review does not matter. If super PAC contributions do not create even the appearance of quid pro quo corruption, neither do Libby's, and quid pro quo corruption is the only kind that counts.

The analysis that led Libby's lawyer to conclude that Libby's PAC contributions were constitutionally protected matched the analysis that led the D.C. Circuit to protect super PAC contributions. The lawyer began with *Citizens United's* dictum, "[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption."<sup>432</sup> He then concluded that because a PAC's expenditure of contributed funds does not corrupt, the contributions themselves cannot corrupt. In light of *Citizens United's* "holding as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption,"<sup>433</sup> the government simply had "no anti-corruption interest" in limiting Libby's contributions.<sup>434</sup> According to Libby's logical lawyer, the "task of weighing the First Amendment interests implicated by contributions . . . against the government's interest in limiting such contributions" was easy. "[S]omething . . . outweighs nothing every time."<sup>435</sup>

The analysis of Libby's lawyer was careful and compelling, but something seems wrong with it. Gifts intended to corrupt public officials should not become constitutionally protected simply because they also finance speech.

## CONCLUSION

This Article has considered what can be said for and against a bumper sticker's declarations that money is not speech and that

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431. Before they land, the Supreme Court must construct the tier. Perhaps the Court should insist that legislative restrictions of twice devalued speech must advance a "sort of" important interest in a "pretty good" way.

432. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

433. *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010).

434. *Id.* at 695.

435. *Id.* (alteration in original) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)) (internal quotation marks omitted).

corporations are not people. It has proposed a framework for evaluating the constitutionality of campaign-finance regulations that differs from the standard currently employed by the Supreme Court. And it has proposed a legislative scheme of campaign-finance regulation that would effectively limit contributions while respecting the Supreme Court's campaign-finance decisions.

Mostly, however, this Article has focused on an issue the Supreme Court has not addressed—the validity of limiting contributions to super PACs. Prior to *Citizens United*, the FEC enforced a statute that limited a person's contributions to one of these groups to \$5000 per year, and *Citizens United* did not consider the validity of this statute. Emphasizing that the issue before it was one of expenditure limits, not contribution limits, the Court struck down a prohibition of independent political expenditures by labor unions and corporations.

Contrary to widespread perception, the ruling in *Citizens United* did not lead to the domination of American politics by large business organizations. During the 2012 campaign, not one Fortune 500 company exercised the right that *Citizens United* had recognized to make independent electoral expenditures.

In *SpeechNow*, the en banc D.C. Circuit unanimously held Congress's limit on donations to super PACs unconstitutional.<sup>436</sup> The court said that one sentence in the *Citizens United* opinion compelled its result—the Supreme Court's declaration that independent expenditures do not corrupt. The D.C. Circuit reasoned that, if independent expenditures do not corrupt, the contributions that make these expenditures possible cannot corrupt either.<sup>437</sup> Several other courts of appeals made the same judgment.

The *SpeechNow* ruling led to the proliferation of super PACs. As a result of the D.C. Circuit's decision, these “attack dogs” could accept vastly larger contributions than the candidates' own campaign organizations could accept. According to the D.C. Circuit (or the Supreme Court or the two courts together), the First Amendment required this bizarre result.

Again large business corporations were generally uninterested in exercising the recently recognized right. In 2012, 490 of the Fortune 500 companies made no super PAC contributions, and only one contributed more than \$1 million.<sup>438</sup> Wealthy individuals, however, noted the disappearance of the \$5000 limit, and ninety-five individuals or couples contributed \$1 million or more to super PACs in 2012.<sup>439</sup>

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436. *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc).

437. *Id.* at 692–93.

438. *See supra* notes 147–50 and accompanying text.

439. *See 2012 Top Donors to Outside Spending Groups*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=V&superonly=N> (last visited Feb. 3, 2015).

As this Article has shown, the pronouncement on which the D.C. Circuit rested its decision was dictum, and the Supreme Court offered several indications that it did not mean this declaration quite the way it sounds. Moreover, *SpeechNow* rested on a narrow view of corruption—one declaring in effect that the use of public dollars to repay private favors does not qualify as corruption unless the payoff was arranged in advance. Although some language in *Citizens United* seemed to support this view, the Supreme Court had endorsed a broader concept of corruption in prior decisions, and language later approved by most members of the *Citizens United* majority in *McCutcheon* was also incompatible with the position attributed to the Supreme Court by the *SpeechNow* decision.

Starting from a different premise in *SpeechNow* would have produced a different result. The D.C. Circuit should have asked whether contributions to super PACs can sensibly be treated differently from contributions to official election campaigns, and the answer to that question would have been no.

Whether Congress may limit super PAC contributions warrants the Supreme Court's attention. The *SpeechNow* decision has driven American government toward what Aristotle called the "perverted" or "corrupted" form in which officials neglect the common good and "rule with a view to the private interest."<sup>440</sup>

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440. ARISTOTLE'S POLITICS, *supra* note 326, at 114.



## APPENDIX A

HAVE *CITIZENS UNITED* AND *SPEECHNOW* ENDED THE GAME?

This Article concluded by saying that whether Congress may limit super PAC contributions warrants the Supreme Court's attention, but a court's attention cannot be paid unless someone brings a lawsuit. This appendix considers whether, by halting the enforcement of restrictions on contributions to super PACs, *Citizens United* and *SpeechNow* have left no one with standing to raise the issue again.

Justice Holmes described holding an act of Congress unconstitutional as "the gravest and most delicate duty that this Court is called on to perform."<sup>1</sup> Chief Justice Marshall said that a court should declare a statute unconstitutional only when "[t]he opposition between the constitution and the law [is] such that the judge feels a clear and strong conviction of their incompatibility with each other."<sup>2</sup> The law usually tilts the game board against litigants who challenge a statute's constitutionality. The Supreme Court affords Congress's action a "presumption of constitutionality."<sup>3</sup>

In one respect, however, the Supreme Court tilts the game board in the opposite direction. No matter how many victories the defenders of a statute's constitutionality have won, new challengers may continue to attack the statute. Once any challenger scores a victory, however, the game is likely to be over. The game becomes one of sudden death, but only for one side.

Rulings upholding statutes and regulations are always subject to reconsideration. A person or group subject to these regulations can challenge their enforcement and attempt to persuade a court to overrule the decisions sustaining them. *Citizens United*, which overruled two prior decisions, illustrates how new challengers may bring new lawsuits until victory is won.

Because hardly anyone has standing to challenge the nonenforcement of statutes and regulations, however, even a five-to-four decision halting a statute's enforcement may be invulnerable. In the years following the invalidation of a statute, circumstances may change, and the composition of the Supreme Court may change too. Because no one can raise the issue again, however, the declaration of unconstitutionality may last forever. The law of standing may effectively place decisions about the constitutionality of statutes on a one-way ratchet.

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1. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).  
 2. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).  
 3. *See, e.g., O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1930).

After the rulings in *Citizens United* and *SpeechNow*, the FEC halted enforcement of the statute limiting contributions to super PACs.<sup>4</sup> Congress's use of an administrative agency rather than the judiciary to enforce election law, however, bends the law of standing. The ratchet may not hold.

The Supreme Court allows a litigant to challenge an agency's non-enforcement of a statute when Congress has specifically authorized this challenge and the litigant is suffering or is likely to suffer injury in fact.<sup>5</sup> And federal election law authorizes challenges to FEC inaction. It allows anyone who believes that an election-law violation has occurred to complain to the FEC,<sup>6</sup> and it authorizes a party "aggrieved" by the FEC's dismissal of a complaint to seek review in the courts.<sup>7</sup> Some prospective plaintiffs probably could establish injury in fact. At least a candidate for federal office whose election was opposed by a super PAC that accepted contributions above the statutory limits could do so.

The validity of a decision striking down a statute also could become a collateral issue in a lawsuit brought for a purpose other than challenging an agency's failure to enforce it. For example, in a lawsuit brought to challenge a campaign-finance regulation that survived *Citizens United*, a defender of the regulation might argue that, even if *Citizens United*'s reasoning could lead to invalidating the regulation, *Citizens United* should be overruled.

One cannot appropriately assume, however, that an opportunity to overrule *Citizens United* will inevitably arise or even that such an opportunity is likely to arise. Nor can one appropriately assume that the Supreme Court, which declined to review *SpeechNow*,<sup>8</sup> will have any further opportunity to consider the issue presented by that case. While a

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4. See FED. ELECTION COMM'N, ADVISORY OPINION 2010-11, <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (Commonsense Ten); FED. ELECTION COMM'N, ADVISORY OPINION 2010-09, <http://saos.fec.gov/aodocs/AO%202010-09.pdf> (Club for Growth).

