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## INTRODUCTION

ALMOST forty years ago, Congress began the project of comprehensive federal campaign finance regulation with the Federal Election Campaign Act Amendments of 1974 (“FECA”).<sup>1</sup> Adding to scattershot restrictions on corporate and union campaign funding, FECA systematically regulated both expenditure of campaign funds by parties, candidates, and individuals, and contribution of campaign funds among them, and it imposed disclosure requirements concerning the same. Only half of this system survived the Supreme Court’s decision in *Buckley v. Valeo*,<sup>2</sup> which struck down as unconstitutional restrictions on independent expenditures while leaving intact limits on contributions and mandated disclosure. But for almost four decades going forward from *Buckley*, the Court and Congress developed the project of campaign finance law under the basic framework of contribution limits and disclosure requirements. This was true, that is, until *Citizens United v. FEC*<sup>3</sup> when for all practical purposes campaign finance law as we knew it died.

The suddenness of campaign finance law’s death is staggering. It took only a few months following *Citizens United* for campaign finance law to look fundamentally different in time for the 2010 elections. Indeed, the news and academic commentary could hardly keep pace. The commentary focused upon the consequences of *Citizens United* for corporations—the simple holding of the decision itself. Not long after publication, however, much of that commentary was already outdated. A larger story of *Citizens United*’s consequences had begun to unfold.

Almost all the public excitement about *Citizens United* focused on the question whether corporations could be restricted from drawing on treasury funds to pay for political campaigning in the form of independent expenditures. Based on the Court’s earlier decision in *Austin v. Michigan Chamber of Commerce*,<sup>4</sup> as well as a century of campaign finance practice, legislatures and courts

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<sup>1</sup> Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in scattered sections of 2, 5, 18, 26, and 47 U.S.C.).

<sup>2</sup> 424 U.S. 1 (1976) (per curiam).

<sup>3</sup> 130 S. Ct. 876 (2010).

<sup>4</sup> 494 U.S. 652 (1990).

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treated corporate spending in politics differently, with much more restriction than individual spending. *Citizens United* overruled *Austin* and traditional campaign finance understanding about corporate spending by striking down as unconstitutional an important element of campaign finance restrictions on corporate spending through independent expenditures. What followed was public outcry about the Court's decision that likely surprised even the Justices themselves. President Obama called the decision "a major victory for big oil, Wall Street banks, health insurance companies and other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."<sup>5</sup> He later singled out *Citizens United* for criticism during his State of the Union address as well. The Service Employees International Union condemned the decision as "lift[ing] the floodgates" of corporate spending and "threaten[ing] to drown out the voices of the people."<sup>6</sup> The decision sparked an unusually robust public debate about the constitutional rights of corporations and the role of money in politics. *Citizens United*, according to its critics, was a rare "breaking point" case that could "warp our democracy forever if we let it do so," sparking Moveon.org to organize protest rallies across the country.<sup>7</sup>

The irony is that the profound doctrinal impact of *Citizens United*, the most important campaign finance case since *Buckley v. Valeo* and the most publicly debated case in years, has been largely missed. Most of the public excitement revolved around the role of corporations in political campaigning, but the actual effect of *Citizens United*'s technical holding in terms of promoting corporate spending on campaign speech was likely not to be very large. In fact, the Court had already opened the door for what amounted to corporate spending on campaign speech, in the form of so-called "sham issue advocacy," a few years earlier in a much less-publicized decision. In *FEC v. Wisconsin Right to Life, Inc.* (Wis-

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<sup>5</sup> See Adam Liptak, Justices, 5-4, Reject Corporate Campaign Spending Limit, N.Y. Times, Jan. 22, 2010, at A1.

<sup>6</sup> Press Release, Serv. Emp. Int'l Union, Batten Down the Hatches: Supreme Court Opens Floodgates for Corporate Spending in Elections (Jan. 21, 2010), available at <http://www.seiu.org/2010/01/batten-down-the-hatches-supreme-court-opens-floodgates-for-corporate-spending-in-elections.php>.

<sup>7</sup> Ari Berman, Citizens Unite Against *Citizens United*, The Nation, Aug. 16-23, 2010, at 29.

*consin Right to Life II*), the Court limited the scope of government restriction of corporate spending to only advertising that was “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>8</sup> What this excluded from government regulation was a broad class of sham issue advertising that criticized or promoted candidates for federal office during campaign season but stopped short of using *Buckley*’s magic words of express advocacy. Studies found voters understood that sham issue advertising amounted to campaign speech,<sup>9</sup> and as a result, corporations that were interested in spending on campaigning could do so by funding sham issue ads that effectively conveyed the intended message. All *Citizens United* added with respect to corporate spending was to permit corporations to be more explicit in their campaign advocacy.

*Citizens United*’s lasting significance in campaign finance law, and indeed as the end of campaign finance law as we knew it, is its doctrinal consequences for the definition of corruption as a basis for campaign finance regulation. The government interest in the prevention of corruption, or at least the appearance thereof, is the singular basis for restriction of campaign finance spending, as all students of campaign finance law well know. The definition of corruption had subtly but unmistakably expanded under the Rehnquist Court to permit a wide range of campaign finance regulation ranging from contribution limits to various restrictions on corporate and union spending to prohibitions on party soft money.<sup>10</sup> But *Citizens United* sharply reversed this expansion and narrowed the definition of corruption by limiting it to the risk of quid pro quo transactions involving campaign contributions directly to candidates for office. This narrowing of what counts as corruption for purposes of campaign finance law constrains not only the regulation of corporate spending but all types of campaign finance spending.

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<sup>8</sup> 551 U.S. 449, 470 (2007).

<sup>9</sup> See generally Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (2001); Jonathan S. Krasno & Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (2000).

<sup>10</sup> See Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 *Wm. & Mary Bill Rts. J.* 533, 560–68 (2010) (describing this expansion of the government interests in campaign finance regulation).

The result of this doctrinal narrowing quickly revealed itself—the nearly complete deregulation of independent expenditures.<sup>11</sup> As I will explain in greater detail below, *Citizens United* itself deregulated only independent expenditures by corporations, but the doctrinal logic of the decision also quickly extended to independent expenditures by non-corporate entities and to contributions to non-corporate entities that make only independent expenditures. By the summer following *Citizens United*, the Federal Election Commission and the lower courts took the lead of the Supreme Court in ruling that the definition of corruption articulated in the decision no longer supported most existing campaign finance regulation of independent expenditures that had stood in place since the birth of modern federal campaign finance law decades ago.<sup>12</sup>

As I explain below, this new deregulated world of campaign finance is not a better world. If there is a hydraulics of campaign finance regulation in which money adjusts to new regulation by finding alternate pathways to achieve the same ends, we are seeing a phenomenon of reverse hydraulics in the world of campaign finance now.<sup>13</sup> It is reverse hydraulics in the sense that the removal of longstanding restrictions on independent expenditures is causing money rapidly to return to the least regulated, least restricted pathways. Today that means money is flowing to outside groups for independent expenditures that are not subject to limit or disclosure. This is perhaps at the expense of contributions to candidates and (for now) parties that must still comply with limits and greater disclosure. Even if one approves of more money in politics, one might blanch at how and where the money is flowing.

The political world that emerged during the 2010 elections was the first glimpse of the newly deregulated world of campaign finance. Corporations spent more money on campaign expenditures

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<sup>11</sup> “Express advocacy” is a “communication[] that in express terms advocate[s] the election or defeat of a clearly identified candidate.” *Buckley*, 424 U.S. at 44–45. Express advocacy usually includes *Buckley*’s so-called magic words (“vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, reject.”). *Id.* at 44 n.52 (internal quotation marks omitted). An “expenditure” is campaign finance spending to influence a federal election through express advocacy, and “independent expenditures” are simply those made without formal coordination or prearrangement with the relevant candidate.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part III.

in 2010 than recent midterm elections, which appeared to be a direct consequence of *Citizens United*'s holding. More important was the role of campaign spending by outside groups that were formally unconnected to candidates and political parties but whose partisan leanings were quite clear. Many of these outside groups spent millions on independent expenditures without any limits on the money that they collected from donors and without any disclosure of where the money came from. They operated, post-*Citizens United*, in a world virtually without restriction on their campaign advertising. What is more, there appears to be nothing that Congress can do to reinstitute meaningful restrictions in the doctrinal wake of *Citizens United*. The Court has closed the door to restriction of this activity. If anything, it is almost certain that further deregulation of campaign finance will continue, as the FEC and courts review other longstanding regulations under *Citizens United*'s definition of corruption.

*Citizens United* therefore is a clear turning point not just for campaign finance law but for all regulation of the relationship between campaign money and the political process. *Citizens United* may well kill off meaningful campaign finance regulation of anything beyond contributions to candidates and certain forms of disclosure. As a result, meaningful checks on the influence of money must come, if they come at all, from somewhere other than campaign finance law. *Citizens United* demands a new way of regulation in response to a new world of campaign finance law. And the new way almost certainly must be ex post instead of ex ante regulation. It must be directed toward checking the influence of money already in the system, rather than slowing or redirecting the flow of money coming into the system in the fashion of campaign finance reform.

Here I conclude with a surprisingly optimistic lesson from the Court's rulings across different areas of law dealing with political corruption. Although the Court is decidedly hostile to ex ante restriction of political money through traditional campaign finance regulation, the Court may be much more sympathetic to ex post regulation of the influence of campaign money in the legislative process on the back end. I argue that *Citizens United*'s unconditional rhetoric about the government's anti-corruption interests may be cabined to campaign finance regulation and does not nec-

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essarily reflect a generalized hostility toward other forms of anti-corruption regulation that address the Court's implicit concerns about campaign finance reform.

In Part I, I introduce the basics of campaign finance law, describe the *Citizens United* decision, and explain its impact on corporate electioneering. In Part II, I explain that the lasting impact of *Citizens United* is not its minor effect specifically on corporate electioneering—the focus of the public outcry and scholarly commentary—but its profound transformation of campaign finance doctrine as it applies well beyond corporate electioneering. *Citizens United* produced a rapid deregulation of independent expenditures that took shape in time for the 2010 elections. In Part III, I explain the consequences of this deregulation of independent expenditures as a reverse hydraulic process in which money shifts away from candidates and parties to outside groups. I criticize this reverse hydraulic shift as negative in most respects. Finally, in Part IV, I chart the way forward for the regulation of campaign finance money in the political process as lying outside campaign finance regulation. I distinguish between ex ante and ex post regulation of quid pro quo corruption and argue that the Court may be surprisingly receptive to the latter, notwithstanding the Court's hostility to the former in *Citizens United*. I apply this theory to other forms of corruption regulation through bribery prosecution and lobbying regulation.

## I. *CITIZENS UNITED* AND CORPORATE MONEY

### A. *Citizens United: The Decision*

*Citizens United* first appeared before the Court as a simple case about whether Section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”)<sup>14</sup> applied to corporate electioneering that appears on cable television through video-on-demand. Section 203 of BCRA prohibited the use of corporate treasury money to fund certain forms of campaign speech known as “electioneering communications.”<sup>15</sup> These electioneering communications are statutorily defined in part as communications that refer to a candidate for federal office and target the relevant electorate at a time proximate

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<sup>14</sup> Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (2006) (codified at 2 U.S.C. § 441b(b)(2) (2006)).

<sup>15</sup> *Id.*

to the election. Such electioneering communications, under BCRA, could not be funded by corporate treasury dollars,<sup>16</sup> but only when they were transmitted by “broadcast, cable, or satellite communication.”<sup>17</sup> “[B]roadcast, cable, or satellite communication” clearly included radio and television advertisements, but it was less clear whether advertisements transmitted by video-on-demand would be covered.

Citizens United, a nonprofit corporation, sought to air just such electioneering communications through video-on-demand in advance of the 2008 primary elections in several states. Citizens United funded and produced a movie titled *Hillary: The Movie* that met the statutory definition of electioneering communication in terms of content, targeted audience, and timing. *Hillary: The Movie* criticized Senator Hillary Rodham Clinton’s life and career and was to be released to coincide with presidential primary elections in states where Clinton was then a presidential candidate. However, Citizens United hoped to air the movie over a new nationwide video-on-demand channel, “Elections ‘08,” if Section 203 of BCRA did not prohibit such distribution against corporate funded electioneering communication.<sup>18</sup> Not only did Citizens United use its own corporate funds to produce *Hillary: The Movie*, it also received and used money from for-profit corporations toward the same purpose. Citizens United sued the FEC to enjoin enforcement of Section 203 of BCRA against its intended release of the movie.

At least initially, few expected *Citizens United* to produce a major shift in campaign finance law. Citizens United argued in its motion for a preliminary injunction that the BCRA prohibition on corporate sponsorship of electioneering communications was unconstitutional on its face as an unconstitutional burden on free speech under the First Amendment. But the Supreme Court had not long ago reviewed just such a facial challenge in *McConnell v. FEC* and flatly upheld government prohibition of corporate elec-

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<sup>16</sup> Id.

<sup>17</sup> 2 U.S.C. § 434(f)(3)(A) (2006). Electioneering communications therefore include all express advocacy carried by broadcast media targeted at the relevant electorate during election season, in addition to issue advocacy that meets the same conditions and mentions a candidate running for federal office.