5. See *Massachusetts v. EPA*, 549 U.S. 497, 516–17, 521 (2007) (holding that the EPA's refusal to regulate greenhouse gases presented a risk of harm to Massachusetts residents that was "actual or imminent"); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (holding that the FEC's denial of information to which voters were entitled by statute constituted injury in fact).

6. 52 U.S.C.A. § 30109(a)(1) (West 2014).

7. See *id.* § 30109(a)(8)(A).

8. See *Keating v. FEC*, 562 U.S. 1003 (2010) (denying a writ of certiorari to review *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc)).

ruling striking down a statute does not end the game entirely, it tilts the board substantially.<sup>9</sup>

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9. Even after *Citizens United* and *SpeechNow*, several states sought to enforce their own statutory limits on super PAC contributions. The federal courts of appeals, however, sustained challenges to the states' enforcement efforts, and none of the states appear to have sought Supreme Court review. See Letter from Brian A. Sutherland, Assistant Solicitor General of the State of New York, to the Hon. Mae A. D'Agostino, United States District Court for the Northern District of New York (May 23, 2014) (on file with author); Email from Jonathan Mitchell, Solicitor General of the State of Texas, to the author (Dec. 21, 2013) (on file with author).

## APPENDIX B

## THE EFFECT OF CAMPAIGN DOLLARS I: STATISTICAL AND NON-STATISTICAL EVIDENCE

*Citizens United* declared, “[T]here is only scant evidence that independent expenditures even ingratiate.”<sup>1</sup> Perhaps the Supreme Court meant in this statement to distinguish independent expenditures from contributions. *Buckley* and other decisions had held that campaign contributions not only ingratiate but corrupt so much so that Congress may restrict them, and *Citizens United* did not retreat from these holdings. If the Supreme Court meant only to distinguish contributions from expenditures, *SpeechNow* erred by declaring that contributions cannot influence candidates unless expenditures do too. Perhaps, however, the Supreme Court saw no reason to believe that either expenditures or contributions ingratiate.

In support of its claim that independent expenditures had not been shown to ingratiate, the Court cited evidence that a federal district judge had assembled to show just the opposite. The Court cited a section of the separate opinion of Judge Kollar-Kotelly in *McConnell v. FEC*<sup>2</sup>—a section headed “Federal Candidates and Political Parties Know and Appreciate Who Runs Candidate-Centered Issue Advertisements in their Races.”<sup>3</sup> This section recited testimony from campaign consultants, a lobbyist, and former office holders, all of which resembled the testimony of former U.S. Senator Dale Bumpers: “Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.”<sup>4</sup>

Judge Kollar-Kotelly observed, “Plaintiffs have put forth no contrary evidence.” She then recited testimony that “[a]n effective advertising campaign may have far more effect on a member than a direct campaign contribution,” that interest groups “appraise politicians of the advertisements that they run on their behalf,” and that politicians “demonstrate their appreciation” by raising money for the groups.<sup>5</sup> *Citizens United*’s citation of this material for the proposition that “there

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1. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

2. 251 F. Supp. 2d 176, 555–57 (D.D.C.) (separate opinion of Kollar-Kotelly, J.), *aff’d in part and rev’d in part*, 540 U.S. 93 (2003).

3. *Id.* at 555. This section spoke of issue advertisements placed by groups more fettered than today’s super PACs. The expenditures of today’s super PACs would have as much influence or more.

4. *Id.* at 556.

5. *Id.* at 556–57.

is only scant evidence that independent expenditures even ingratiate”<sup>6</sup> was astonishing. Perhaps the Court considered the evidence “scant” simply because it consisted of the testimony of knowledgeable observers and was not quantitative or “scientific.” The misguided sense that only quantitative evidence matters has become commonplace. I have called this sense “the bottom-line collectivist-empirical mentality.”<sup>7</sup>

Statistically-minded researchers have examined whether their methods can establish that campaign contributions influence legislators’ votes, and although their findings have been mixed,<sup>8</sup> most have answered no.<sup>9</sup> Because nearly all of this research preceded the explosion of contributions that followed *Citizens United* and *SpeechNow*, its continuing relevance is questionable. Moreover, there was little reason to give much weight to most of the researchers’ conclusions even prior to *SpeechNow*. Their methods foundered on a problem of covariance and would have been unlikely to reveal a strong effect even if one existed.

A legislator who supports conservative measures usually is a conservative. He usually has received campaign contributions from conservative donors and has been elected by conservative voters. Separating the effects of campaign contributions on his votes from the effects of his personal views and those of his constituents is difficult and may be impossible. Statistical analysis cannot determine whether the chicken came before the egg or the egg before the chicken. Nevertheless, researchers have kept trying.

Although some researchers have purported to control for legislators’ “ideology,” they could not do so. They could control only for the legislators’ past actions—actions that themselves might have been influenced by campaign contributions. The most frequently cited of the studies concluding that campaign contributions have no provable effect on legislative votes is one that Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder Jr., published in 2003.<sup>10</sup> This study

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6. *Citizens United*, 558 U.S. at 360.

7. See Albert W. Alschuler, “Close Enough for Government Work”: *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 346.

8. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 394–95 (2000) (observing that some studies are “said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates’ positions,” that other studies “point the other way,” and that “there is little reason to doubt that sometimes large contributions will work actual corruption of our political system”).

9. See Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003). This study reviewed the findings of thirty-six prior studies and noted that “in three out of four instances, campaign contributions had no statistically significant effects on legislation or had the ‘wrong’ sign—suggesting that more contributions lead to less support.” *Id.* at 113–14.

10. See *id.* at 112–14.

focused on the scores that the U.S. Chamber of Commerce gives members of Congress each year on the basis of their “key business votes.”<sup>11</sup> The study reported that these scores did not vary with the size of the business and labor contributions members had received.<sup>12</sup>

If notable changes in the legislators’ scores had followed large changes in either business or labor contributions, one might have inferred that the contributions affected votes. But the absence of any discernable change provided little reason to conclude that conviction rather than cash drove votes.

Consider a Democrat who recognized on his first run for Congress that labor union PACs were the largest contributors to Democrats in his district. Swallowing hard, this candidate might have endorsed the unions’ legislative agenda despite some personal reservations. If, following his election, this member continued to support the unions’ proposals and continued to collect their cash, neither an examination of his Chamber of Commerce scores nor any other quantitative study would reveal that his votes had been driven by contributions. Union contributions might have increased in some years (for example, when the member faced a tough election) and fallen in others, but his scores would have remained the same.<sup>13</sup> One former member of Congress

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11. *See How They Voted*, U.S. CHAMBER OF COM., <http://www.uschamber.com/report/how-they-voted> (last visited Feb. 3, 2015).

12. Actually, when the Ansolabehere group controlled only for party affiliation and past constituent voting patterns (and when they employed a standard regression model rather than one with “legislator fixed effects”), they found that the correlation between business and labor contributions and Chamber of Commerce scores was positive and statistically significant. *See Ansolabehere et al.*, *supra* note 9, at 114, 116–17. But the authors considered other statistical models more revealing. They ultimately concluded that “[l]egislators’ votes depend almost entirely on their own beliefs and the preferences of their voters and their party.” *Id.* at 116.

13. In some of its models, the Ansolabehere group treated “electoral competition” as an “instrumental variable” and explained that “the idea is that a close race increases an incumbent’s demand for PAC contributions, producing an exogenous shift in contributions via increase in the propensity to ‘sell’ services, including roll call votes.” *Id.* at 115. The authors’ hypothesis appeared to be: If members’ Chamber of Commerce scores became more pro-labor when they faced close elections and received increased contributions from union PACs, one could reasonably infer that they bent to their contributors’ desires. By the same token, if their scores remained the same, one could infer that they voted their consciences (or possibly their constituents’ desires).

The second inference, however, would be unwarranted. Once a member had “sold out” to labor interests, one could expect a close election to bring increased contributions from union PACs without changing his Chamber of Commerce score. The purpose and effect of the increased union contributions would not have been to change the member’s already favorable votes but simply to enable him to retain his seat. Similarly, if a close election brought increases in both business and labor contributions, one would expect no change in a member’s score.

The authors’ treatment of their second “instrumental” variable was similarly confusing. They sought to assess the effect of a member’s “power” by employing three variables—a dummy variable indicating that a member is a party leader, a dummy variable indicating that the

acknowledged, “[I]t has got to be on your mind that a vote one way or other is going to affect the ability to raise money.”<sup>14</sup> No social science research has called the honesty or accuracy of this statement into question.

After finding that no effect of contributions on Chamber of Commerce scores could be proven, Ansolabehere and his coauthors concluded that “campaign contributing should not be viewed as an investment, but rather as a form of consumption.”<sup>15</sup> Interest groups, however, may seek to advance their interests in either (or both) of two ways—by promoting the election of candidates who favor their positions or by persuading candidates inclined to oppose their positions or on the fence to move in a beneficial direction.<sup>16</sup> Whether the contributions do one thing or the other, contributors hope for a return on their investments and are not simply buying a yacht. No quantitative research indicates that donations by interest groups should be regarded as a form of consumption rather than a form of investment.

To be sure, the two forms of investment differ. Unlike giving money to a candidate to influence him to change his position, spending money to persuade the public to support a candidate is protected by First Amendment. But both things can happen at the same time.

Some donations plainly are motivated by a desire to buy favor. Only the goal of obtaining special access or other favors can explain why corporate PACs “hedge” by giving to both candidates in the same race, why their contributions regularly favor the party in power, and why they donate generously to powerful incumbents in safe districts.<sup>17</sup>

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member is a committee chair and a dummy variable indicating that the member served on either the Ways and Means or Energy and Commerce committees (probably the two most powerful committees with respect to business issues).” *Id.*

Why powerful members attract more campaign contributions than others is unclear. They may do so because they have more “clout” than other members and their votes are especially valuable. On this hypothesis, the price of their votes should increase, and the effect of every dollar contributed should decline. An equally plausible hypothesis, however, is that powerful members attract large contributions because they can influence the decisions that precede roll call votes, including what language important bills contain. These members may receive large contributions for reasons that have little or nothing to do with changing their ultimate roll call votes.

14. Eric Lipton, *For Freshmen in the House, Seats of Plenty*, N.Y. TIMES (Aug. 10, 2013), <http://www.nytimes.com/2013/08/11/us/politics/for-freshmen-in-the-house-seats-of-plenty.html> (quoting Brad Miller, a former Democratic representative from North Carolina).

15. See Ansolabehere et al., *supra* note 9, at 117.

16. Political scientists speak of two models of political giving—the “*ideological* (or ‘*position-induced*’) model” and “the *investor* (or ‘*service induced*’) model.” See Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives 4* (June 20, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2313232>.

17. See *id.* app. B; Jeffrey Milyo, David Primo & Timothy Groseclose, *Corporate PAC Campaign Contributions in Perspective*, 2 BUS. & POL. 75, 76 (2000) (“[I]t is well-established

One may reasonably suppose, however, that the other form of investment predominates. For the most part, even corporate PACs hope to advance their interests by persuading voters to elect candidates already disposed to favor these interests. Social science research may establish that the market for votes is not a spot market and that liberals do not become conservatives overnight.<sup>18</sup> Still, campaign contributions can change votes sometimes, and sometimes may be enough to make the contributions worthwhile even apart from their effect in persuading voters.

The Ansolabehere study notes that nearly “all research on donors’ influence in legislative politics examines the effects of contributions on roll call votes cast by members of Congress.”<sup>19</sup> Roll call votes, however, are watched not only by the Chamber of Commerce but also by other interest groups, the media, and the public. Favoritism for donors may be more likely to affect less visible and less ideologically charged decisions.<sup>20</sup> Daniel Lowenstein has remarked that some social science researchers resemble “the fabled inebriate who searched for a lost key at night at the opposite end of the block from where he dropped it because the light was better there.”<sup>21</sup>

Party leaders, committee chairpersons, and the members of key committees are in a position to influence the important decisions that precede roll call votes. They can determine what a bill says and whether

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that PAC contributions flow disproportionately to incumbent office holders, majority party members, members of powerful committees and to members on committees with jurisdictions relevant to the PAC sponsor.”); Lloyd N. Cutler, *Can the Parties Regulate Campaign Financing?*, 486 ANNALS AM. ACAD. POL. & SOC. SCI. 115, 116 (1986) (quoting the statement of former Senate Majority Leader and presidential nominee Bob Dole that “when these political action committees give money they expect something in return other than good government”).

18. This research appears to supply a sufficient answer to the “public choice” economists who see contributors simply as buying legislators’ votes. William Landes and Richard Posner describe what appears to be a common view among economists and taxi drivers:

In the economists’ version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. . . . Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is “sold” by the legislature and “bought” by the beneficiaries of the legislation.

William W. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

19. Ansolabehere et al., *supra* note 9, at 112.

20. See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 813–14 (1990) (concluding that political favors are likely to take a less visible form than roll call votes).

21. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 314–15 (1989).



it will come to a vote at all.<sup>22</sup> These legislators receive contributions in considerably larger amounts than other legislators,<sup>23</sup> and no study suggests that donors are mistaken in thinking that their contributions to powerful legislators pay dividends. Returns can take the form of phone calls, phrasing, and procedure rather than altered roll call votes.<sup>24</sup>

The three appendices that follow review some nonquantitative evidence on the effects of campaign cash. As Yogi Berra explained, “You can observe a lot by watching.”<sup>25</sup>

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22. The *New York Times* recently noted that the House Financial Services Committee is sometimes called “the cash committee” because its members receive more donations than those of any other committee. “With so many lawmakers clamoring to be on the Financial Services Committee, it has grown to 61 members from 44 since 1980, forcing the installation of four tiered rows of seats in the Rayburn House Office Building.” Lipton, *supra* note 14.

23. See, e.g., Stephen Ansolabehere & James M. Snyder Jr., *Money and Institutional Power*, 77 TEX. L. REV. 1673, 1689–98 (1999).

24. See, e.g., James V. Grimaldi & Susan Schmidt, *Lawmaker from Ohio Subpoenaed in Abramoff Case*, WASH. POST (Nov. 5, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/04/AR2005110401197.html> (“As chairman of the powerful House Administration Committee, [Representative Robert] Ney promised to add language to a bill to reopen a casino for a Texas Indian Tribe that [lobbyist Jack] Abramoff represented. After Ney agreed to prepare the legislation, Abramoff directed tribal officials to make three contributions totaling \$32,000 to Ney’s campaign and political action committees.”).

25. See ALLEN BARRA, *YOGI BERRA: ETERNAL YANKEE* 278 (2009); YOGI BERRA WITH DAVE KAPLAN, *YOU CAN OBSERVE A LOT BY WATCHING* (2008).

## APPENDIX C

## THE EFFECT OF CAMPAIGN DOLLARS II: THE GENEROSITY OF SHELDON ADELSON

This Article has noted that, in 2012, Sheldon Adelson, a Las Vegas casino owner, and his wife Miriam donated \$30 million to Restore Our Future, a super PAC supporting the election of Mitt Romney as President.<sup>1</sup> The couple apparently donated \$140 million or more to electoral efforts that year.<sup>2</sup> Prior to their initial \$10 million contribution to Restore Our Future, Sheldon Adelson met with Romney in Las Vegas and reportedly sought “assurance that Romney would support Israel more strongly than President Obama has.”<sup>3</sup>

Romney was not Sheldon Adelson’s first choice for the 2012 Republican presidential nomination. Before contributing to the Romney campaign, he and his family donated \$21 million to a PAC supporting the campaign of former Speaker Newt Gingrich.<sup>4</sup> Adelson in fact financed a multi-million-dollar campaign of negative advertisements about Romney,<sup>5</sup> and he complained publicly that Romney waffled on the issues.<sup>6</sup>

Romney’s support for Israel did not waver following the Adelsons’ initial \$10 million contribution. In the month after this contribution, Romney accused President Obama of deriding Israel’s leaders and of “shabby treatment of one of our finest friends.”<sup>7</sup> Shortly after making these remarks, Romney traveled to Israel where he offered an

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1. See *supra* notes 14–17 of this Article and accompanying text; *Restore Our Future*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/pacgave2.php?cmte=c00490045&cycle=2012> (last visited Feb. 3, 2015).

2. Theodoric Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, PROPUBLICA (Dec. 20, 2012, 12:47 PM), <http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012>.

3. See Callum Borchers, *Adelson Reportedly Gives \$10m to Pro-Romney Super PAC*, BOS. GLOBE (June 13, 2012), <http://www.bostonglobe.com/news/politics/2012/06/13/sheldon-adelson-donates-million-super-pac-backing-mitt-romney/kmYCnXf8qOMDbglsUYi1PL/story.html>.

4. See Alicia Mundy & Sara Murray, *Adelson Gives \$10 Million to Pro-Romney Super PAC*, WALL ST. J. (June 13, 2012, 10:47 AM), <http://blogs.wsj.com/washwire/2012/06/13/adelson-gives-10-million-to-pro-romney-super-pac/>.

5. See Trip Gabriel & Nicholas Confessore, *PAC Ads to Attack Romney as Predatory Capitalist*, N.Y. TIMES (Jan. 8, 2012), <http://www.nytimes.com/2012/01/09/us/politics/pro-gingrich-pac-plans-tv-ads-against-romney.html>.