<sup>18</sup> See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 276 (D.D.C. 2008).

tioning under BCRA.<sup>19</sup> The Court explained that it had “repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.’”<sup>20</sup> The Court noted that BCRA’s prohibition on corporate electioneering communications was a congressional response to the fact that “[c]orporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads” in the preceding years.<sup>21</sup> It cited its historical deference to “Congress[s] careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations,”<sup>22</sup> and then upheld the BCRA prohibition as a proper supplement to “the legislative effort to combat real or apparent corruption.”<sup>23</sup> Based on this clear direction from the Supreme Court in *McConnell*, the district court dismissed Citizens United’s facial challenge in the motion for a preliminary injunction as already decided by *McConnell*. Citizens United subsequently abandoned its facial challenge in its motion for summary judgment and raised only an as-applied challenge to Section 203 in its jurisdictional statement to the Supreme Court on appeal.<sup>24</sup>

The constitutional basis for the Court’s anti-distortion rationale was the 1990 decision *Austin v. Michigan Chamber of Commerce*.<sup>25</sup> The Court had long recognized a compelling government interest in the prevention of actual and apparent corruption as constitutional justification for campaign finance regulation, exacting First Amendment scrutiny notwithstanding. *Austin* extended the government’s compelling interest in the prevention of actual and apparent corruption to “a different type of corruption in the political arena.”<sup>26</sup> Evaluating a state-law analog to the federal prohibition on corporate expenditures, *Austin* found the “unique state-

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<sup>19</sup> 540 U.S. 93 (2003).

<sup>20</sup> *Id.* at 205 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>21</sup> *Id.* at 127.

<sup>22</sup> *Id.* at 117 (internal quotation marks omitted).

<sup>23</sup> *Id.* at 194.

<sup>24</sup> See *Citizens United*, 130 S. Ct. at 931 (Stevens, J., concurring in part and dissenting in part).

<sup>25</sup> 494 U.S. 652 (1990).

<sup>26</sup> *Id.* at 660.

conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”<sup>27</sup> The legal advantages of perpetual life, limited liability, and favorable treatment of the accumulation and distribution of assets bestowed corporations with special ability to aggregate wealth that might produce “an unfair advantage in the political marketplace.”<sup>28</sup> As a result, the Court reasoned that this risk of distortion from corporate wealth constituted a danger of real or apparent corruption even when deployed to pay for independent expenditures, as opposed to contributions to candidates. The Court in *Austin* therefore treated the corporate source of campaign expenditures as sufficient reason to restrict them under the anti-distortion conception of the government interest in corruption prevention.

The precedential force of *Austin* and *McConnell* made it appear that *Citizens United* would decide a limited question of statutory interpretation under BCRA, even after it reached the Court on appeal. But oral argument during the spring of 2009 took a strange turn. Deputy Solicitor General Malcolm Stewart conceded on behalf of the government that federal campaign finance law could permit the prohibition of corporate sponsored books containing express campaign speech.<sup>29</sup> This concession about what might be understood as statutory support for book banning appeared to stir Chief Justice Roberts and Justice Alito at oral argument, prompting Justice Alito to note “[t]hat’s pretty incredible.”<sup>30</sup> And then, instead of deciding the case after oral argument, the Court held over decision to the 2009 Term and ordered re-argument for the fall. The Court directed the parties to file supplemental briefs addressing the bombshell question: “For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, and the part of *McConnell v. Federal Election Comm’n*, which addresses the facial validity of Section 203 [of BCRA]?”<sup>31</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 658–59 (quoting *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986)).

<sup>29</sup> See Transcript of Oral Argument at 37, *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 931 (2010) (No. 08-25).

<sup>30</sup> David G. Savage, *Hillary: The Law Changer*, A.B.A. J., Sept. 2009, at 24, 25.

<sup>31</sup> *Citizens United v. FEC*, 129 S. Ct. 2893, 2893 (2009) (mem.) (internal citations omitted).

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After re-argument, the Court's decision in *Citizens United* squarely answered the question presented and reversed decades of campaign finance law: the Court overruled *Austin* and parts of *McConnell* in striking down Section 203 of BCRA as well other federal restrictions on corporate electioneering. Of course, *Citizens United* had attracted lots of public attention for reasons having nothing to do with campaign finance law. The re-argument presented the first case during the October 2008 Term, the first oral argument by Elena Kagan as solicitor general, and the first case on the Court for Justice Sonia Sotomayor. But the immediate and dramatic policy consequence of *Citizens United* was that federal prohibitions on corporate sponsorship of campaign speech in the form of electioneering communications and independent expenditures, as well as similar prohibitions modeled after federal law in roughly half the states, were suddenly unconstitutional. These restrictions on corporate money in campaign finance boasted a rich historical pedigree, which Justice Stevens cited extensively in dissent.<sup>32</sup> The federal prohibitions on corporate expenditures, for example, pre-dated the establishment of the modern federal campaign finance regime in the comprehensive amendments of the Federal Election Campaign Act in 1974. The federal prohibition on corporate expenditures, struck down in *Citizens United*, dated back in previous formulations more than sixty years to a ban on corporate expenditures in the Taft Hartley Act of 1947.<sup>33</sup> Close regulation of corporate involvement in campaign finance dated back even further to the Tillman Act of 1907.<sup>34</sup>

The Court rejected the anti-distortion interest on which *Austin* relied for the regulation of corporate electioneering. The Court explained that the First Amendment forbade the government from attempting to “equaliz[e] the relative ability of individuals and groups to influence the outcome of elections” and therefore does not permit “political speech [to] be limited based on a speaker’s wealth.”<sup>35</sup> Political speech could be limited, through campaign fi-

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<sup>32</sup> *Citizens United*, 130 S. Ct. at 930, 952–56 (Stevens J., concurring in part and dissenting in part).

<sup>33</sup> Labor Management Relations Act, ch. 120, § 304, 61 Stat. 136, 159 (1947) (codified as amended in scattered sections of 2 U.S.C.).

<sup>34</sup> Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)).

<sup>35</sup> *Citizens United*, 130 S. Ct. at 904–05 (citation omitted).

nance regulation, only when regulation is tailored to the compelling government interest in the prevention of corruption. Although *Austin* adopted an anti-distortion theory of this government interest, the Court in *Citizens United* declared *Austin* “not well reasoned.”<sup>36</sup> *Austin* ruled that corporations enjoyed special legal advantages in the accumulation of wealth that presented unique distortive risks to the political process, but the Court in *Citizens United* replied that “[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech.”<sup>37</sup>

In the absence of a special rationale for regulating corporate electioneering under *Austin*, the Court framed restrictions on corporate campaign finance as a simple matter of government discrimination. Prohibitions on corporations are unconstitutional because “the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”<sup>38</sup> To hold otherwise, the Court explained, would mean that individuals and unincorporated associations can spend on independent expenditures while “certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.”<sup>39</sup>

Of course, it was unclear why the restrictions on corporations constituted a particularly onerous form of discrimination against the constituents of corporations, such as shareholders. The decision to incorporate is voluntary, and in any event, the constituents of corporations still remained entirely free to engage in independent expenditures in their individual capacities, just like individuals who have not incorporated. Whatever discrimination effectuated by federal campaign finance law prevented the constituents from making independent expenditures only collectively out of the corporate treasury as a corporation. The law, however, had put them on equal ground with everyone else who also needed to aggregate their personal funds through an unincorporated entity, such as a political committee or political party. As a result, *Citizens United* did not correct unfair treatment of corporate constituents who

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<sup>36</sup> Id. at 912.

<sup>37</sup> Id. at 905.

<sup>38</sup> Id.

<sup>39</sup> Id. at 908.

stood at a disadvantage vis-à-vis fellow citizens who do not choose to incorporate. Indeed, *Citizens United* bestowed on corporate constituents an advantage, at least as the law stood at the time, by allowing them to aggregate wealth within the corporation without having to realize and pay individual income tax on those funds before aggregating them in an unincorporated entity subject to campaign finance regulations, including contribution limits.<sup>40</sup> Corporate shareholders therefore gained the new advantage of lower transaction costs compared to everyone else once corporations were permitted to engage in electioneering.

*Citizens United* instantly unsettled campaign finance law, which had always been organized around prohibitions on corporate electioneering. At the simplest level, federal campaign finance law had always built off the assumption of prohibitions on corporations in a way that left gaps in the statutory scheme after *Citizens United* undid that assumption. For instance, federal campaign finance law prohibits “foreign nationals” from making independent expenditures and defined “foreign nationals” as any “partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.”<sup>41</sup> The statutory definition immediately after *Citizens United*, however, did not necessarily include a domestic corporation owned or controlled to a meaningful degree by foreign interests. This gap, even if easily addressable by Congress, contributed to confusion about what *Citizens United* meant for campaign finance law and led to President Obama’s claim during his State of the Union address that the decision “open[ed] the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”<sup>42</sup> Obama was technically incorrect, in the sense that *Citizens United* itself decided nothing about foreign corporations,<sup>43</sup> but the gigantic statutory gap created in longstanding campaign finance law that had always been oriented around prohi-

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<sup>40</sup> See Michael S. Kang, *After Citizens United*, 44 Ind. L. Rev. 243, 245–46 (2010).

<sup>41</sup> 2 U.S.C. § 441e (2006) (incorporating by reference 22 U.S.C. § 611(b)(3) (2006)).

<sup>42</sup> See Eva Rodriguez, *On Alito’s State of the Union Head Wag, You’re All Wrong*, PostPartisan, Wash. Post (Jan. 28, 2010, 1:49 PM), [http://voices.washingtonpost.com/postpartisan/2010/01/on\\_alitos\\_state\\_of\\_the\\_union\\_h.html](http://voices.washingtonpost.com/postpartisan/2010/01/on_alitos_state_of_the_union_h.html) (quoting President Obama’s State of the Union Address).

<sup>43</sup> *Citizens United* specifically reserved the issue. See 130 S. Ct. at 911.

bitions on corporate spending produced the opportunity for the claim.

### B. Corporate Campaign Spending After Citizens United

President Obama's criticism of *Citizens United* only echoed the public outcry over the decision. Senator Russ Feingold wrote in the *Washington Post* that the "decision gives a green light to corporations to unleash their massive coffers on the political system."<sup>44</sup> Fred Wertheimer, a veteran campaign finance reformer, called the decision "the most radical and destructive campaign finance decision in Supreme Court history."<sup>45</sup> Public opinion echoed this criticism of *Citizens United*. Eighty percent of survey respondents reported that they opposed the decision, with nearly two in three respondents reporting that they were strongly opposed.<sup>46</sup>

The main thrust of criticism to *Citizens United* focused on what critics saw as the Court's conflation of individual and corporate free speech rights and a fear of the proverbial floodgates opening to unleash a tidal wave of corporate cash on public elections.<sup>47</sup> There were prominent examples of corporate spending after *Citizens United* struck down applicable state law prohibitions on corporate expenditures. A district court decision to strike down Minnesota's state prohibition on corporate expenditures, immediately following *Citizens United*, opened the door for Target Corporation to spend \$150,000 on independent expenditures in support of Min-

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<sup>44</sup> Russ Feingold, Who is Helped, or Hurt, by the *Citizens United* Decision, Wash. Post, Jan. 24, 2010, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012203874.html>.

<sup>45</sup> Fred Wertheimer, Supreme Court Decision in Citizens United Case is Disaster for American People and Dark Day for the Court, Democracy 21 (Jan. 21, 2010), [http://www.democracy21.org/index.asp?Type=B\\_PR&DE={5DEFDF8F-21A1-4A73-9EFF-361083E7D509}](http://www.democracy21.org/index.asp?Type=B_PR&DE={5DEFDF8F-21A1-4A73-9EFF-361083E7D509}).

<sup>46</sup> 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>.

<sup>47</sup> See Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 143 & n.2 (2010) (identifying these popular criticisms of *Citizens United*).

nesota gubernatorial candidate Tom Emmer.<sup>48</sup> Along the same lines, Best Buy spent \$100,000 in support of Emmer.<sup>49</sup>

Not all corporations, however, responded to *Citizens United* by gearing up their electioneering activities. Indeed, not a single for-profit corporation had bothered to file an amicus brief in the case urging the Court to free corporations from the federal prohibition on corporate electioneering.<sup>50</sup> Even before BCRA and even where more express corporate electioneering was permitted, corporations tended not to spend heavily on campaigning, at least not near levels feared by *Citizens United*'s many critics.<sup>51</sup> As one professor of corporate governance noted, "Getting into politics means picking fights . . . . And picking fights is generally what companies don't want to do."<sup>52</sup> Target and Best Buy's spending in support of Tom Emmer led to shareholder and customer backlashes that set a corporate example of what not to do.<sup>53</sup> New York City public advocate Bill de Blasio urged corporations to pledge not to spend on campaigning, *Citizens United* notwithstanding, and created a website to track corporate spending policies with contact information for the listed companies.<sup>54</sup> Under such pressure, Goldman Sachs very pub-

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<sup>48</sup> See Jennifer Martinez & Tom Hamburger, Target Feels Backlash From Shareholders, L.A. Times (Aug. 19, 2010), <http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820>.

<sup>49</sup> See Katrina vanden Heuvel, Citizens United Aftershocks, Wash. Post (Aug. 25, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082405642.html>.

<sup>50</sup> See Samuel Issacharoff, On Political Corruption, 124 Harv. L. Rev. 118, 130 & n.66 (2010) (noting that only the Chamber of Commerce made the expansive case under the First Amendment on behalf of corporations).

<sup>51</sup> See Lloyd Hitoshi Mayer, Breaching a Leaking Dam?: Corporate Money and Elections, 4 Charleston L. Rev. 91, 135–37 (2009) (surveying corporate campaign spending).