6. See Peter H. Stone, *Sheldon Adelson Spent Far More on Campaign Than Previously Known*, HUFFINGTON POST, (Dec. 3, 2012, 12:00 AM), [http://www.huffingtonpost.com/2012/12/03/sheldon-adelson-2012-election\\_n\\_2223589.html](http://www.huffingtonpost.com/2012/12/03/sheldon-adelson-2012-election_n_2223589.html).

7. Richard A. Oppel Jr., *Romney Blasts Security Leaks as a Betrayal*, N.Y. TIMES (July 24, 2012), <http://www.nytimes.com/2012/07/25/us/politics/romney-blasts-security-leaks-as-an-obama-betrayal.html>.

explanation of why Israel's per capita GDP vastly exceeds the Palestinians': "Culture makes all the difference."<sup>8</sup>

Adelson was a member of the audience that stood and cheered Romney's remarks.<sup>9</sup> He later was seated next to Romney at a \$50,000-per-couple breakfast in Jerusalem for American campaign donors.<sup>10</sup> No one—perhaps not even Romney himself—can remember whether the chicken came before the egg at this breakfast.

A presidential candidate might bend his rhetoric on a major foreign policy issue to bring cheers and cash from large contributors, and his rhetoric might shape his policies once elected. Social science researchers could never prove it, however, and neither could anyone else.

Although Adelson's contributions seem to have been prompted primarily by his concept of the public good,<sup>11</sup> his private interests might have played a part as well. For one thing, Adelson's extensive business interests abroad receive favorable tax treatment that the incumbent President he opposed had sought unsuccessfully to end.<sup>12</sup> For another, Chinese currency restrictions that Governor Romney pledged to oppose

8. See Philip Rucker & Joel Greenberg, *Romney Faces Palestinian Criticism for Jerusalem Remarks as He Heads to Poland*, WASH. POST, (July 30, 2012), [http://www.washingtonpost.com/politics/text-of-romneys-remarks-about-culture-israel-and-the-palestinians/2012/07/31/gJQAjmsrNX\\_story.html](http://www.washingtonpost.com/politics/text-of-romneys-remarks-about-culture-israel-and-the-palestinians/2012/07/31/gJQAjmsrNX_story.html); Ashley Parker, *Romney Comments on Palestinians Draw Criticism*, N.Y. TIMES (July 30, 2012, 11:28 AM), <http://thecaucus.blogs.nytimes.com/2012/07/30/romney-comments-on-palestinians-draw-criticism/>.

9. See Kasie Hunt, *In Israel, Romney Declares Jerusalem to Be Capital*, ASSOCIATED PRESS (July 29, 2012, 5:17 PM), <http://bigstory.ap.org/article/romney-builds-ties-israel-woos-voters-home>.

10. See Thomas L. Friedman, *Why Not in Vegas?*, N.Y. TIMES (July 31, 2012), <http://www.nytimes.com/2012/08/01/opinion/friedman-why-not-in-vegas.html>; Kevin Liptak, *Romney Raises More Than \$1 million in Jerusalem*, CNN (July 30, 2012, 8:20 AM), <http://politicalkicker.blogs.cnn.com/2012/07/30/romney-raises-more-than-1-million-in-jerusalem/>.

11. Adelson not only criticized the Obama administration's foreign policy but also said, "What scares me is the continuation of the socialist-style economy we've been experiencing for the past four years." Steven Bertoni, *Billionaire Sheldon Adelson Says He Might Give \$100M to Newt Gingrich or Other Republican*, FORBES (Feb. 21, 2012, 12:04 AM), <http://www.forbes.com/sites/stevenbertoni/2012/02/21/billionaire-sheldon-adelson-says-he-might-give-100m-to-newt-gingrich-or-other-republican/>. But Adelson does not oppose all forms of socialism. Although he condemns Obamacare, he favors the sort of "socialized medicine" (his term) found in Israel. See Alicia Mundy, *Sheldon Adelson: "I'm Basically a Social Liberal,"* WALL ST. J. (Dec. 5, 2012, 6:53 AM), <http://blogs.wsj.com/washwire/2012/12/05/sheldon-adelson-im-basically-a-social-liberal/>.

12. According to the *New York Times*, 90% of the earnings of Adelson's company come from hotel and casino properties in Singapore and Macau. As a result, "the company now has a United States corporate tax rate of 9.8 percent, compared with the statutory rate of 35 percent." *What Sheldon Adelson Wants*, N.Y. TIMES (June 23, 2012), <http://www.nytimes.com/2012/06/24/opinion/sunday/what-sheldon-adelson-wants.html>. *The Times* did not indicate what taxes the company paid abroad but did note that the income tax rate in Macau was zero. *Id.*

were damaging Adelson's foreign interests.<sup>13</sup> In addition, both the Securities Exchange Commission and the Department of Justice were investigating Adelson's company, the Las Vegas Sands Corporation, for violating the Foreign Corrupt Practices Act.<sup>14</sup> The Justice Department was investigating the company for money laundering as well.<sup>15</sup>

Adelson told an interviewer that the accusations against his company were unfounded and that officials had targeted him because of his political activity.<sup>16</sup> When he listed several reasons for contributing to the Romney campaign, his concern that President Obama's reelection would bring further "vilification" not only of Adelson himself but also of other Obama opponents topped the list.<sup>17</sup>

Second on the list was the fact that (in the interviewer's words) "[i]f Romney were elected, Adelson would have a powerful ally on the two issues he cares most about: the security and prosperity of Israel, and opposition to unions, including the so-called card-check proposal that

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13. On the assumption that half the patrons of Macau casinos are Chinese, a five percent appreciation in the value of the yuan probably would increase Adelson's company's earnings in that city by \$73.8 million per year. See Alison Fitzgerald & Julie Bykowitz, *Donors Invest Millions in Romney for Billions in Returns*, BLOOMBERG (Aug. 29, 2012), <http://www.bloomberg.com/news/2012-08-29/donors-invest-millions-in-romney-for-billions-in-returns.html>. Governor Romney promised to call the Chinese government a currency manipulator, something President Obama had not done. See *id.*

14. See Thomas B. Edsall, *Embracing Sheldon Adelson*, N.Y. TIMES (Aug. 6, 2012, 12:56 AM), <http://campaignstops.blogs.nytimes.com/2012/08/06/embracing-sheldon-adelson/>.

15. See Kate O'Keefe et al., *Sands Probed in Money Moves*, WALL ST. J. (Aug. 7, 2012, 7:24 AM), <http://online.wsj.com/news/articles/SB10000872396390444320704577566803521121134>. The money laundering investigation ended on August 27, 2013, when Las Vegas Sands entered an agreement with the U.S. Attorneys' Office in Los Angeles to pay \$47 million to the federal government. See Michael Luo, *Las Vegas Casino Settles in Money-Laundering Inquiry*, N.Y. TIMES (Aug. 28, 2013), <http://www.nytimes.com/2013/08/28/us/las-vegas-casino-settles-in-money-laundering-inquiry.html>.

In 2001, Adelson was concerned that a congressional resolution opposing China's bid to host the 2008 Olympics would harm his business interests. He therefore telephoned a recipient of his campaign contributions, House Majority Whip Tom Delay. After investigating, Delay assured Adelson that the resolution was tied up in House procedures and would "never see the light of day." See *In Thrall to Sheldon Adelson*, N.Y. TIMES (Aug. 16, 2012), <http://www.nytimes.com/2012/08/17/opinion/in-thrall-to-sheldon-adelson.html>; Connie Bruck, *The Brass Ring: A Multibillionaire's Relentless Quest for Global Influence*, NEW YORKER (June 30, 2008), [http://www.newyorker.com/reporting/2008/06/30/080630fa\\_fact\\_bruck?currentPage=all](http://www.newyorker.com/reporting/2008/06/30/080630fa_fact_bruck?currentPage=all).

16. Mike Allen, *Sheldon Adelson: Inside the Mind of the Mega-Donor*, POLITICO (Sept. 23, 2012, 9:12 PM), <http://www.politico.com/news/stories/0912/81588.html>.