<sup>52</sup> Jay Weiner, In the Bull's-Eye, How Target—and Minnesota—Landed at Ground Zero of an Expensive U.S. Debate, Minn. Post (Aug. 5, 2010), [http://www.minnpost.com/stories/2010/08/05/20267/in\\_the\\_bulls-eye\\_how\\_target\\_and\\_minnesota\\_landed\\_at\\_ground\\_zero\\_of\\_an\\_expensive\\_us\\_debate](http://www.minnpost.com/stories/2010/08/05/20267/in_the_bulls-eye_how_target_and_minnesota_landed_at_ground_zero_of_an_expensive_us_debate) (quoting Ian Maitland).

<sup>53</sup> See Martinez & Hamburger, *supra* note 48.

<sup>54</sup> See vanden Heuvel, *supra* note 49; Suzy Khimm, Bill de Blasio: Citizens United Avenger, Mother Jones (Sept. 22, 2010, 3:00 AM), <http://motherjones.com/politics/2010/09/bill-de-blasio-citizens-united-avenger>.

licly reversed its corporate policy and pledged not to spend treasury funds on campaign advertising.<sup>55</sup>

In fact, it is likely that many corporations did not relish the new opportunity for political campaigning provided by *Citizens United*. The restrictions on corporate electioneering in BCRA were, after all, supported by a number of large corporations, including General Motors, Ford Motors, Monsanto, Time Warner, Dell, Cisco, and IBM.<sup>56</sup> The legal ability of corporations to spend politically in support of legislators opens the door to a form of extortion against deep-pocket corporations by those very same legislators.<sup>57</sup> Legislators may threaten, explicitly or implicitly, to work against the interests of targeted corporations unless they spend money in support of those legislators' re-election. The explosion of soft money during the 1990s, before BCRA cut off the flow of soft money, led directly to corporate support for BCRA restrictions on corporations, and even the Tillman Act of 1907 enjoyed support from corporations as a reaction against a similar worry about legislative coercion.<sup>58</sup>

At least to some degree, public reaction to *Citizens United* overestimated the practical and legal effect of the decision with respect to corporate electioneering. Indeed, the reopening of corporate involvement in electioneering really began again with *FEC v. Wisconsin Right to Life, Inc. (Wisconsin Right to Life II)*.<sup>59</sup> The case received none of the attention from the general public that surrounded *Citizens United*,<sup>60</sup> but it represented a major reversal by the Court from *McConnell*. In *Wisconsin Right to Life II*, the Court entertained an as-applied challenge to the BCRA prohibition on the use of corporate treasury funds for electioneering communications. A nonprofit corporation named Wisconsin Right to Life ran

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<sup>55</sup> See Javier C. Hernandez, Political Ads Off Limits, Goldman Promises, N.Y. Times, Aug. 3, 2010, at A24.

<sup>56</sup> See Robert H. Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L. Rev. 1103, 1115 (2002); Richard J. Mahoney, Letter to the Editor, A Corporate Mood, N.Y. Times, Jan. 30, 1997, at A20.

<sup>57</sup> See generally Fred S. McChesney, Money for Nothing: Politicians, Rent Extraction, and Political Extortion (1997); David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, 1380 (1994).

<sup>58</sup> Sitkoff, *supra* note 56, at 1152–53.

<sup>59</sup> 551 U.S. 449 (2007).

<sup>60</sup> Michael M. Franz, The *Citizens United* Election? Or Same as It Ever Was?, 8 Forum, no. 4, at 4 (2010).

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several series of advertisements during the blackout period criticizing officeholders' positions on abortion and urging viewers to call those officeholders. The advertisements were very similar to the form of the sham issue advertisements, funded by corporate money, that BCRA was designed to stamp out with the Court's constitutional approval in *McConnell*.<sup>61</sup>

The Court, now with new personnel, effectively reversed its position from *McConnell* and held unconstitutional the application of BCRA's prohibition on corporate electioneering communication to Wisconsin Right to Life's advertisements.<sup>62</sup> The Court explained that BCRA could constitutionally prohibit corporate funding of advertisements only when those electioneering communications cannot "reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate."<sup>63</sup> In other words, when electioneering communications might be understood plausibly as genuine issue advocacy, those communications would be constitutionally protected against application of BCRA and could be funded by corporate treasury dollars, BCRA notwithstanding. *Wisconsin Right to Life II* therefore reversed much of the effect of *McConnell* because most electioneering communications in the form of sham issue ads were purposely framed as issue advocacy while skirting the definition of express advocacy. Indeed, the FEC subsequently implemented *Wisconsin Right to Life II* by announcing a safe harbor from BCRA enforcement when an electioneering communication focuses on a public policy issue and urges a candidate to take a position on that issue or urges the public to contact the candidate about the issue—exactly the form of sham issue ads that precipitated BCRA in the first place.<sup>64</sup>

Following *Wisconsin Right to Life II*, corporations could avoid BCRA by doing exactly what they did before BCRA and doing exactly what BCRA was designed to prevent. As a result, corpora-

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<sup>61</sup> Issue advocacy is the residual category of all political communications that do not use words of express advocacy, including so-called sham issue advertisements that are intended to influence elections while skirting the definition of express advocacy. See Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 *Minn. L. Rev.* 1773, 1776–77 (2001) (defining "sham issue advocacy").

<sup>62</sup> *Wis. Right to Life II*, 551 U.S. at 476–77.

<sup>63</sup> *Id.* at 476.

<sup>64</sup> FEC Interpretative Rule, 11 C.F.R. § 114.15(a) (2009).

tions could fund issue advocacy that effectively served as campaign advertisements as early as 2007, almost three years ahead of the Court's decision in *Citizens United*. Of course, *Citizens United* opened the door to corporate electioneering even further than *Wisconsin Right to Life II* because it allowed corporations to engage not only in sham issue advocacy but also actual express advocacy in the form of independent expenditures. Corporations could engage in explicit campaign speech without the dressing of an issue advertisement. Nonetheless, with respect to corporate electioneering, the legality of sham issue advertising offered ample opportunity to engage in exactly the type of widespread corporate electioneering that BCRA's restrictions were intended to thwart. As Professors Nathaniel Persily and Jennifer Rosenberg argue, the Court in *Wisconsin Right to Life II* "gut[ted] the primary definition of electioneering" in BCRA and effectively declared it unconstitutional as applied to all possible applications beyond pre-BCRA law.<sup>65</sup>

It is critical, however, to note that *Wisconsin Right to Life II* otherwise left intact the constitutional essentials of campaign finance law, including the entirety of campaign finance law as it applies to non-corporate entities. Chief Justice Roberts's majority opinion strained to frame its holding as consistent with *McConnell* and carving out only an as-applied exception to the broader constitutionality of BCRA as defined by *McConnell*.<sup>66</sup> Justices Scalia and Souter attacked this conceit from opposite directions. Justice Scalia called for explicit reconsideration of *McConnell*, because he contended that the majority's recognition of an as-applied exception to BCRA was fundamentally inconsistent with *McConnell*'s ruling on BCRA's facial constitutionality and the need for clarity under the First Amendment.<sup>67</sup> Justice Souter argued that *McConnell* controlled the question in *Wisconsin Right to Life II*, because *McConnell* squarely considered the application of BCRA to advertisements like those in *Wisconsin Right to Life II* and found them

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<sup>65</sup> Nathaniel Persily & Jennifer S. Rosenberg, Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions, 93 Minn. L. Rev. 1644, 1662 (2009).

<sup>66</sup> See *Wis. Right to Life II*, 551 U.S. at 482 (stating that there was "no occasion to revisit" *McConnell*).

<sup>67</sup> *Id.* at 483–84 (Scalia, J., concurring in part and concurring in the judgment).

constitutional.<sup>68</sup> But regardless of whether the majority opinion violated the spirit of *McConnell*, it did not fundamentally challenge the basic assumptions of campaign finance law. It claimed to curb only the construction of the definition of electioneering communications and expressly did not overrule earlier decisions, including *McConnell* and *Austin*.<sup>69</sup>

*Wisconsin Right to Life II* therefore did nothing to disturb the constitutionality of source restrictions on corporate funding of express advocacy or at least of its unmistakable equivalent. The majority opinion preserved the notion that the identity of the sponsor mattered and that certain categories of independent expenditures could be banned when funded by corporations and other prohibited sources of sponsorship. Along the same lines, *Wisconsin Right to Life II* did not alter judicial acceptance of the distinct notion of corruption articulated in *Austin* to justify such source restrictions on corporations. Even if *Wisconsin Right to Life II* re-opened the door to widespread corporate funding of what amounts to campaign advertising for all practical matters, the decisions left almost entirely intact the constitutional edifice that undergirded BCRA, source restrictions, contribution limits, and the rest of campaign finance regulation.

Assessing *Citizens United*'s impact, election law scholars focused mainly on the decision's limited effect on corporate electioneering in the shadow of *Wisconsin Right to Life II* and thus substantially understated the decision's impact on campaign finance law. Persily wrote—shortly after the decision—that *Citizens United* garnered more public attention than it merited because “the writing for it has been on the wall since the court’s 2007 decision in *FEC v. Wisconsin Right to Life*.”<sup>70</sup> Persily noted that “before *Citizens United*, a corporation or union could sponsor ads with its treasury funds that said ‘Tell Congressman Smith to stop destroying America.’ After *Citizens United*, they can add at the end, ‘and, by the way, don’t vote for him.’”<sup>71</sup> Joel Gora echoed that *Citizens United* was a “sim-

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<sup>68</sup> Id. at 525 (Souter, J., dissenting).

<sup>69</sup> Id. at 480–81 (majority opinion).

<sup>70</sup> Nathaniel Persily, *The Floodgates Were Already Open*, *Slate* (Jan. 25, 2010, 2:30 PM), <http://www.slate.com/id/2242558>.

<sup>71</sup> Id.

ple case”<sup>72</sup> that is “not that great an expansion of rights over what the law was previously.”<sup>73</sup> Gora observed that “[w]hile *Citizens United* certainly eliminates the remaining restraint on content and allows speakers to conclude with the bottom line—vote for or against the person—that new entitlement does not add that much to what could have been said before.”<sup>74</sup>

Election law scholars thus viewed *Citizens United* as basically reconciling campaign finance treatment of corporations with the logic of *Buckley*. Rick Hasen criticized *Citizens United* on certain grounds but conceded that “*Citizens United* indisputably harmonized campaign finance law pertaining to the constitutionality of spending limits on corporations.”<sup>75</sup> Professor Sam Issacharoff argued along similar lines that “*Citizens United* is actually less sweeping than it might appear.”<sup>76</sup> Corporations generally are reluctant participants in campaign finance and face collective action problems in gaining leverage through electioneering activity. For these reasons, Issacharoff concluded that “*Citizens United* is a distraction of limited consequence” in the larger project of campaign finance reform.<sup>77</sup>

Neither scholars nor the general public, then, understand *Citizens United*’s long-term impact quite rightly. Election law scholars, focused too narrowly on *Citizens United*’s consequences for corporate electioneering, understate the decision’s far-reaching ramifications for campaign finance law. The general public grasps the decision’s impact in terms of magnitude but for the wrong reasons. The public focuses on *Citizens United*’s practical effect on corporate electioneering, which it wildly overestimates. Instead, *Citizens United* is the most important campaign finance decision since *Buckley* for reasons having little to do with corporate electioneering. The decision’s importance rests less on its direct impact on corporate electioneering, as is usually assumed, than on its pro-

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<sup>72</sup> Joel M. Gora, *The First Amendment . . . United*, 27 Ga. St. U. L. Rev. 935, 935 (2011).

<sup>73</sup> *Id.* at 969.

<sup>74</sup> *Id.* at 969–70.

<sup>75</sup> Richard L. Hasen, *Citizens United* and the Illusion of Coherence, 109 Mich. L. Rev. 581, 583 (2011).

<sup>76</sup> Issacharoff, *supra* note 50, at 141.

<sup>77</sup> *Id.* at 142.

found implications for the structure of campaign finance law beyond corporate electioneering.

## II. THE END OF CAMPAIGN FINANCE LAW AS WE KNEW IT

Far beyond the basic removal of restrictions on corporate electioneering, *Citizens United* marks a more important and dramatic turning point in campaign finance law. What went misunderstood about *Citizens United* is that its consequences for corporate electioneering are dwarfed substantively by its enormous import for the notion of corruption in campaign finance, and by extension, for the scope of government regulation in campaign finance as it applies across the board. The decision's most important consequences extend far beyond the constitutional protection of corporate speech, and they played out with incredible speed, leading to an entirely new world of campaign finance within months of the decision.

*Citizens United* marks the end of campaign finance law as we knew it. The critical distinctions in campaign finance law—regarding what can be regulated and who can be regulated—have been undercut in the wake of the decision. Almost all the legal debate that dominated the world of campaign finance law since *Buckley v. Valeo* suddenly became irrelevant in the nearly complete deregulation of independent expenditures. *Citizens United* not only deregulated independent expenditures by corporations, but it also removed almost all government regulation of campaign finance beyond transactions directly involving a political party or candidate.

### A. *Campaign Finance Law and the Corruption Interest After Citizens United*

The critical move in *Citizens United* is the Court's narrowing of the government interest in the prevention of corruption. This interest in the prevention of quid pro quo corruption and the appearance thereof has been, since *Buckley*, the only government interest that constitutionally justifies campaign finance regulation against First Amendment challenge. The Court has consistently rejected government interests in equalizing viewpoints as grounds for government regulation and recognized only a sufficiently impor-

tant government interest in the prevention of corruption and the appearance of corruption. As a result, the government may regulate campaign finance spending only when the regulation can be justified as a means of preventing quid pro quo corruption in politics or at least the appearance thereof. This government interest supports the constitutionality of limits on contributions to candidates, for instance, but other forms of campaign finance regulation that do not support that government interest have been struck down by the Court even if they serve other interests in equalizing political competition.<sup>78</sup> Virtually all campaign finance regulation must be articulated in terms of the corruption interest to survive constitutional challenge.