17. *Id.* Adelson noted that someone—probably a government official—had leaked the fact that his company was under investigation only after he and his family had become heavily involved in the 2012 election. He believed the objective was "making [him] toxic so that they can make the argument to Republicans, 'This guy is toxic. Don't do business with him.'" *Id.*

would make it easier for workers to organize.”<sup>18</sup> Las Vegas Sands owns the only non-union hotels and casinos on the Las Vegas strip.<sup>19</sup>

In addition, Adelson has begun a lobbying campaign for federal legislation to prohibit internet gambling.<sup>20</sup> He opposes this gambling for “moral” reasons and also says that online gambling would be “suicidal” for the U.S. casino industry.<sup>21</sup> Adelson told an interviewer that he is “willing to spend whatever it takes” to see the practice outlawed.<sup>22</sup>

Adelson does not believe his political contributions should be constitutionally protected or even legal. “I’m against very wealthy people attempting to or influencing elections,” he told an interviewer. “But as long as it’s doable I’m going to do it.”<sup>23</sup>

Governor Romney lost the 2012 presidential election, and all but one of the other seven candidates Adelson supported in the 2012 general election lost too.<sup>24</sup> Adelson, however, did not seem discouraged. He announced that he was prepared to double his donations the next time around and explained, “I happen to be in a unique business where winning and losing is the basis of the entire business . . . . So I don’t cry when I lose. There’s always a new hand coming up.”<sup>25</sup>

Three days after Mitt Romney announced his choice of Paul Ryan as his running mate, Ryan called on Adelson and other donors at Adelson’s Venetian Hotel in Las Vegas.<sup>26</sup> One week after the Romney–Ryan ticket lost the general election, three Republicans then regarded as possible 2016 presidential contenders—Governors Jindal of Louisiana, Kasich of Ohio, and McDonnell of Virginia—met privately with Adelson at the Venetian.<sup>27</sup> On August 1, 2013, Adelson hosted a fundraiser at another of his Las Vegas resorts for the gubernatorial

18. *Id.*

19. Dana Spitzer, *Billionaire Casino Owner Adelson Takes Aim at Unions*, PEOPLE’S WORLD (Jan. 4, 2013), <http://www.peoplesworld.org/billionaire-casino-owner-adelson-takes-aim-at-unions/>.

20. Nathan Vardi, *Sheldon Adelson Says He Is “Willing to Spend Whatever it Takes” to Stop Online Gambling*, FORBES (Nov. 22, 2013, 9:08 AM), <http://www.forbes.com/sites/nathanvardi/2013/11/22/sheldon-adelson-says-he-is-willing-to-spend-whatever-it-takes-to-stop-online-gambling/>.

21. *Id.*

22. *Id.*

23. Bertoni, *supra* note 11.

24. Alicia Mundy & Alexandra Berzon, *Casino Mogul Adelson Loses Most Election Bets*, WALL ST. J. (Nov. 9, 2012, 7:00 AM), <http://blogs.wsj.com/washwire/2012/11/09/adelsons-loses-most-election-bets/>.

25. Alicia Mundy, *Adelson to Keep Betting on the GOP*, WALL ST. J. (Dec. 4, 2012, 11:01 PM), <http://online.wsj.com/article/SB10001424127887323717004578159570568104706.html>.

26. Trip Gabriel, *A Quiet Introduction to Big Money Donors*, N.Y. TIMES (Aug. 16, 2012), <http://query.nytimes.com/gst/fullpage.html?res=9803E0DD123BF935A2575BC0A9649D8B63>.

27. Kenneth P. Vogel, *2016 Contenders Court Mega-Donors*, POLITICO (Dec. 12, 2012, 4:29 AM), <http://www.politico.com/story/2012/12/2016-contenders-courting-mega-donors-84497.html>.

reelection of a fourth 2016 presidential possibility, Governor Christie of New Jersey.<sup>28</sup>

In March 2014, Adelson hosted a group called the Republican Jewish Coalition in Las Vegas.<sup>29</sup> The gathering began with a dinner for another presidential prospect, former Governor Bush of Florida.<sup>30</sup> Three possible 2016 presidential contenders, Governor Walker of Wisconsin and Governors Kasich and Christie, also addressed the group.<sup>31</sup> Christie offended some listeners by referring to the West Bank as the “occupied territories”—a term also used on occasion by the U.S. State Department and Israeli officials—but the governor met privately with Adelson to say that he “misspoke.”<sup>32</sup> Some members of the press referred to the event as the “Sheldon primary.”<sup>33</sup>

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28. See Maggie Haberman, *Chris Christie at Sheldon Adelson Fundraiser in Las Vegas*, POLITICO (Aug. 1, 2013, 6:08 PM), <http://www.politico.com/story/2013/08/chris-christie-sheldon-adelson-fundraiser-95085.html>.

29. See Richard Minitzer, *Did Chris Christie “Bully” Sheldon Adelson’s Friend?*, FORBES (Apr. 1, 2014, 5:12 PM), <http://www.forbes.com/sites/richardminitzer/2014/04/01/is-chris-christie-actually-electable/>.

30. Philip Rucker, *Sheldon Adelson Plans VIP Dinner for Jeb Bush at GOP Gathering in Vegas*, WASH. POST (March 22, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/22/sheldon-adelson-plans-vip-dinner-for-jeb-bush-at-gop-gathering-in-vegas/>.

31. *Id.*

32. Minitzer, *supra* note 29.

33. Dan Balz, *“Sheldon Primary” is One Reason Americans Distrust the Political System*, WASH. POST (March 28, 2014), [http://www.washingtonpost.com/politics/the-sheldon-primary-is-one-reason-why-americans-distrust-the-political-system/2014/03/28/765bfdc-b67e-11e3-a7c6-70cf2db17781\\_story.html](http://www.washingtonpost.com/politics/the-sheldon-primary-is-one-reason-why-americans-distrust-the-political-system/2014/03/28/765bfdc-b67e-11e3-a7c6-70cf2db17781_story.html).

## APPENDIX D

## THE EFFECT OF CAMPAIGN DOLLARS III: EXECUTIVE CLEMENCY

An outcry followed President Clinton's grant of 177 pardons and commutations on his last day in office, and this outcry "focused particularly on the pardons he granted Marc Rich and his business partner Pincus Green."<sup>1</sup> Rich and Green had been indicted on charges of trading with the enemy—conspiring to purchase more than six million barrels of oil from Iran while that nation was holding fifty-two U.S. hostages<sup>2</sup>—and tax evasion—"the biggest tax fraud case in the history of the United States," according to the chief prosecuting attorney.<sup>3</sup> "Both had been fugitives and had lived in Switzerland since their indictments."<sup>4</sup>

The Justice Department's rules barred the consideration of a fugitive's clemency application through ordinary channels,<sup>5</sup> and White House Counsel Beth Nolan, Deputy Counsel Bruce Lindsey, and all the other lawyers in the White House Counsel's office opposed clemency. White House Chief of Staff John Podesta advised the President against clemency as well.<sup>6</sup>

Denise Rich, however, Marc Rich's former wife, had written two letters to the President requesting a pardon: "I am writing as a friend and admirer of yours to add my voice to the chorus of those who urge you to grant my former husband, Marc Rich, a pardon for the offenses unjustly alleged and so aggressively pursued."<sup>7</sup> Her earlier financial

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1. Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY, 1131, 1136–37 (2012).

2. Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money and Influence*, L.A. TIMES (Feb. 18, 2001), <http://articles.latimes.com/2001/feb/18/news/mn-27173>; see also Eric N. Berg, *Marc Rich Indicted in Vast Tax Evasion Case*, N.Y. TIMES (Sept. 20, 1983), <http://www.nytimes.com/1983/09/20/business/marc-rich-indicted-in-vast-tax-evasion-case.html>.

3. *The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 88 (2001) (statement of Morris "Sandy" Weinberg Jr., former assistant U.S. Attorney, Southern District of New York).

4. Alschuler, *supra* note 1, at 1137.

5. See 28 C.F.R. § 1.2 (2012).

6. See *Excerpts from Testimony on Pardon*, N.Y. TIMES (Mar. 2, 2001), <http://www.nytimes.com/2001/03/02/us/excerpts-from-testimony-on-pardon.html> (reciting Podesta's testimony that he and the entire staff of the White House Counsel's Office opposed the pardon); *In re Grand Jury Subpoenas Dated Mar. 9, 2001*, 179 F. Supp. 2d 270, 279 (S.D.N.Y. 2001) ("Rich's representatives also contacted White House Chief of Staff John D. Podesta, White House Counsel Beth Nolan, and Deputy White House Counsel Bruce Lindsey to enlist their support. Podesta, Nolan, and Lindsey, however, . . . opposed [the pardon] . . .").