Until *Citizens United*, the government interest in the prevention of corruption gradually extended over nearly three decades to support an increasingly wide range of campaign finance regulation. *Austin*, a key decision struck down by *Citizens United*, had extended the corruption interest to include an anti-distortion theory that permitted the government to restrict corporations that might have distorted the marketplace of political speech. But *Austin* was hardly the only decision that extended the government interest in the prevention of corruption. For instance, in *Nixon v. Shrink Missouri Government PAC*,<sup>79</sup> the government failed to provide empirical evidence of actual corruption in Missouri politics that would support Missouri's campaign finance restrictions. The Court of Appeals below struck down those restrictions in part based on this absence of empirical showing.<sup>80</sup> The Supreme Court, however, reversed and upheld the restrictions. It explained that "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."<sup>81</sup> What is more, the Court emphasized the government's interest in the prevention of the *perception* of corruption, as opposed to actual corruption itself. Based on accounts of suspicious practices and over-

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<sup>78</sup> See, e.g., *Davis v. FEC*, 554 U.S. 724 (2008) (striking down the Millionaire's Amendment to BCRA); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978) (striking down expenditure prohibitions on corporations and banks in direct democracy); *Buckley*, 424 U.S. 1 (1976) (striking down expenditure limits on individuals and candidates).

<sup>79</sup> 528 U.S. 377 (2000).

<sup>80</sup> *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521–22 (8th Cir. 1998).

<sup>81</sup> *Shrink Mo.*, 528 U.S. at 391.

whelming electoral support for campaign finance restrictions in the state, the Court concluded that “there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and [there is] no reason to question the existence of a corresponding suspicion among voters.”<sup>82</sup> The eminent plausibility of corruption in the public perception was sufficient reason for deference to the state.

*McConnell v. FEC* applied a similarly deferential approach to the government’s interest in prevention of corruption. In *McConnell*, the Court reviewed not only the BCRA provisions on electioneering communications but also the constitutionality of BCRA provisions that prohibited the receipt and spending of “soft money” by the national party committees. Soft money could be spent by the parties for only nonfederal purposes such as local and state elections, administrative expenses, and issue advocacy, provided that the parties refrained from using soft money for express advocacy and contributions. The advantage of soft money was that the Federal Election Commission allowed the parties to collect unlimited amounts of soft money in nonfederal accounts almost completely outside the usual array of campaign finance regulation. Source prohibitions on corporate and union funds did not apply, nor did contribution limits. BCRA prohibited party soft money and subjected all party campaign finance to hard money restrictions.

The Court upheld the soft money prohibition on a theory of corruption that encompassed the purchase of access and influence from the parties in the absence of a direct exchange with the candidates themselves. As in *Shrink Missouri*, the government did not provide “concrete evidence of an instance in which a federal officeholder has actually switched a vote.”<sup>83</sup> There was ample evidence, however, including written pricing menus, that parties had straightforwardly sold “access to high-level government officials” in their ranks in exchange for soft money donations.<sup>84</sup> With respect to this blatant exchange of access for dollars, the Court in *McConnell* explained that “[o]ur cases have firmly established that Con-

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<sup>82</sup> Id. at 395.

<sup>83</sup> *McConnell v. FEC*, 540 U.S. 93, 149 (2003).

<sup>84</sup> Id. at 150–52.

gress'[s] legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'"<sup>85</sup> The political parties themselves do not hold office and cannot deliver a quid pro quo on their own, but parties can facilitate quid pro quo arrangements and provide the appearance of corruption, because the parties "enjoy a special relationship and unity of interest" that allows them to serve as agents for their candidates and officeholders.<sup>86</sup> For the Court, it was "not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude."<sup>87</sup> Only a "crabbed view of corruption"<sup>88</sup> could exclude such arrangements in light of the fact that parties raised half a billion dollars in the previous presidential election year, accounting for almost half their total spending.<sup>89</sup>

Justice Kennedy, however, championed just such a "crabbed view of corruption" in campaign finance law against the majority of the Rehnquist Court. Justice Kennedy dissented in *McConnell* against the Court's willingness to "establish that the standard defining corruption is broader than conduct that presents a *quid pro quo* danger."<sup>90</sup> In Justice Kennedy's view, *Buckley* held that "the corruption interest only justifies regulating candidates' and officeholders' receipt of what we can call the '*quids*' in the *quid pro quo* formulation."<sup>91</sup> Where there is no such receipt of a quid in the form of a contribution, the corruption interest therefore might not apply. For this reason, Justice Kennedy argued that the corruption interest did not support the BCRA prohibition on party soft money. Because parties do not themselves enjoy direct access to government power, the attenuation of the connection between the soft money donor and candidates undermined the government interest in regulation. Justice Kennedy insisted that "[t]he very aim of

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<sup>85</sup> Id. at 150 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

<sup>86</sup> Id. at 145.

<sup>87</sup> Id.

<sup>88</sup> Id. at 152.

<sup>89</sup> Id. at 124.

<sup>90</sup> Id. at 293 (Kennedy, J., concurring in part and dissenting in part).

<sup>91</sup> Id. at 292.

*Buckley's* standard . . . was to define undue influence by reference to the presence of *quid pro quo* involving the officeholder.”<sup>92</sup>

For Justice Kennedy, the application of his position to the majority opinion in *Citizens United* was therefore simple—a prohibition on corporate expenditures likewise could not be justified under the corruption interest. Independent expenditures do not involve a financial exchange with a candidate or officeholder, even if federal candidates or officeholders benefit from the expenditures. Independent expenditures, by definition, are made without coordination with, or any other direction from, any federal candidate or officeholder. Only candidates and officeholders, at least in Justice Kennedy’s view, can offer government favors in exchange for the quid of a campaign finance contribution. For this reason, Justice Kennedy’s decision explained that the federal prohibitions on independent expenditures, in the absence of such an exchange, cannot be understood as responding to a threat of corruption.<sup>93</sup> Justice Kennedy’s opinion gleefully and explicitly overruled *Austin* as “not well reasoned.”<sup>94</sup> It then explicitly overruled *McConnell* for its reliance on *Austin* in upholding the BCRA restrictions on electioneering communications.<sup>95</sup>

What emerges from *Citizens United* is a dramatically narrower basis for government regulation of campaign finance beyond the question of corporate electioneering. *Citizens United* was about 2 U.S.C. § 441b and its prohibition on corporate independent expenditures. The corporate element of the holding received all the public attention, but it is the logic of the decision on independent expenditures as a general matter that has the furthest-reaching doctrinal consequences. The Court flatly concluded that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>96</sup> The Court explained that “[l]imits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government’s interest in preventing *quid pro quo* corruption.”<sup>97</sup> Al-

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<sup>92</sup> Id. at 294.

<sup>93</sup> *Citizens United*, 130 S. Ct. at 908.

<sup>94</sup> Id. at 912.

<sup>95</sup> Id. at 913.

<sup>96</sup> Id. at 909.

<sup>97</sup> Id. at 908.

though the Court was specifically addressing only § 441b and corporate expenditures in the case, the logic it applies to find § 441b unconstitutional is not limited to corporate expenditures. It applies to independent expenditures as a general matter and calls into question the constitutionality of any restriction on independent expenditures by almost any speaker.

Although the Court cited *Buckley* for its rejection of limitations on independent expenditures, campaign finance law never shielded independent expenditures from government regulation as faithfully as the Court's forceful language suggested in *Citizens United*. To start, the source restriction on independent expenditures by corporations and unions in *Citizens United* had been part of federal law for more than sixty years. The Court trumpeted *Citizens United* as simply "return[ing] to the principle established in *Buckley*."<sup>98</sup> It explained that "[n]o case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity."<sup>99</sup> That was true only so far as it went. The Court had followed *Austin* with a series of cases applying its logic to corporate speech and similarly permitted government regulation and restriction of independent expenditures in other areas of campaign finance law.<sup>100</sup>

The Court, for instance, consistently upheld limits on contributions to political committees and did not condition their constitutionality on the committees' use of that money. As Professor Dan Ortiz argued, the Court always upheld contribution limits to political committees without regard to whether the money was used only for independent expenditures.<sup>101</sup> In such cases, the donor and recipient committee's use of the contributed money was only for independent expenditures but nevertheless was thoroughly restricted by the contribution limit even in the absence of a connection to a political party or candidate. Contribution limits therefore had consistently been applied to committees without any reservation, de-

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<sup>98</sup> Id. at 913.

<sup>99</sup> Id. at 903.

<sup>100</sup> See *FEC v. Beaumont*, 539 U.S. 146 (2003); *McConnell*, 540 U.S. at 205–07. But cf. *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (holding that the application of a statute restricting independent spending is inapplicable to an organization that is more akin to a voluntary political association than a business).

<sup>101</sup> Memorandum from Daniel R. Ortiz for Democracy 21 and the Campaign Legal Center (Mar. 7, 2005) (on file with the Virginia Law Review Association).

spite the fact that the contributed money might be spent by a committee exclusively on independent expenditures.

The Court upheld BCRA's prohibition on soft money for the national party committees in *McConnell* along similar lines. The FEC had originally opened the door for soft money during the 1990s. Soft money to the national party committees would be used, by definition, for purposes other than express advocacy. The use of soft money for issue advocacy and other administrative expenses, according to the FEC's reasoning, did not present a risk of corruption and therefore should not be restricted under FECA contribution limits. BCRA overrode the FEC's ruling, however, and prohibited the national party committees from soliciting, receiving, or spending any soft money outside FECA contribution limits and other regulation. The *McConnell* Court upheld BCRA's prohibition on soft money notwithstanding the fact that it would not be used for contributions.

*Citizens United* put these campaign finance restrictions into immediate question and fundamentally transformed campaign finance law well beyond the regulation of corporations, even if public attention focused entirely on corporate expenditures. The corruption interest had been dramatically shrunk down to what the Court had previously called a "crabbed view of corruption"<sup>102</sup> with all campaign finance regulation closely tailored to a narrow understanding of quid pro quo corruption at penalty of unconstitutionality. Taken to its logical extreme, the Court's view of corruption, as previously articulated by Justice Kennedy, may limit campaign finance regulation to not much beyond the regulation of contributions to candidates and officeholders. Only contributions to candidates and officeholders convey quids directly to those individuals in position to return the favor. As I explain in the next Part, campaign finance law moved dramatically in this direction within months of *Citizens United*.

### *B. The Deregulation of Independent Expenditures*

It did not take long for campaign finance law to take *Citizens United*'s lead. While a decision in *Citizens United* was pending, another campaign finance case was winding through the federal ap-

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<sup>102</sup> *McConnell*, 540 U.S. at 152.

peals process: *SpeechNow.org v. FEC*. It looked like a reasonably straightforward case before *Citizens United* was decided, but *Citizens United* so transformed the underlying logic of campaign finance law that *SpeechNow.org*, by following its lead, would transform the practice of campaign finance in time for the 2010 elections.<sup>103</sup>

The case began two years earlier when the unincorporated 527 political organization SpeechNow.org filed suit to challenge the application of federal contribution limits to the donations it receives. Contribution limits applied to the donations that SpeechNow.org receives because SpeechNow.org qualified as a “political committee” under FECA. A “political committee” under federal campaign finance law is defined as any committee, club, association, or other group of persons whose major purpose is to influence federal elections and which receives contributions aggregating in excess of \$1,000 or makes expenditures aggregating in excess of \$1,000 during a calendar year.<sup>104</sup> SpeechNow.org also admitted that it was founded for the purpose of expressly advocating for the election and defeat of candidates for federal office and that it intended to receive more than \$1,000 in contributions and spend more than \$1,000 in expenditures.<sup>105</sup> There was therefore no question that SpeechNow.org qualified as a political committee and that, by operation of statute, a federal contribution limit of \$5,000 applied.<sup>106</sup>

The district court, in denying SpeechNow.org’s motion for a preliminary injunction, upheld this application of federal campaign finance law and rejected SpeechNow.org’s constitutional challenge. Even an entity that makes only independent expenditures, as opposed to contributions, qualifies as a political committee and was subject to contribution limits. In its constitutional challenge, SpeechNow.org argued that contribution limits could not be constitutionally applied to it as a political committee that makes only independent expenditures. The district court followed *Buckley* in noting that contribution limits receive a lower level of scrutiny than expenditure limits and are generally upheld, because they entail

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<sup>103</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 692–93 (D.C. Cir. 2010).

<sup>104</sup> See *Buckley*, 424 U.S. 1, 79 n.105 (1976); see also 2 U.S.C. § 431(4) (2006).

<sup>105</sup> FEC Advisory Opinion 2007-32 (Jan. 22, 2008).

<sup>106</sup> See 2 U.S.C. § 441a(a)(1)(C) (2006).

only a “marginal restriction” on contributors’ speech.<sup>107</sup> Contribution limits restrict only the amount of the contribution to a legally separate entity and leave open the contributors’ ability to speak directly for themselves through expenditures. SpeechNow.org’s contributors were entirely free to speak for themselves without legal restriction if they wished to give more than the \$5,000 contribution allowed by federal law, but they had to comply with the contribution limit if they wished SpeechNow.org to speak on their behalf. The district court refused to collapse the analytic distinction between contributions and expenditures from *Buckley* and upheld the application of contribution limits even though SpeechNow.org intended to make only independent expenditures.<sup>108</sup>

The district court’s view reflected the standard understanding of campaign finance law before *Citizens United*. Contribution limits cut off only contributions to a particular organization and leave open ample opportunity for direct speech through expenditures such that the loss to speech is less than what would be with expenditures limits.<sup>109</sup> Not only is the speech interest for contributions less, but just as importantly, contribution limits guard against the heightened risk of corruption inherent in the aggregation of campaign money. Political committees are by definition political organizations whose major purpose is the election of government officials. They coordinate among a larger group of contributors and concentrate their financial resources in ways that generally raise worries about corrupting candidates and elected officials who need those financial resources deployed on their behalf.