7. See Alison Leigh Cowan, *Rich Cashied in a World of Chits to Win Pardon*, N.Y. TIMES (Apr. 11, 2001), <http://www.nytimes.com/2001/04/11/us/plotting-a-pardon-rich-cashed-in-a-world-of-chits-to-win-pardon.html>.

contributions had included “more than \$1 million to the Democratic Party and its candidates, \$450,000 to Clinton’s library fund, \$100,000 to a fund to help Hillary Clinton’s Senate campaign, \$10,000 to the President’s defense fund, and \$7375 worth of furniture to the Clintons.”<sup>8</sup>

Denise Rich pressed for an invitation to a White House dinner where she sought a private moment with the President. According to Jack Quinn, a former Clinton White House Counsel then representing Marc Rich, Denise Rich said simply, “I know you got my letter, and it means a great deal to me.”<sup>9</sup>

Beth Dozoretz also made a personal appeal to Clinton. She was a prominent Democratic fundraiser, a former finance chair of the Democratic National Committee, and a friend of Denise Rich.<sup>10</sup> President Clinton later wrote, “The suggestion that I granted the pardons because Mr. Rich’s former wife, Denise, made political contributions and contributed to the Clinton library foundation is utterly false. There was absolutely no quid pro quo.”<sup>11</sup>

A less familiar tale of Clinton’s magnanimity on his last day in office is almost as revealing. Carlos Vignali had served six years of a fifteen-year prison term when Clinton commuted his sentence to the time already served.<sup>12</sup> According to the judge who sentenced Vignali, he “played a major role in the financing, transport, and procurement of drugs” for a large Minneapolis drug conspiracy.<sup>13</sup>

Vignali’s father, Horacio Vignali, had given \$160,000 in political contributions since his son’s conviction, most of it to California Democrats.<sup>14</sup> Horacio encouraged the recipients of these contributions

8. James V. Grimaldi & Dan Eggen, *House Panel Expands Probe of Rich Pardon; 3 Former Clinton Aides Subpoenaed*, WASH. POST, Feb. 16, 2001, at A3.

9. Cowan, *supra* note 7.

10. See Melinda Henneberger, *Pardon Puts New Spotlight on a Clinton Fund-Raiser*, N.Y. TIMES (Feb. 17, 2001), <http://www.nytimes.com/2001/02/17/us/pardon-puts-new-spotlight-on-a-clinton-fund-raiser.html>; *In re* Grand Jury Subpoenas dated Mar. 9, 2001, 179 F. Supp. 2d 270, 279 (S.D.N.Y. 2001) (describing Dozoretz as a close friend of Denise Rich and a good friend of Clinton).

11. William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), <http://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html>. For a fuller description of the history of the Marc Rich and Pincus Green pardons, see Alschuler, *supra* note 1, at 1137–42.

12. See *Politics: Criminal Probe of Rich Pardon Opened; Other Developments*, FACTS ON FILE WORD NEWS DIG., Feb. 14, 2001, at 100A2 [hereinafter *Criminal Probe of Rich*].

13. See David S. Doty, *Clemency: A View from the Bench of Two Commutations—Vignali and Willis*, 13 FED. SENT’G REP. 161, 161–62 (2000–2001). Judge Doty, who had written letters supporting the successful clemency applications of two other drug dealers he had sentenced, was “aghast” at the Vignali commutation. See *id.*; *Criminal Probe of Rich*, *supra* note 12.

14. Richard A. Serrano & Stephen Braun, *Working the American System*, L.A. TIMES



and other prominent figures to endorse clemency for Carlos. He obtained letters or favorable phone calls from two members of Congress, two California State Assembly speakers, a cardinal of the Catholic Church, the Los Angeles County sheriff, a Los Angeles County Supervisor, a city councilman, and the United States Attorney in Los Angeles.<sup>15</sup> Carlos's clout-less coconspirators collected no commutations, and several of them remained in custody when Carlos went home.<sup>16</sup>

John Catsimatidis, the owner of a supermarket chain, had been a contributor to both Democratic and Republican candidates and had been particularly supportive of the Clintons. He also had pledged to raise \$1 million for the Clinton Presidential Library.<sup>17</sup> Catsimatidis wrote letters supporting the successful clemency applications of Edward Downe Jr.,<sup>18</sup> a former financial executive who had pleaded guilty to insider trading, and William Fugazy, the "limo king of New York" who had pleaded guilty to perjury.<sup>19</sup> Catsimatidis then telephoned Clinton's Chief of Staff, John Podesta, to ask him to bring the letters to the President's attention.<sup>20</sup> Catsimatidis told the press, "In the last 50 years, I don't know of anyone who's gotten a pardon who hadn't paid a lot of money to a lawyer or hasn't known somebody. . . . How do you create a pardon other than talking to people?"<sup>21</sup>

Both Republican and Democratic Presidents may have taken note of campaign contributions in deciding whether to grant clemency. Clinton's predecessor, George H. W. Bush, approved clemency at a far

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(Apr. 29, 2001), <http://articles.latimes.com/2001/apr/29/magazine/tm-57153>.

15. *Id.* The U.S. Attorney in Minneapolis, the district where Carlos was convicted, opposed clemency. See Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 32 CAP. U. L. REV. 185, 211 (2003); see also Alschuler, *supra* note 1, at 1143 (noting that Horatio Vignali paid fees of \$204,280 to Hugh Rodham, a Florida attorney and Hillary Clinton's brother, to promote Carlos's cause in the White House and that Rodham returned the money at the behest of President and Mrs. Clinton after the press publicized the fees).

16. Richard A. Serrano & Stephen Braun, *In Many Drug Cases, Normal Clemency Process Bypassed*, L.A. TIMES (Mar. 5, 2001), <http://articles.latimes.com/2001/mar/05/news/mn-33657> (reporting that Todd Hopson, a Vignali co-defendant serving eighteen years, "more closely fits the model that Clinton, FAMM [Families Against Mandatory Minimums] and others have spoken of—a first-time offender, a minor role in the drug crime, and someone who does not have the money or connections to get out of prison early").

17. Greg B. Smith, *Clinton Library Fundraiser Helped Perjurer Get Pardon*, WASH. POST, Mar. 4, 2001, at A02.

18. See Mark Hosenball, *A Library Link?*, NEWSWEEK (Mar. 9, 2001), <http://www.newsweek.com/library-link-149021>. Downe himself had contributed \$21,500 to Democratic candidates since 1991 and had given \$1000 to Hillary Clinton's U.S. Senate campaign, *InsidePolitics*, *Would You Pardon Them?*, CNN (Feb. 19, 2001, 2:36 PM), <http://www.cnn.com/ALLPOLITICS/time/2001/02/26/pardon.html>.

19. *InsidePolitics*, *supra* note 18; Hosenball, *supra* note 18.

20. Hosenball, *supra* note 18.

21. Smith, *supra* note 17.

lower rate than any other twentieth-century President,<sup>22</sup> but he did pardon Armand Hammer, the Chairman of Occidental Petroleum, who recently had given more than \$100,000 to Republican state committees and another \$100,000 to the Bush–Quayle Inaugural Committee.<sup>23</sup> In 1976, Hammer had pleaded guilty to making an illegal contribution to President Nixon’s reelection campaign.<sup>24</sup>

Bush also pardoned Edwin L. Cox Jr., who had served a short prison sentence for bank fraud.<sup>25</sup> After Bush’s loss to Clinton in the 1992 presidential election, former Texas governor Bill Clements called Bush’s chief of staff, James Baker, to seek a pardon for Cox.<sup>26</sup> Baker passed along Clements’s request to the White House Counsel’s office with a note reporting that Cox’s father was “a longtime supporter of the President’s.”<sup>27</sup> He also sent a copy of his note to President Bush. After Bush approved the pardon, Cox’s father continued his support by donating at least \$100,000 to the Bush Presidential Library, \$125,000 to Republican campaign committees, and \$30,000 to the gubernatorial campaign of President Bush’s son, George W. Bush.<sup>28</sup> Edwin Cox Jr. would have been ineligible for a pardon under the rules applicable to people without White House connections.

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22. See Office of the Pardon Attorney, *Clemency Statistics*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm> (last visited Feb. 3, 2015).

23. Marc Lacey, *Political Memo; Resurrecting Ghosts of Pardons Past*, N.Y. TIMES (Mar. 4, 2001), <http://www.nytimes.com/2001/03/04/us/political-memo-resurrecting-ghosts-of-pardons-past.html>.

24. Eric Pace, *Armand Hammer Dies at 92; Executive Forged Soviet Ties*, N.Y. TIMES (Dec. 11, 1990), <http://www.nytimes.com/1990/12/11/obituaries/armand-hammer-dies-at-92-executive-forged-soviet-ties.html>; David Rampe, *Armand Hammer Pardoned by Bush*, N.Y. TIMES (Aug. 15, 1989), <http://www.nytimes.com/1989/08/15/us/armand-hammer-pardoned-by-bush.html>.

25. Michael Weisskopf, *A Pardon, a Presidential Library, a Big Donation*, TIME (Mar. 6, 2001), <http://www.time.com/time/printout/0,8816,101652,00.html>.