The fact that SpeechNow.org’s money would be spent only on independent expenditures did not change the analysis under campaign finance law. Committees that monitor candidates and officials, with aggregated financial resources at their disposal, potentially can act as corrupting influences even when their money is spent on nominally independent expenditures. Independent expenditures, after all, are independent in only a formal sense. They are made without formal coordination, but candidates and those making the independent expenditures know whom the spending is

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<sup>107</sup> SpeechNow.org v. FEC, 567 F. Supp. 2d 70, 77 (D.D.C. 2008) (citing *Buckley*, 424 U.S. at 20).

<sup>108</sup> Id. at 76–77, 82.

<sup>109</sup> See, e.g., *Buckley*, 424 U.S. at 21.

intended to benefit. Although less direct than contributions, independent expenditures offer a political benefit to candidates that serve as the quids in a quid pro quo exchange nearly as well as a contribution. When those independent expenditures can be made without restriction in very large amounts, the risk of corruption may even be greater than the risk from capped contributions.

Just this concern about the risk of corruption from expenditures undergirded congressional attempts to restrict them when funded by corporations and unions. The original prohibitions on corporate and union expenditures, the predecessors to the federal prohibitions struck down by *Citizens United*, were part of the Taft-Hartley Act of 1947.<sup>110</sup> These prohibitions were never reviewed in *Buckley* but were reviewed earlier in *United States v. UAW-CIO*.<sup>111</sup> There, the Court relied heavily on congressional intent and legislative history regarding the corrupting potential of corporate and union expenditures in upholding the prohibitions. It explained that the prohibitions were specific responses to claims by the Congress of Industrial Organizations that its election activities were limited to “political ‘expenditures,’ as distinguished from ‘contributions,’” and that its advocacy was “not a proscribed ‘contribution’ but merely an ‘expenditure of its own funds to state its position to the world.’”<sup>112</sup> Senator Taft, a sponsor of the Taft-Hartley Act, explained that the prohibitions on corporate and union expenditures “plugg[ed] up a loophole” that “would absolutely have destroyed the prohibition against political advertising . . . [A] candidate for office could have his corporat[e] friends publish an advertisement for him in the newspapers every day for a month before [the] election.”<sup>113</sup> The House Committee Report likewise concluded that the prohibition on corporate and union contributions could be “wholly defeated” if expenditures were allowed as a substitute.<sup>114</sup>

Similar concerns about the substitutability of nominally independent electioneering supported the BCRA restrictions on corporate and union electioneering communications in *McConnell*. The district court in *McConnell*, based on an exhaustive factual record,

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<sup>110</sup> Labor Management Relations Act, ch. 120, §§ 304, 313, 61 Stat. 136, 159 (1947).

<sup>111</sup> 352 U.S. 567 (1957).

<sup>112</sup> *Id.* at 580.

<sup>113</sup> *Id.* at 583 (quoting Senator Taft, 93 Cong. Rec. 6439 (1947)).

<sup>114</sup> H.R. Rep. No. 79-2739, at 40 (1945).

found that corporations and unions sponsored interest groups with the understanding their donations would fund electioneering communications that would benefit specific officeholders.<sup>115</sup> Officeholders sought to have corporations and unions provide this financial sponsorship for electioneering communications, however uncoordinated in a formal sense. Corporations and unions would routinely inform the relevant officeholders after doing so to seek credit for their support. Based on this type of evidence, the district court found that “the potential for the appearance of corruption . . . relates to the very simple fact that when a corporation or labor union spends millions of dollars from its general treasury on a campaign, elected officials are likely to feel beholden.”<sup>116</sup> Contemplating this potential for corruption, the district court noted that *Buckley* “explicitly left open the possibility that a time might come when a record would indicate that independent expenditures made by individuals to support candidates would raise an appearance of corruption.”<sup>117</sup> Indeed, *Buckley* reasoned only that independent expenditures by individuals, at least based on the scant record presented to the Court, “do[] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>118</sup> The district court in *McConnell* thus concluded, and the Supreme Court subsequently affirmed, that Congress justifiably identified a substantial risk of the appearance of corruption from electioneering communications even in the absence of direct contributions to candidates.

*Citizens United* suddenly eliminated any discretion for courts and Congress to recognize a realistic risk of corruption from independent expenditures or electioneering communications. A risk of corruption, according to the Court, arises from the potential for a

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<sup>115</sup> *McConnell v. FEC*, 251 F. Supp. 2d 176, 622–25 (D.D.C. 2003).

<sup>116</sup> *Id.* at 624.

<sup>117</sup> *Id.* at 624–25.

<sup>118</sup> *Buckley*, 424 U.S. at 46; see also *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 498 (1985) (noting that it is “hypothetically possible . . . that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (acknowledging that “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections”).

“political *quid pro quo*.”<sup>119</sup> The potential for a *quid pro quo* distinguishes expenditures from contributions. Contributions involve an actual exchange with a candidate or officeholder that could secure a *quid pro quo*, but independent expenditures lack this element of literal exchange. As the Court explained, “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”<sup>120</sup> In the absence of such coordination or actual exchange, Congress cannot prohibit independent expenditures even if, the Court suggested, it found that independent expenditures facilitate actual or apparent corruption.<sup>121</sup> Prohibitions on independent expenditures are categorically unconstitutional as a matter of law and “asymmetrical to preventing *quid pro quo* corruption.”<sup>122</sup>

After *Citizens United*, the U.S. Court of Appeals for the D.C. Circuit viewed the appeal in the *SpeechNow.org* case as straightforward. As explained above, *SpeechNow.org* planned to engage only in independent expenditures without making any contributions to candidates and officeholders, and it challenged the application of contribution limits to donations received in support of those expenditures. The making of independent expenditures had been sufficient for decades to justify application of campaign finance restrictions to groups like *SpeechNow.org*, but the D.C. Circuit recognized that *Citizens United* marked a transformation of campaign finance law. *Citizens United* held that “the government has *no* anti-corruption interest in limiting independent expenditures.”<sup>123</sup> If independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government has no interest in limiting contributions to groups that make only independent expenditures either. Just as any limitation on independent expenditures is unconstitutional as a matter of law under *Citizens United*, so too would be a limitation on contributions to fund only independent expenditures. In the absence of any contribution to candidates in either case, the D.C. Circuit explained, “there is no cor-

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<sup>119</sup> *Citizens United*, 130 S. Ct. at 901 (quoting *Buckley*, 424 U.S. at 26).

<sup>120</sup> *Id.* at 910.

<sup>121</sup> *Id.* at 911 (“When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy.”).

<sup>122</sup> *Id.*

<sup>123</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C. Cir. 2010).

rupting ‘quid’ for which a candidate might in exchange offer a corrupt ‘quo.’”<sup>124</sup> The D.C. Circuit therefore struck down the application of contribution limits to a group, like SpeechNow.org, that limits itself to independent expenditures.<sup>125</sup>

Of course, SpeechNow.org’s donors would have been free to make their own independent expenditures on an unlimited basis, irrespective of the contribution limit struck down by the D.C. Circuit. Individual donors possess this freedom, because there has never been any question since *Buckley* that independent expenditures by an individual cannot be limited by campaign finance regulation. For this very reason, the Court in *Buckley* reasoned that a contribution limit, in contrast to an expenditure limit, “entails only a marginal restriction upon the contributor’s ability to engage in free communication.”<sup>126</sup> Contributions constituted nothing more than “speech by proxy.”<sup>127</sup> A lower level of scrutiny thus has always applied to contribution limits than to expenditure limits, which “impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions.”<sup>128</sup> The D.C. Circuit, however, read *Citizens United*’s unconditional language to reject this understanding from *Buckley* that contribution limits receive significant judicial deference as a result of the lesser expressive value inherent in contributions. Indeed, the Supreme Court had applied such deference to contribution limits that it had never struck down a contribution limit until the Roberts Court recently did so in *Randall v. Sorrell*.<sup>129</sup> For the D.C. Circuit, the categorical proclamation in *Citizens United* that independent expenditures raise no risk of corruption at all meant there were simply no grounds for government regulation whatsoever, even under the very deferential standard for reviewing contribution limits under *Buckley*. It required an extreme position on campaign finance law from the Supreme Court for the D.C. Cir-

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<sup>124</sup> Id. at 694–95.

<sup>125</sup> Id. at 698.

<sup>126</sup> *Buckley*, 424 U.S. at 20–21.

<sup>127</sup> *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion).

<sup>128</sup> *Buckley*, 424 U.S. at 23.

<sup>129</sup> 548 U.S. 230 (2006); see Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court’s Recent Election Law Decisions*, 2008 Sup. Ct. Rev. 89, 109–10 (2008) (“From *Buckley v. Valeo* until *Randall v. Sorrell*, contribution limits appeared almost untouchable by the Supreme Court.”).

cuit to deregulate independent expenditures completely in *SpeechNow.org*, but an extreme position is exactly what *Citizens United* signaled.

This deregulation of independent expenditures continued with the FEC codification of *SpeechNow.org*. The FEC sanctioned the new type of political committee, the so-called “super-PAC” that engages only in independent expenditures and therefore may raise contributions without restriction from contribution limits.<sup>130</sup> Not only are contribution limits inapplicable, but super-PACs are also free to raise funds for independent expenditures from corporations, unions, and banks. Those entities are free to engage in independent expenditures and do not raise any corruption risk in doing so, at least as a matter of law after *Citizens United*. For the same reason, no corruption risk inhered from their contributing money to a super-PAC for the same activity. Again, in the absence of a contribution to a candidate or officeholder, there is no risk of quid pro quo corruption under *Citizens United*. In effect, *Citizens United* enabled these super-PACs to engage in nearly limitless fundraising in time for the 2010 elections. Three dozen political committees registered with the FEC as super-PACs in the two months following the FEC ruling.<sup>131</sup> One super-PAC, American Crossroads, took advantage of deregulation to raise almost \$28 million in only a few months between the FEC ruling and the fall elections.<sup>132</sup> As one Republican campaign finance lawyer put it, “This is pretty much the holy grail that people have been looking for.”<sup>133</sup>

Other groups pushed campaign finance law further by opting out of minimal FEC disclosures to which even super-PACs submitted. These organizations often are registered with the Internal Revenue Service (IRS) as tax-exempt 501(c)(4) social welfare organizations,

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<sup>130</sup> FEC Advisory Opinion 2010-09 (July 22, 2010) (sanctioning of super-PACs at the request of Club for Growth).

<sup>131</sup> See Dan Eggen & T.W. Farnam, ‘Super PACs’ Alter Campaign, Wash. Post, Sept. 28, 2010, at A1, A6.

<sup>132</sup> See Dan Eggen & T.W. Farnam, Two Conservative Groups Emerge as Biggest Midterm Spenders, Wash. Post, Dec. 3, 2010, at A9.

<sup>133</sup> Eggen & Farnam, supra note 131, at A6 (quoting Trevor Potter). The FEC subsequently made clear that federal officeholders and candidates were permitted to solicit contributions to super-PACs provided that they do not solicit contributions above the \$5000 contribution limit. See FEC Advisory Opinion 2011-12 (June 30, 2011) (Majority PAC). Solicited contributors, however, remain free to make unlimited contributions.

rather than as groups created primarily to influence elections, and do not register as political committees with the FEC.<sup>134</sup> As a result, these groups do not comply with the disclosure of contributors and contributions required of FEC political committees.<sup>135</sup> Nor do these groups comply with the IRS disclosure requirements that apply to 527 organizations that are primarily engaged in political campaigning.<sup>136</sup> Ostensibly, the price of this opacity is that these groups cannot be “primarily engaged” in political campaigning to support or oppose candidates for office, but prominent 501(c)(4) organizations nonetheless engage in extensive electioneering.<sup>137</sup> For some groups, including most prominently Crossroads GPS, these electioneering activities included outright independent expenditures without any meaningful disclosure of the sources of their contributions.<sup>138</sup>

In short, post-*Citizens United*, outside groups that engage in forthright and extensive campaigning, in the form of independent expenditures, operate entirely outside campaign finance regulation as it had existed for more than thirty years since *Buckley*. The three major pillars of federal campaign finance law—(1) source restrictions on corporations and unions; (2) contribution limits; and (3) disclosure of contributors and contributions—do not apply to them. Their self-limitation to nominally independent expenditures, under *Citizens United*, preempts the application of government regulation.

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<sup>134</sup> See I.R.C. § 501(c)(4) (West 2010) (defining social welfare organizations as “operat[ing] exclusively for the promotion of the social welfare . . . [.] the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes”).

<sup>135</sup> See Donald B. Tobin, Political Advocacy and Taxable Entities: Are They the Next “Loophole”?, 6 First Amendment L. Rev. 41, 50–56 (2007) (describing the distinctions among 527 organizations, political committees, and 501(c)(4) social welfare organizations).

<sup>136</sup> See 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (2010) (stipulating that “[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office”).

<sup>137</sup> Miriam Galston, Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups, 95 Geo. L.J. 1181, 1220–29 (2007) (discussing the major purpose test). See generally Tobin, *supra* note 135 (discussing the major purpose limitation and how outside groups avoid disclosure of political contributions).

<sup>138</sup> For these groups, the FEC requires disclosure of their contributors’ identities only when the contribution is specifically earmarked at the time of contribution for a specific electioneering communication.

The expenditures of these outside groups can be confidently understood as independent only in a nominal sense. As a practical matter, the world of campaign finance always involves the same sets of political professionals who raise and use campaign money and regular contributors who provide the necessary money through whatever available channels that are most advantageous.<sup>139</sup> The experienced, well-known political professionals of both major parties run the most active and well-funded of the outside groups, which for all intents and purposes are tightly affiliated with the major parties and their candidates.<sup>140</sup> The richest outside group combines the super-PAC American Crossroads and the 501(c)(4) organization American Crossroads GPS and is headed by leading Republican strategists Karl Rove and Ed Gillespie.<sup>141</sup> Together the Crossroads entities raised more than \$70 million in 2010 and plan to spend more than \$200 million for the 2012 elections.<sup>142</sup> Things are no different in terms of the leadership profile of left-leaning groups. Prominent Democratic strategist Harold Ickes led the 527 groups—Americans Coming Together and the Media Fund—upon which the Republican strategy in 2010 was modeled.<sup>143</sup>

Although formal communication of strategy between these groups and candidates or parties is forbidden, the regulation of what constitutes coordination of expenditures with parties and

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<sup>139</sup> See Marty Cohen et al., *The Party Decides: Presidential Nominations Before and After Reform 3–7* (2008) (depicting party-based networks of campaign professionals and regular campaign donors); Seth E. Masket, *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures 43–53* (2009) (describing coordination between party professionals and networks of regular campaign donors); Gregory Koger, Seth Masket & Hans Noel, *Cooperative Party Factions in American Politics*, 38 *Am. Pol. Res.* 33, 35 (2010) (describing parties as social networks that include campaign consultants and regular donors).

<sup>140</sup> See Richard M. Skinner, Seth E. Masket & David A. Dulio, *Presentation at the American Political Science Association Annual Conference: 527 Committees and the Political Party Network* (Sept. 5, 2009) (documenting the network of partisan actors tying together the formal party organizations and allied 527s).

<sup>141</sup> See Jeanne Cummings, *Texas Builder Gives Crossroads \$7M*, *Politico* (Oct. 20, 2010, 8:53 PM), <http://www.politico.com/news/stories/1010/43937.html>.

<sup>142</sup> See Tom Hamburger & Matea Gold, *Parties Ignite a Financial Arms Race*, *L.A. Times*, Dec. 12, 2010, at A1, A25.

<sup>143</sup> See *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70, 75, 75 n.8 (D.D.C. 2008); see also Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 *Geo. Wash. L. Rev.* 1070, 1073–80 (2005) (discussing coordination among Democrat-allied groups in 2004).

candidates is inherently difficult. Outside groups on the same side of the partisan divide regularly coordinate with each other to map out their campaign strategy.<sup>144</sup> What is more, outside groups developed even greater capacity for informal coordination in 2010. For the first time, the National Republican Congressional Committee publicly revealed its advertisement-buying strategy.<sup>145</sup> This public disclosure allowed Republican-allied groups, led by the United States Chamber of Commerce, to coordinate their own ad buys. As the Chamber political director put it, knowledge of the party ad strategy allowed outside groups to “see where the holes are and figure out who is filling what holes.”<sup>146</sup> Informal but effective coordination replaced whatever formal coordination was prohibited by law.

The 2010 elections provided a glimpse of what this deregulation of independent expenditures will mean. The 2010 midterm elections were by far the most expensive in history. Roughly \$4 billion were spent on federal races in 2010, compared to the \$2.6 billion spent on the last midterm elections in 2006.<sup>147</sup> What is notable is that corporate money, as far as we can tell, accounted for only a small percentage of federal campaign spending in 2010. Almost no companies reported independent expenditures of their own, and a study by *Public Citizen* reported in late October that total contributions by all companies accounted for less than \$13 million.<sup>148</sup>

The biggest change in campaign finance in 2010 was the involvement of outside groups. Almost \$300 million of the 2010 total was spent by outside groups.<sup>149</sup> This level of spending represented

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<sup>144</sup> See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 *Geo. Wash. L. Rev.* 949, 965–69 (2005) (discussing the relationship among and between outside groups and the parties in 2004); Meredith A. Johnston, Note, *Stopping “Winks and Nods”: Limits on Coordination as a Means of Regulating 527 Organizations*, 81 *N.Y.U. L. Rev.* 1166, 1184–85 (2006) (describing informal coordination with 527 groups in 2004); see also Jeanne Cummings, *GOP Groups Coordinated Spending*, *Politico* (Nov. 3, 2010, 12:54 PM), <http://www.politico.com/news/stories/1110/44651.html> (describing coordinated strategy and meetings among Republican-allied groups in 2010).

<sup>145</sup> Cummings, *supra* note 144.

<sup>146</sup> *Id.* (quoting Bill Miller).

<sup>147</sup> *Congressional Campaigns: Half of Outside Spending in Campaigns Came from Groups Not Revealing Donors*, *BNA Money & Pol. Rep.*, Nov. 12, 2010.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

an increase of 168% over 2008 in House races and 44% in Senate races.<sup>150</sup> Seventy-two super-PACs formed in the short time between July 2010 and the fall midterm elections and spent a total of \$83.7 million.<sup>151</sup> An even larger amount of spending—an estimated \$138 million—came from groups that did not disclose their contributors.<sup>152</sup> In other words, the first post-*Citizens United* elections did not feature the avalanche of corporate spending that many feared following the decision, but the elections did feature clear increases in spending by outside groups, particularly those groups that do not disclose their contributors.

It is important to step back and remember where campaign finance law stood just before *Citizens United* and where it stood just months later in time for the 2010 elections. Before *Citizens United*, a critical distinction in campaign finance regulation was whether a political actor engages in express advocacy or issue advocacy.<sup>153</sup> Indeed, this basic distinction between express advocacy and issue advocacy had been the defining understanding that emerged from *Buckley* at the beginning of modern campaign finance law under FECA. If an actor engages in express advocacy, then government regulation could be constitutionally applied despite First Amendment concerns. Engaging in express advocacy meant, to simplify only a bit, that FECA disclosure requirements applied, as did contribution limits on the receipt of funds from others to pay for that advocacy. What is more, FECA prohibited corporations, unions, and banks, as well as others, from engaging in any express advocacy altogether. In short, to avoid campaign finance regulation, a political actor needed to avoid express advocacy.

After *Citizens United*, the abstention from express advocacy to avoid campaign finance regulation simply became unnecessary. Express advocacy, at least in the form of independent expenditures, became almost entirely unregulated. Of course, corporations,

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<sup>150</sup> See Franz, *supra* note 60, at 6.

<sup>151</sup> See T.W. Farnam, Super PACs Spent \$83M on Election, Pittsburgh Post-Gazette (Dec. 6, 2010), <http://www.post-gazette.com/pg/10340/1108611-84.stm>.

<sup>152</sup> Congressional Campaigns, *supra* note 147.

<sup>153</sup> See generally C. Edwin Baker, Campaign Expenditures and Free Speech, 33 Harv. C.R.-C.L. L. Rev. 1 (1998); Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 Tex. L. Rev. 1751 (1999); Frederick Schauer & Richard H. Pildes, Electoral Exceptionalism and the First Amendment, 77 Tex. L. Rev. 1803 (1999).

unions, and banks were no longer prohibited from engaging in independent expenditures. But more importantly, anyone other than parties and candidates themselves could avoid *almost all* campaign finance regulation if they engaged in only independent expenditures. The doctrinal implication of *Citizens United* was that there remained virtually no grounds for government regulation of anyone else if only independent expenditures were in question: no source restrictions, no applicable contribution limits, basically no disclosure. The constitutional line for the permissibility of regulation had moved that far in a very short time. Most obviously, the three pillars of campaign finance regulation—source restrictions on corporate and union money, contribution limits, and disclosure of contributors—no longer applied to scores of outside groups that collected and spent millions for express campaign advocacy on behalf of federal candidates.

The new constitutional distinction of central importance now is not one about express advocacy but instead one about contributions. While express advocacy through independent expenditures is no longer regulated in significant part, contributions still are and bring with them government regulation. In other words, a political actor can basically act largely without regulation by refraining from making contributions to political parties or candidates, but if a political actor chooses to make such contributions, only then can the fuller range of FECA regulations apply.<sup>154</sup> This shift since *Citizens United* represents a radical shrinkage in the scope of regulable campaign finance activity that was difficult to identify at the time of the decision itself but has unfolded very rapidly since. This deregulation of independent expenditures by outside groups was the direct consequence of *Citizens United*, and it had nothing to do with corporations or unions, nor was it pre-ordained by *Wisconsin*

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<sup>154</sup> After *Carey v. FEC*, however, the FEC announced that it must permit even outside groups that make contributions also to collect unrestricted funds for independent expenditures, free from source restrictions and contribution limits, provided those funds for independent expenditures are kept in a segregated account. See FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011). As a result, now there is virtually no practical restriction on the ability of a super-PAC to contribute except that super-PAC contributions must be made from segregated hard-dollar funds. Even the limitation on super-PAC contributions thus has lost almost all its bite.

*Right to Life II* or anything else the Roberts Court had previously decided.

### III. THE REVERSE HYDRAULICS OF CAMPAIGN FINANCE

What has occurred since *Citizens United* should be described as “reverse hydraulics.” As *Citizens United* rolled back campaign finance law as it stood for decades, political money has rushed back to newly deregulated channels like water finding its own level. In practical terms, the deregulation of independent expenditures will mean a shift of money to independent expenditures by outside groups that now are almost completely free of legal restriction and away from contributions to candidates and parties that alone remain subject to the full array of federal campaign finance regulation. This reverse hydraulic flow of money is unfortunate as a normative matter, as I explain in this Part.

#### A. *The Reverse Hydraulic Effect of Citizens United*

Professors Sam Issacharoff and Pam Karlan once identified a hydraulics of campaign finance reform.<sup>155</sup> Political actors give and spend money on campaigning because they care about influencing political outcomes and believe that campaign money helps their side to prevail. Campaign finance reform may intervene to complicate the way that they spend campaign money, but money is fungible and can be redeployed in new ways that are less regulated or not regulated at all. As Issacharoff and Karlan describe it, campaign money follows a hydraulic process in response to new regulation, like water finding its own level. Campaign money redirects around new regulation through new channels toward the same political ends as before.

What has happened since *Citizens United* is not quite this phenomenon because what has happened is not new regulation—it is the rollback of existing regulation. Instead of a hydraulics of campaign finance regulation, we are seeing a reverse hydraulics of campaign finance deregulation. “Reverse hydraulics” means that

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<sup>155</sup> Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *Tex. L. Rev.* 1705 (1999).

when existing regulation is removed, money then may flow through the more direct paths that have opened up. As regulation of independent expenditures has been struck down as unconstitutional by *Citizens United* and *SpeechNow.org*, campaign money now is flowing back into the regulatory void through the newly opened, more direct channels. This is not the usual story of strategic adaptation to regulation; this is reversion in response to the removal of regulation.

At the simplest level, campaign money spent by outside groups on issue advocacy, formerly in hydraulic response to BCRA, now will be spent largely on express advocacy in the form of independent expenditures. Before *Citizens United*, outside groups could avoid FECA restrictions that attach to money collected and spent on express advocacy by spending on issue advocacy instead. Money from corporate and union treasuries was subject to FECA's source restrictions and could not be spent on express advocacy, but it could be spent generally on issue advocacy. What is more, outside groups avoided disclosure requirements under FECA and collected this form of soft money without needing to comply with contribution limits only if they limited themselves to issue advocacy. Now after *Citizens United*, there is little reason for outside groups to limit themselves to issue advocacy instead of express advocacy, because none of these FECA restrictions need apply to their express advocacy. Outside groups can avoid most disclosure requirements under FECA and collect money for independent expenditures without restriction from FECA's source prohibitions and contributions limits.

The reverse-hydraulic effects for the 2010 elections were clear. First, independent expenditures exploded upward in 2010 by more than 300 percent compared to the previous midterm elections in 2006. They increased from less than \$75 million total in 2006 to roughly \$300 million in 2010.<sup>156</sup> Second, independent expenditures by outside groups in particular increased dramatically. *Citizens United* meant the nonregulation of independent expenditures by groups other than parties and candidates. As a matter of reverse

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<sup>156</sup> See Lawrence Lessig, *Republic, Lost: A Declaration for Independence* 250 (Feb. 15, 2011) (unpublished manuscript) (on file with the Virginia Law Review Association).

hydraulics, money will go to those unregulated groups and perhaps not as much to parties and candidates where it still is regulated. Outside groups spent almost \$300 million for the 2010 elections, which represented a significant increase over the 2008 elections and an even larger increase over the previous midterm elections in 2006.<sup>157</sup>

These reverse hydraulic effects completely un-did the reform results of BCRA. The drafters of BCRA understood the hydraulics of campaign reform that Issacharoff and Karlan described. They argued that their intention was not to stanch the flow of money into politics, as Issacharoff and Karlan doubted that reform could achieve.<sup>158</sup> Instead, they hoped that campaign money could be channeled in healthier directions for accountability, representation, and transparency. Stricter regulation of independent electioneering by outside groups, particularly when funded by corporations and unions, encouraged money to flow away from these previously unregulated spaces of issue advocacy and electioneering communications. Reformers paired these greater restrictions on outside groups with higher contribution limits for donations to political parties and candidates. This regulatory package therefore channeled campaign money away from outside groups and toward parties and candidates, even if the overall amount of money stayed the same.<sup>159</sup>

BCRA thus traded off the unregulated, undisclosed spending by outside groups for regulated, fully disclosed spending by parties and candidates under the contribution limits of federal campaign finance law. Issacharoff and Karlan were concerned about the effect of campaign finance reform in pushing money away from “the mediating influence of candidates and political parties.”<sup>160</sup> Although reform might purport to stem the flow of money into poli-

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<sup>157</sup> See Franz, *supra* note 60, at 1; BNA Money & Pol. Rep. *supra* note 147.