26. *Id.*

27. *Id.*

28. *Id.*

## APPENDIX E

THE EFFECT OF CAMPAIGN DOLLARS IV: THE APPOINTMENT OF  
AMBASSADORS

In recently released post-Watergate testimony, former President Richard Nixon acknowledged that he reserved many ambassadorships for campaign contributors. “I did give top consideration to major financial contributors,” he declared.<sup>1</sup> “[I]t was not vitally important . . . to have . . . an individual whose qualifications were extraordinary” in positions like the U.S. ambassadorships to “Luxembourg or El Salvador or Trinidad et cetera.”<sup>2</sup> “[T]here was a lot of in-fighting within the Administration . . . as to . . . how many posts would be available to financial contributors . . . .”<sup>3</sup>

The former President pointed to tradition:

[I]n every presidency that I know of contributors have been appointed to non-career posts in considerable numbers . . . . Bill Bullitt, for example, was probably the best ambassador to Russia and the best ambassador to France we have had in a generation. Now he didn’t get his job because he happened to shave the top of his head. He got his job because he contributed a half million dollars to Mr. Roosevelt’s campaign. . . . Pearl Mesta wasn’t sent to Luxembourg because she had big bosoms. Pearl Mesta went to Luxembourg because she made a good contribution.<sup>4</sup>

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1. Deposition of Richard M. Nixon at 34–35, *United States v. Doe*, 418 U.S. 683 (1975) (No. 73-1766) [hereinafter *Nixon Deposition*], available at <http://media.nara.gov/research/nixon-grand-jury/9-16a/9-16a-testimony-nixon-6-23-1975-Part1.pdf>.

2. *Id.* at 18.

3. *Id.* at 32.

4. *Id.* at 21, 25–26. Perle Mesta, a famed Washington hostess and Harry Truman’s ambassador to Luxembourg, inspired the Irving Berlin musical “Call Me Madam.” She was portrayed on stage and screen by Ethel Merman. Frank Rich, *Journal: Calling Perle Mesta*, N.Y. TIMES (Nov. 18, 1997), <http://www.nytimes.com/1997/11/18/opinion/journal-calling-perle-mesta.html>.

Mesta’s name was almost never mentioned without the tag line “the hostess with the mostest,” *see id.*, and William Bullitt might have been the host with the most. His career was even more colorful than Mesta’s. He coauthored a psycho-biography of Woodrow Wilson with Sigmund Freud (who had personally psychoanalyzed Bullitt). *See* Erik H. Erikson, *The Strange Case of Freud, Bullitt, and Woodrow Wilson: I*, N.Y. REV. OF BOOKS, Feb. 1967, available at <http://www.nybooks.com/articles/archives/1967/feb/09/the-strange-case-of-freud-bullitt-and-woodrow-wils/> (reviewing SIGMUND FREUD & WILLIAM C. BULLITT, *WOODROW WILSON: A PSYCHOLOGICAL STUDY* (1967)). In addition, he served as the first American ambassador to the Soviet Union, conducted a backdoor campaign to have Sumner Welles dismissed from the State Department because Welles had solicited gay sex from railroad porters, and hosted at his Moscow residence “the Spring Ball of the Full Moon”—a 1935 party at which more than 100 zebra finches flew throughout the

White House tapes that became public after Nixon testified show that he said to his chief of staff, H. R. Haldeman, “My point is that anybody who wants to be an ambassador must at least give \$250,000.”<sup>5</sup> He said of Raymond Guest, who had expressed an interest in becoming ambassador to Belgium, “Uh, he’s fine. His wife speaks French, he speaks French, uh, uh, but the cost is uh, a quarter of a million.”<sup>6</sup> On being told of a press report that Cornelius Vanderbilt Whitney would be named ambassador to Spain (something that Nixon apparently did not know), he declared, “Hell, if we did it, it was a great sale . . . . He gave a quarter of a million dollars.”<sup>7</sup>

The custom of giving campaign contributors a large leg up in obtaining ambassadorships has not faded in the years since the Nixon administration. In the administration of President Barack Obama, as in those of his predecessors George W. Bush, Bill Clinton, George H. W. Bush, Ronald Reagan, and Jimmy Carter, slightly more than 30% of all

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house and a baby bear got drunk on champagne fed to it by Communist leader Karl Radek. *William Christian Bullitt Jr.*, Wikipedia, [http://en.wikipedia.org/wiki/William\\_Christian\\_Bullitt\\_Jr.](http://en.wikipedia.org/wiki/William_Christian_Bullitt_Jr.) (last visited Feb. 3, 2015).

5. George Lardner Jr. & Walter Pincus, *Nixon Set Minimum Contribution for Choice Diplomatic Posts*, WASH. POST (Oct. 30, 1997), <http://www.washingtonpost.com/wp-srv/national/longterm/nixon/103097envoy.htm>.

6. *Id.*

7. *Id.* After Thomas Pappas raised funds that Nixon knew would be paid to the Watergate burglars for their silence, Nixon agreed to Pappas’s request that he not replace the ambassador to Greece. “Let him stay,” the President said of the ambassador. “Let him stay. No problem. Pappas has raised the money we need for this other activity.” George Lardner Jr. & Walter Pincus, *Contributor Got Oval Office Thank-You for Watergate Funds*, WASH. POST (Oct. 30, 1997), <http://www.washingtonpost.com/wp-srv/national/longterm/nixon/103097pappas.htm>.

Nixon acknowledged that “the making of an absolute commitment for ambassadorships” would be illegal. *See* Nixon Deposition, *supra* note 1, at 37. Prosecutors sought his testimony because some of his aides apparently had made such absolute commitments. Notably, two campaign contributors who had obtained ambassadorships in Nixon’s first term apparently had been promised that he would appoint them to better (i.e., European) ambassadorships if each gave \$100,000 to his reelection campaign. Nixon’s personal lawyer, Herbert Kalmbach, in fact went to prison for making this arrangement with the ambassador to Trinidad and Tobago, Fife Symington Jr. *See* Bob Woodward & Carl Bernstein, *Haldeman Role in Envoy Deal Told: Haldeman Linked to Envoy Deal*, WASH. POST, June 26, 1974, at A1; *Buckley v. Valeo*, 519 F.2d 821, 840 (D.C. Cir. 1975) (“On February 25, 1974, Herbert Kalmbach, a principal fund raiser, pleaded guilty to a charge of violation of 18 U.S.C. § 600, in having promised, in 1971, a more prestigious post to Ambassador (to Trinidad) J. Fife Symington, in return for a \$100,000 contribution to be split between 1970 senatorial candidates designated by the White House and Mr. Nixon’s 1972 campaign.”); S. REP. NO. 93–981, at 492–510 (1974) (compiling extensive evidence of the influence of campaign contributions on President Nixon’s ambassadorial appointments).

ambassadors have been political appointees.<sup>8</sup> The cost of a top ambassadorship apparently has increased from \$250,000 to \$1 million.<sup>9</sup>

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8. See Al Kamen, *Embassy Openings for Open Wallets*, WASH. POST (Jan. 19, 2011), [http://www.washingtonpost.com/pb/national/embassy-openings-for-open-wallets/2011/01/18/ABYmMkD\\_story.html](http://www.washingtonpost.com/pb/national/embassy-openings-for-open-wallets/2011/01/18/ABYmMkD_story.html); see also Brandon Conrads, *Obama Selects Key Donor as Ambassador to Hungary*, OPENSECRETS (Nov. 8, 2013), <http://www.opensecrets.org/news/2013/11/obama-selects-key-donor-as-ambasad.html>; Michael Beckel, *Big Donors & Bundlers Among Obama's Ambassador Picks*, OPENSECRETS (May 28, 2009), <http://www.opensecrets.org/news/2009/05/big-donors-bundlers-among-obam.html>; Michael Beckel, *Obama's New Ambassador Nominees Gave Big—and Bundled Bigger*, OPENSECRETS.ORG (June 18, 2009), <http://www.opensecrets.org/news/2009/06/obamas-new-ambassador-nominees.html>.

9. See Kamen, *supra* note 8.

## APPENDIX F

## PARTISAN ADVANTAGE AND INCUMBENT PROTECTION

Chief Justice Roberts wrote for the plurality in *McCutcheon*, “[T]hose who govern should be the *last* people to help decide who *should* govern.”<sup>1</sup> The last people who should have a job, however, may be the ones to whom the Constitution assigns it. Sadly perhaps, legislators are the only people who can supply election laws. Under the “rule of necessity,” even a judge with a financial interest in the outcome of a case may hear it when no disinterested judge can replace him.<sup>2</sup>

When legislators enact campaign-finance regulations, they influence the outcome of elections, and when judges strike down campaign-finance regulations, they do too. Because members of Congress must stand for reelection, there is good reason for mistrusting their decisions. The Supreme Court’s partisan division on the validity of campaign-finance regulations raises eyebrows too.<sup>3</sup>

Considerable discussion has focused on whether contribution limits are beneficial to incumbents (because challengers can overcome the greater name recognition and other electoral advantages of incumbents only by raising large amounts of money) or whether these limits benefit challengers (because incumbents can more easily raise large amounts of money).<sup>4</sup> In *Randall v. Sorrell*,<sup>5</sup> the Supreme Court saw low contribution limits as a form of incumbent protection. It invalidated Vermont’s extremely low limits partly because they threatened to “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders.”<sup>6</sup> But the Court apparently got it backwards. Recent empirical studies have concluded that “[i]n real-world elections, the benefits of low contribution limits largely redound to challengers.”<sup>7</sup>

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1. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441–42 (2014) (plurality opinion).