<sup>158</sup> See Thomas E. Mann & Norman J. Ornstein, Separating Myth From Reality in *McConnell v. FEC*, 3 Election L.J. 291, 293–94 (2004).

<sup>159</sup> See David B. Magleby, A Change Election, *in* The Change Election: Money, Mobilization, and Persuasion in the 2008 Federal Elections 1, 12–13 (David B. Magleby ed., 2011). In fact, total campaign spending by parties and candidates increased after BCRA as increases in hard-money contributions under the higher limits offset the loss of soft money. See *id.* at 13; see also Norman Ornstein & Anthony Corrado, Jr., Reform That Has Really Paid Off, Wash. Post, Apr. 1, 2007, at B3.

<sup>160</sup> Issacharoff & Karlan, *supra* note 155, at 1714.

tics, Issacharoff and Karlan warned that the hydraulics of campaign finance reform meant the “money that reform squeezes out of the formal campaign process must go somewhere.”<sup>161</sup> To the degree that the money was redirected by regulation toward electioneering advocacy by outside groups, they worried that money was channeled through groups without the same incentives of “candidates who must stake out positions across a variety of issues and [of] political parties that have strong institutional interests in hewing to a middle course.”<sup>162</sup> Conscious of this worry, BCRA purposely re-adapted campaign finance law to redirect money toward candidates and parties. Of course, where BCRA imposed new restrictions on soft money to the national parties, at least some political donors avoided BCRA’s restrictions by channeling money to outside groups in place of the national parties. There was, then, some hydraulics of reform pushing soft money to outside groups in ways for which BCRA did not fully account.<sup>163</sup> But BCRA *had* the overall effect of encouraging political contributing to and spending by parties and candidates, at least until *Citizens United* declared much of it unconstitutional.

Today’s reverse hydraulics of deregulation after *Citizens United* restores, ironically, the precise worries about which Issacharoff and Karlan earlier warned. The absence of regulation after *Citizens United* for independent expenditures by outside groups channels campaign money to those groups, just as well as would have more stringent regulation of candidates and parties by campaign finance reform. What matters is the regulatory differential between alternate channels for money. Money flows to the lesser regulated channel, all other things being equal. This effect occurs whether the differential results from increased regulation of one channel relative to another (hydraulics) or from decreased regulation of one channel relative to another (reverse hydraulics). Just as Issacharoff and Karlan worried that increased regulation of candidates and parties would redirect campaign money to outside groups that are less accountable to and representative of the public, we should

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<sup>161</sup> *Id.* at 1713.

<sup>162</sup> *Id.* at 1714.

<sup>163</sup> See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 *Iowa L. Rev.* 131, 156–59 (2005).

now worry that radically decreased regulation of outside groups will produce the same result.

*B. Assessing Reverse Hydraulics: The Normative Payoff*

Justice Kennedy and the Court are correct as a general matter that contributions to candidates and parties carry a greater risk for quid pro quo corruption than independent expenditures by outside groups and individuals. Contributions to candidates and parties provide a more direct connection between the donor and a government decision maker potentially in a position to reciprocate the benefit. Limits on contributions restrict direct exchanges between donors on one hand and parties or candidates on the other hand. To the degree that parties or candidates are receptive to quid pro quo exchanges, contribution limits constrain the magnitude of direct exchanges and therefore limit the potential for quid pro quo corruption. Of course, the possibility of quid pro quo exchange exists with respect to nominally independent expenditures as well, but it is attenuated by comparison. Accounting for the quids through independent expenditures is less precise than with contributions, where the candidate and party can confirm receipt and properly verify the contribution amount. Candidates and parties are likely to prefer contributions over expenditures because contributions give them more control over the money and the resulting speech.<sup>164</sup> Even if independent expenditures are valuable to candidates and parties, contributions are better dollar for dollar.<sup>165</sup> In short, the Court is right to regard the constitutional case for regulation with respect to quid pro quo corruption as weaker for independent expenditures by outside groups than for contributions to candidates and parties.

A lesser risk from independent expenditures by outside groups, however, is not the same as the *absence* of any constitutionally

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<sup>164</sup> See, e.g., Daniel Malloy, Special-Interest Spending Looms Large, Pitt. Post-Gazette, Oct. 27, 2010, at A1 (quoting a campaign spokesperson saying that “[o]bviously you’d like to have control over your message in a campaign, so the less control you have there’s an uncertainty factor”).

<sup>165</sup> See *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 498 (1985) (“[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”).

cognizable risk of corruption. The decision in *Buckley* that expenditure limits could not be constitutionally justified by the government interest in preventing corruption, while permitting regulation of contributions, was as much a pragmatic judgment as anything else. The Court balanced countervailing free speech and equality interests in campaign finance law by allowing regulation of contributions and disallowing expenditures, despite their similarities in terms of the relevant considerations.<sup>166</sup> On the substantive merits, though, it is difficult to argue that independent expenditures do not raise any risk of quid pro quo corruption, or even the appearance thereof. As Professor Ortiz argues, “there is no reason to believe that a candidate would feel much less beholden to someone who has expended sums on her behalf than to someone who has given her money directly.”<sup>167</sup> There may be a difference in the degree of indebtedness from contributions compared to expenditures, but it is not the significant difference in kind that would justify the constitutional distinction that the Court asserts.

The Court admitted that independent expenditures in fact raise a risk of quid pro quo corruption or the appearance thereof just the year before *Citizens United* in *Caperton v. A.T. Massey Coal Co.*<sup>168</sup> The Court there held that West Virginia Supreme Court Justice Brent Benjamin was required under the Due Process Clause to recuse himself in a case involving a campaign supporter who spent \$3 million on the Justice’s successful election bid. The campaign supporter, Don Blankenship, contributed the \$1,000 statutory maximum under West Virginia’s contribution limit to Benjamin’s campaign, but that contribution was not the source of the Court’s concern about the potential for bias. Blankenship had contributed a far greater amount, nearly \$2.5 million, to an outside 527 organization that used the money for independent expenditures in support of Benjamin’s election. In addition, Blankenship spent more than half a million dollars on his own independent expenditures for

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<sup>166</sup> See Kathleen Sullivan, Political Money and Freedom of Speech, 30 U.C. Davis L. Rev. 663, 667 (1997) (arguing that *Buckley* “attempt[ed] to solve an analogical crisis by splitting the difference”).

<sup>167</sup> Daniel R. Ortiz, The Unbearable Lightness of Being *McConnell*, 3 Election L.J. 299, 301 (2004); see also Sullivan, supra note 166, at 667 (“[A]n ‘independent’ expenditure may inspire just as much gratitude by the candidate as a direct contribution.”).

<sup>168</sup> 129 S. Ct. 2252 (2009).

the same purpose. Virtually all Blankenship's campaign spending in support of Benjamin thus came in the form of independent expenditures that *Citizens United* claimed as a matter of law "do not give rise to corruption or the appearance of corruption."<sup>169</sup> Nonetheless, the Court in *Caperton* held that Blankenship's independent expenditures gave rise to "a serious risk of actual bias—based on objective and reasonable perceptions."<sup>170</sup> The Court concluded that, even though the independent expenditures did not constitute any formal bribe or quid pro quo, "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected."<sup>171</sup>

*Caperton* does not necessarily suggest that independent expenditures have the same potential for quid pro quo corruption as contributions, but it certainly admits that there is *some* legally cognizable risk of corruption from independent expenditures. The circumstances in *Caperton* were unusual in the sense that Blankenship's spending exceeded three times the amount spent directly by either candidate's campaign in the election.<sup>172</sup> This level of spending by a single individual in a state supreme court race, the Court concluded, had "a significant and disproportionate influence on the electoral outcome" that is unlikely to be attributed to most independent expenditures.<sup>173</sup> *Caperton*, however, acknowledges independent expenditures pose a risk for quid pro quo corruption that should preclude the Court's conclusion in *Citizens United* that independent expenditures categorically do not give rise to corruption as a matter of law. If independent expenditures create a reasonable perception of bias under the strict requirements for judicial recusal, they would create a similar appearance of quid pro quo corruption if nothing else.<sup>174</sup> What is more, given the impermissibility of government limitation, the potential for corruption

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<sup>169</sup> *Citizens United*, 130 S. Ct. at 909.

<sup>170</sup> *Caperton*, 129 S. Ct. at 2263.

<sup>171</sup> *Id.* at 2262.

<sup>172</sup> *Id.* at 2264.

<sup>173</sup> *Id.*

<sup>174</sup> See Stephen M. Hoerding & Bradley A. Smith, *The Caperton Caper and the Kennedy Conundrum*, 2009 *Cato Sup. Ct. Rev.* 319, 340–41 ("The holding in *Caperton*, and the resulting jumble of propositions, suggests that if independent expenditures create the probability of bias, they must also create at least the 'appearance of corruption.'").

through independent expenditures is essentially unbounded. It is difficult to reconcile the fact that the government cannot limit independent expenditures at all, even if they run into the millions, when the government may limit to \$2500 the contributions made to federal candidates by the same individual.

In the normative assessment of reverse hydraulics after *Citizens United*, as opposed to the Court's constitutional analysis, the government interest in the prevention of corruption is not the only normative value to consider in campaign finance law. Of course, the Court has insisted that prevention of corruption, narrowly defined in *Citizens United*, is the only government interest to consider in the First Amendment analysis of campaign finance regulation. This exclusive window for government regulation is the reason that *Citizens United's* narrow definition of corruption is so deeply important and ultimately destructive to campaign finance law as we long knew it. However, there are many important democratic values implicated by campaign finance law that are left unconsidered in the Court's nearly exclusive focus on the prevention of corruption in the constitutional analysis. Assessing the post-*Citizens United* world of campaign finance requires looking beyond the prevention of corruption as defined by the Court.

First, the reverse hydraulic flow of money to outside groups, away from candidates and parties, is unfortunate in terms of accountability and representation. Only candidates and their political parties appear on the ballot. Elections present voters with choices that should be informed by candidates' and parties' accounts of what they believe and plan to do if elected. These accounts of candidates' and parties' own political views should be what voters most want to know and need to know. What is more, candidates and parties ought to be the best spokespeople (or at least have the best incentives to enlist the best spokespeople) for their candidacies. When money flows away from candidates and parties to outside groups, as a matter of reverse hydraulics, then money flows away from those whose views are most relevant and who best speak for their own candidacies.

Only candidates and parties, not outside groups, are accountable through elections. Voters can judge whether candidates and parties abide by their own campaign promises, and elections allow voters to punish candidates and parties who misrepresent themselves or

otherwise engage in irresponsible claims. The prospect of the next election therefore disciplines candidates and parties to a degree that simply does not apply to outside groups. Outside groups never face the voters or have to run for election on the basis of their campaigns.<sup>175</sup> Indeed, outside groups may disappear immediately after the election or whenever their current organizational form becomes inconvenient. They have far less long-term interest in cultivating public credibility or reputation than candidates and parties who appeal to voters in election after election.

For all these reasons, it is no surprise that some of the worst excesses of political campaigning come from outside groups. The most famously inflammatory attack advertisements originated from outside groups formally independent of the candidate they supported. The Swift Boat campaign against John Kerry in the 2004 presidential election was sponsored by a group called the Swift Boat Veterans for Truth.<sup>176</sup> The infamous advertisement against Michael Dukakis's presidential bid in 1988 that focused on furloughed convict Willie Horton was likewise sponsored by an unknown outside group—this time named the National Security Political Action Committee.<sup>177</sup> These advertisements were widely criticized and likely would not have been sponsored by candidates and parties concerned about their public reputations. However, outside groups without any long-term stake in their image were willing to run them, despite their demagogic character. Of course, this type of speech has value in the constitutional analysis as part of a robust democratic discourse that tolerates exaggeration, distortion, and base appeals, but it is reasonable in the broader normative analysis to value it less in terms of responsibility and relevance than most campaign speech directly from candidates and parties.

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<sup>175</sup> See Peter J. Wallison & Joel M. Gora, *Better Parties, Better Government: A Realistic Program for Campaign Finance Reform* 53 (2009) (criticizing outside groups for having none of the transparency, accountability, or policy coherence of political parties and candidates); Issacharoff & Karlan, *supra* note 155, at 1714 (arguing that money has its greatest influence “as politics pushes toward issue advocacy by groups not engaged in the give and take of party and coalitional politics”).

<sup>176</sup> See generally Albert L. May, *Swift Boat Vets in 2004: Press Coverage of an Independent Campaign*, 4 *First Amendment L. Rev.* 66 (2005).

<sup>177</sup> See David C. Anderson, *Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice* 229–30 (1995).