2. *See* *United States v. Will*, 449 U.S. 200, 213, 217 (1980).

3. Moreover, *Bush v. Gore*, 531 U.S. 98 (2000), still casts a shadow. Three of the five Justices in the majority in *Bush v. Gore* were also part of the five-Justice majorities in *Citizens United* and *McCutcheon*. Some cynical Democrats do not consider it a coincidence that the rulings in all of these cases advanced the electoral interests of Republicans.

4. *See, e.g.*, Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 ELECTION L.J. 125, 127 (2010) (discussing campaign-finance models that predict whether contribution limits protect incumbents or challengers).

5. 548 U.S. 230 (2006).

6. *Id.* at 248–49 (plurality opinion).

7. CIARA TORRES-SPPELLISY ET AL., BRENNAN CTR. FOR JUST., ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS 2 (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf>; *see* Stratmann, *supra* note 4, at 126–27 (describing prior studies and offering further findings that “[t]he tighter the [contribution] limits, the more competitive the election”).

Generalizations on this subject are of dubious value. Contribution limits plainly benefit some incumbents and plainly disadvantage others. An incumbent from a “swing” district who expects wealthy donors to target him at the next election would be likely support contribution limits with enthusiasm. An incumbent who has been reelected repeatedly from a safe district, however, would be likely to oppose them. This member’s seniority and the power accompanying it could enable him to fill a large war chest, which he would not need to use to wage war. Whether progressive or conservative, this incumbent might use most of the funds he collected to aid other politicians and to pay the expenses of campaigning and office holding—including expenses he might incur at the National Democratic Club or the Capitol Hill Club and at five-star resorts. This member would have little to gain by voting to limit contributions.<sup>8</sup>

A less discussed, more easily answered, and probably more relevant question is which political party benefits from contribution limits. When one party tends to attract small donors and the other large donors, capping contributions is likely to benefit the party that disproportionately attracts small donors. Today, the party that benefits politically from contribution limits is almost certainly the Democratic Party.<sup>9</sup>

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8. Since 1989, federal law has prohibited federal office holders, former office holders, and current candidates from using campaign funds to pay personal living expenses. *See* U.S. S. SELECT COMM. ON ETHICS, 108th Cong., S. ETHICS MANUAL 154 & n.428 (2003). However, candidates and former candidates may donate these funds to charities without limit, to political parties without limit, and to political campaigns other than their own within limits. *Id.* at 154. They also may use campaign funds to pay legal expenses if charged with official misconduct, to buy furniture and art for their offices, and to pay other expenses of campaigning and office holding. *Id.* at 116–17, 155. Officials have used these funds to enable their spouses to accompany them on work-related travel and to host extended fundraising gatherings at resorts in places like Vail, Park City, Puerto Rico, Las Vegas, South Florida, and Bermuda. Eric Lipton, *A Loophole Allows Lawmakers to Reel in Trips and Donations*, N.Y. TIMES (Jan. 20, 2014), <http://www.nytimes.com/2014/01/20/uspolitics/a-loophole-allows-lawmakers-to-reel-in-trips-and-donations.html>. One member of Congress even has used campaign funds to pay herself 18% interest on loans from herself to her campaign. Steve Kroft, *60 Minutes: Washington’s Open Secret: Profitable PACs*, CBS NEWS (Oct. 21, 2013), [http://www.cbsnews.com/8301-18560\\_162-57608255/washingtons-open-secret-profitable-pacs/](http://www.cbsnews.com/8301-18560_162-57608255/washingtons-open-secret-profitable-pacs/) (describing the interest charges of the “worst offender,” Grace Napolitano); *see also* Thomas J. Cole, *Lawmakers Use Campaign Funds for Expenses*, ALBUQUERQUE J. (Feb. 15, 2012, 12:05 AM), <http://www.abqjournal.com/88006/news/lawmakers-use-campaign-funds-for-expenses.html>; Dave Mann & Abby Rapoport, *Lifestyles of the Corrupt and Elected*, TEX. OBSERVER (Jan. 16, 2011, 8:19 AM), <http://www.texasobserver.org/cover-story/lifestyles-of-the-corrupt-and-elected>; Adam Schwartzman, *Joe Bruno, Other Pols Use Campaign Funds to Pay Legal Expenses*, VILLAGE VOICE BLOGS (Sep. 3, 2010, 2:00 PM), [http://blogs.villagevoice.com/runninscared/2010/09/joe\\_bruno\\_other.php](http://blogs.villagevoice.com/runninscared/2010/09/joe_bruno_other.php); Ken Silverstein, *Beltway Bacchanal: Congress Lives High on the Contributor’s Dime*, HARPER’S MAG. (Mar. 2008), <http://harpers.org/archive/2008/03/beltway-bacchanal/>.

9. In 2012, the Barack Obama presidential campaign raised three times more cash from “small individual contributors” than the Mitt Romney presidential campaign. It raised only 1.3

It may not be a coincidence that the five Justices in the majority in both *Citizens United* and *McCutcheon* were appointed by Republican presidents while three of the four dissenters in *Citizens United* and all of the dissenters in *McCutcheon* were appointed by Democrats. To explain this alignment, one need not embrace the cynical view that Republican Justices strive to get Republicans elected. Instead, Republican-appointed Justices might simply have been more suspicious than Democrat-appointed Justices of legislators whose approval of campaign-finance limitations could have furthered their own partisan interests. Without seeking to tilt the game board in favor of their party, these Justices might have sought to block Democratic legislators from tilting it in favor of theirs.<sup>10</sup>

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times more cash from “large individual contributors.” See *2012 Presidential Race*, OPENSECRETS, <http://www.opensecrets.org/pres12/index.php> (last visited Feb. 3, 2015).

In the 2010 midterm elections, conservative super PACs outspent liberal super PACs by 25 percent. See Michael Beckel, *Led by Karl Rove-Linked Groups, “Super PACs” and Nonprofits Significantly Aid GOP in Election 2010*, OPENSECRETS (Nov. 5, 2010), <http://www.opensecrets.org/news/2010/11/led-by-karl-rove-linked-groups-nonp.html>.

According to the *New York Times*:

About two dozen individuals, couples or corporations gave \$1 million or more to Republican super PACs [in the beginning of 2012]. . . . Collectively, their contributions totaled more than \$50 million this cycle, making them easily the most influential and powerful political donors in politics today. They have relatively few Democratic counterparts so far . . . .

Nicholas Confessore et al., *In Republican Race, a New Breed of Superdonor*, N.Y. TIMES (Feb. 21, 2012), <http://www.nytimes.com/2012/02/22/us/politics/in-republican-race-a-new-breed-of-superdonor.html>.

A *Times* update in late September 2012 reported:

While Democratic super PACs have begun to attract a growing number of donors giving six- and seven-figure checks, they remain far behind their Republican equivalents in terms of fund-raising. The four top Democratic groups had together raised less through the beginning of September than Restore Our Future, which is backing Mitt Romney.

Nicholas Confessore, *Reversing Course, Soros to Give \$1 Million to a Pro-Obama “Super PAC”*, N.Y. TIMES (Sept. 27, 2012, 3:32 PM), <http://thecaucus.blogs.nytimes.com/2012/09/27/soros-gives-1-million-to-democratic-super-pac/?src=recg>.

10. Recall, however, that public opinion strongly favors campaign-finance regulation. See Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>; Lydia Saad, *Half in U.S. Support Publicly Financed Federal Campaigns: Vast Majority Supports Limiting Campaign Spending and Contributions*, GALLUP (June 24, 2013), <http://www.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx>. The legislators who oppose campaign-finance regulation appear to be the ones most likely to be subordinating their constituents’ desires to their own political interests. Moreover, in 2011, the Supreme Court struck down by a vote of five-to-four a scheme of public



Undoubtedly, legislators of both parties do consider the electoral consequences of campaign-finance restrictions, and their efforts to gain electoral advantage should lead judges to be wary. Wariness goes too far, however, when it causes judges to turn a blind eye to the contributions that make deliberate favoritism in awarding government benefits likely.

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financing of election campaigns approved by voter initiative. Although the self-interest of incumbent legislators could not have motivated this scheme, the Justices in the majority were the same those who formed the majorities in *Citizens United* and *McCutcheon*. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).