Furthermore, the deregulation of independent expenditures by outside groups now encourages what is essentially anonymous speech funded by undisclosed sponsors. Although super-PACs that register as political committees with the FEC still comply with campaign finance disclosures, less than half of the independent expenditures by outside groups during the 2010 election cycle were made with disclosure of the contributors' identities.<sup>178</sup> Forcing such disclosure on outside groups has always been a regulatory challenge because the groups themselves are merely legal creations that can be manipulated to avoid disclosure obligations. Outside groups at the state level regularly frustrate campaign finance disclosure by organizing complicated layers of entities within entities that allow the real individuals providing the financial resources to hide inside an organizational structure that resembles a Russian matryoshka doll.<sup>179</sup> These challenges only multiply now that the FEC requires BCRA disclosure of a donation that funds an electioneering communication only when the donation is earmarked for a specific advertisement—a requirement that invites avoidance and undermines meaningful disclosure as a practical matter. The shift toward independent expenditures by outside groups thus means that there will be more campaign spending by sponsors who are not publicly disclosed.

The lack of transparency is again unfortunate from a normative perspective. Disclosure is the lone area of campaign finance regulation that even the Roberts Court appears to support. Eight of nine justices voted in *Citizens United* to uphold BCRA's disclosure requirements as far as they go.<sup>180</sup> Campaign finance disclosure not only addresses corruption by shining sunlight on campaign finance dealings, but it provides information to voters about the sources of financial support for candidates and parties. This information helps voters both to understand what types of interests are aligned with which candidates and parties, as well as to better evaluate cam-

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<sup>178</sup> Taylor Lincoln, *Disclosure Eclipse 3* (2010), available at <http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf>.

<sup>179</sup> See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 *Election L.J.* 295, 296 (2005).

<sup>180</sup> 130 S. Ct. at 913–17.

campaign messages based on the credibility of the source of support.<sup>181</sup> Despite these values of disclosure, independent expenditures by outside groups do not necessarily require disclosure under the FEC's application of federal requirements. What is more, outside groups have great incentives to avoid such disclosure when contributors prefer anonymity, and particularly when the independent expenditures are the type of inflammatory rhetoric that these groups are willing at times to sponsor. Disclosure is thus likely to be least available in certain instances of independent expenditures for which the public interest would be greatly served by disclosure of contributors' identities.

Finally, the deregulation of independent expenditures and the resulting reverse hydraulics of campaign finance law are likely to discourage broader participation in campaign finance donation. The 2008 elections, and the Obama presidential campaign in particular, featured unprecedented contributions from grassroots donors. The Obama campaign, for instance, reached 3 million donors through the Internet for a total of 6.5 million contributions online and a total of more than \$500 million.<sup>182</sup> Six million of those contributions were less than \$100, and the average online contribution was \$80.<sup>183</sup> This success came from effective use of the Internet as a campaign finance tool, but just as importantly, resulted from the simplest change in tactics: people of average means gave to the campaign because the campaign asked them. The political science on political participation finds that it is not strictly a function of people's interest in politics, or of competitive elections, or of media coverage, or of many things that people blame for the lack of participation in American politics. What the political science finds, and what tends to get overlooked, is that grassroots participation

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<sup>181</sup> See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 *UCLA L. Rev.* 1141 (2003) (surveying the literature on heuristic cues and applying it to campaign finance disclosure); Lloyd Hitoshi Mayer, *Disclosures About Disclosure,* 44 *Ind. L. Rev.* 255 (2010) (discussing campaign finance disclosure in terms of voter education).

<sup>182</sup> See Laura MacCleery, *Goodbye Soft Money, Hello Grassroots: How Campaign Finance Reform Restructured Campaigns and the Political World,* 58 *Cath. U. L. Rev.* 965, 999 (2009).

<sup>183</sup> *Id.*

depends heavily on political elites to mobilize the public.<sup>184</sup> A Democratic party official explained that grassroots contributions were the result of the Obama campaign “including more people in the political process,” instead of the previous practice of “basically reach[ing] out to labor unions and sa[ying], give to this member of Congress.”<sup>185</sup>

The worry with the deregulation of independent expenditures is that candidates and parties may not continue any nascent trend toward grassroots participation. BCRA’s restrictions on soft money and corporate and union electioneering forced candidates and parties to look increasingly toward individual donors for money subject to the federal contribution limits.<sup>186</sup> But the deregulation of independent expenditures now reverses a good part of BCRA’s salutary influence. With opportunities for unlimited independent expenditures by outside groups, we are likely to see political elites trending away from grassroots mobilization, before it becomes more widespread, back to a heavier focus on a relatively small group of ultra-wealthy donors who give huge amounts.<sup>187</sup> It is highly unlikely that super-PACs will engage in much grassroots fundraising. Indeed, the advantage of a super-PAC is that it does not need to engage in grassroots fundraising and instead can focus on attracting the largest contributions available from a small set of rich donors, without a contribution limit. Former senator Bob Dole once explained that “[p]oor people don’t make campaign contribu-

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<sup>184</sup> See Donald P. Green & Alan S. Gerber, *Get Out the Vote!: How to Increase Voter Turnout 1–4* (2004); Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* 117 (1993).

<sup>185</sup> Tim Fernholz, *What to Expect When You’re Expecting a Majority*, *Am. Prospect*, Oct. 2008, at 23 (quoting Brian Wolff, Chair of the Democratic Congressional Campaign Committee); see also Molly J. Walker Wilson, *The New Role of the Small Donor in Political Campaigns and the Demise of Public Funding*, 25 *J.L. & Pol.* 257 (2009) (describing the trend toward small donors in the 2008 elections).

<sup>186</sup> See Issacharoff, *supra* note 50, at 138 (arguing that BCRA reforms created incentives for campaigns to solicit money from more sources); MacCleery, *supra* note 182, at 970–71 (crediting BCRA for the increase in grassroots contributions).

<sup>187</sup> See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 *U. Pa. L. Rev.* 73 (2004) (describing a small group of contributors that dominate federal campaign finance); Terry Smith, *Race and Money in Politics*, 79 *N.C. L. Rev.* 1469 (2001) (criticizing the racial stratification of federal campaign finance).

tions,”<sup>188</sup> but that is certainly truer when legal incentives do not encourage political actors to ask. The reverse hydraulics of campaign finance after *Citizens United* provides less incentive to ask, and both major parties already have geared up to take full advantage of unlimited contributions from a restricted set of ultra-wealthy donors under campaign finance deregulation.<sup>189</sup>

#### IV. THE WAY FORWARD POST-*CITIZENS UNITED*: CAMPAIGN FINANCE REFORM WITHOUT CAMPAIGN FINANCE REGULATION

What is the way forward now for campaign finance reform? We are certain to have more money in politics than ever, because the constitutional space for government restriction of campaign finance money is smaller than it ever has been in the history of campaign finance law. As restrictions fall away, more campaign finance money is headed in what appear to be less attractive directions, subject to virtually no campaign finance regulation as we knew it. *Citizens United*, however, leaves open almost no means through campaign finance regulation to remedy the pathologies of reverse hydraulics. The decision’s narrow interpretation of the government interest in the prevention of corruption leaves virtually no constitutional space for new campaign finance regulation. The way forward for campaign finance reform therefore must come from outside campaign finance regulation as we have known it.

Ironically, the Court may be much more sympathetic to alternative government regulation of the relationship between campaign finance and the legislative process than *Citizens United* suggests at first blush. Other Court decisions outside campaign finance law indicate the Court’s specific concerns about campaign finance regulation and point out the correct direction for reform. Campaign finance reform must shift to ex post measures to limit the influence

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<sup>188</sup> Robert G. Kaiser, *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* 355 (2009) (quoting Bob Dole).

<sup>189</sup> See, e.g., Tom Hamburger & Matea Gold, *Democrats Rethink Outside Spending*, L.A. Times, Nov. 4, 2010, at AA1, AA6 (describing the revision of Democratic thinking for 2012 and quoting Harold Ickes as saying “I think a lot of people engaged in ‘04 and ‘08 got real [counterproductive] signals from the White House that we don’t need your big money”); Eliza Newlin Carney, *Democrats Join the Battle*, Nat’l J. (Feb. 27, 2011), <http://www.nationaljournal.com/columns/rules-of-the-game/democrats-join-the-battle-20110227> (outlining Democratic strategy for 2012 to match Republican-allied outside spending).

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of campaign money once it is already in the system, as opposed to ex ante regulation of money to limit its entry in the first place. Ex post regulation offers narrower targeting of the corruption risk without discouraging political speech in the process. In the end, the Court's decisions taken together suggest that they can be best reconciled with reference to these concerns, rather than the differential risk of corruption across the cases.

*A. The Dead End for Campaign Finance Regulation*

*Citizens United* leaves little room for any adaptation of campaign finance regulation in response to these new dynamics of campaign finance money. Campaign finance reform has always resembled a cat-and-mouse game in which political actors adjusted to new regulation only to motivate new regulation in response and so forth. The Court has consistently rejected government interests in equalizing viewpoints as grounds for government regulation and found that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."<sup>190</sup> Congress could adapt to new campaign finance practices by enacting new regulation that again changes the incentives of political actors in the game and either slows the flow of money into politics, or in the alternative, encourages the flow of money in favored directions.

There appears to be nothing, however, that Congress can do to slow the current flow of increasing amounts of money into campaign finance. The deregulation of campaign finance removes restrictions for political actors who find it advantageous to bring increasing amounts of money into politics and will do so going forward. The 2010 elections were only a preview of what political actors can accomplish in the newly deregulated world of campaign finance. Issacharoff and Karlan warned that the hydraulics of campaign finance dictated that more regulation would not lead to less money coming into the system. If that was true for the addition of regulation, then more money entering into the system with removal of substantial regulation is absolutely certain.

Can legislative adaptation through campaign finance regulation at least do something to redirect the increasing flow of money in

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<sup>190</sup> *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496–97 (1985).

normatively favorable directions? That is, even if there is more money coming into the system, the best hope for those concerned about its influence might be to encourage the flow of that money in the best available directions.<sup>191</sup> BCRA itself was designed to redirect campaign finance money toward express advocacy from candidates and parties by restricting the channels for money to flow elsewhere. BCRA encouraged money toward federal contributions to candidates and parties not only by making such contributions more attractive through looser regulation but also by making independent issue advocacy subject to greater, more costly regulation as well. BCRA therefore encouraged a shift from unregulated soft money and issue advocacy to regulated hard money and full disclosure, even if the total amount of money in the campaign finance system indeed increased. The necessary elements in this process of legislative adaptation were (1) lowering the costs of campaign finance through favored channels and (2) raising the costs of campaign finance through disfavored ones.

*Citizens United* and its progeny *SpeechNow.org*, however, effectively bar new restrictions on campaign finance and make very difficult any legislative effort today to undo, in effect, the reverse hydraulics of *Citizens United*. Rechanneling campaign finance back toward favored directions through legislative adaptation would require not only lowering regulation of favored channels but also raising the costs of using disfavored ones, and the latter move is effectively barred by the Court. The clear signal from the Court is that there is no room for more campaign finance regulation going forward, and if anything, there is likely to be a further peel-back of the campaign finance regulation that currently survives. *Citizens United* bars, for instance, any fresh attempt to regulate independent expenditures by outside groups that might make those expenditures less attractive to campaign donors relative to contributions to candidates and parties. Opportunities for legislative adaptation through traditional campaign finance law are constitutionally precluded.

Of course, a slightly different approach to undoing the reverse hydraulics of *Citizens United* would be to make favored channels

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<sup>191</sup> See Kang, *supra* note 163, at 176–77 (arguing that regulation can channel political activity even when it may not deter it).

more attractive without making disfavored channels less attractive. Deregulation of contributions to candidates and parties might make them relatively more attractive to political sponsors, who thus might contribute directly rather than underwrite independent expenditures by outside groups.<sup>192</sup> The relaxation of the surviving BCRA prohibition on party soft money, for example, would permit larger donations to candidates and parties and shift money that otherwise might have been spent on independent expenditures back in their direction. Indeed, the Court may soon head down this path on its own as a constitutional matter before long.<sup>193</sup> This approach would subsidize the campaign financing of candidates and parties without deterring campaign financing through outside groups. It is all carrots, no sticks.

Under this modified approach, more money will flow to parties and candidates, but when it is at all politically advantageous to channel money through outside groups, campaign money will still flow to outside groups. Indeed, campaign money is most likely to flow to outside groups when the normative concerns about independent expenditures by outside groups are most acute. When nondisclosure of the donor is a priority, or when inflammatory advertising is particularly desirable, campaign money will still run through outside groups even if contribution limits on candidates and parties were similarly removed. Subsidizing contributions to candidates and parties will not matter significantly if secrecy or unaccountability are at a premium because they can be best achieved through independent expenditures by outside groups.

As a result, with further deregulation, there would be much of whatever harms stem from outside group spending and only some part of the benefits of money going to parties and candidates.<sup>194</sup> If the relative advantages and disadvantages of campaign finance through different channels were constant across different circumstances, then a subsidy to one preferred channel might make it

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<sup>192</sup> See, e.g., Wallison & Gora, *supra* note 175, at 19 (proposing elimination of all restrictions on parties' ability to finance their candidates' campaigning).

<sup>193</sup> See Kang, *supra* note 40, at 253 (predicting that the soft-money prohibitions will be struck as unconstitutional under *Citizens United*).

<sup>194</sup> See Johnston, *supra* note 144, at 1196–97 (arguing that reducing campaign finance regulation of parties by itself would not channel money away from 527 organizations without greater regulation of 527 organizations).

cheaper and more effective for political actors to use all the time. Independent expenditures through outside groups, however, are more advantageous under certain circumstances, and contributions directly to candidates and parties are more advantageous under others. Further deregulating candidates and parties only means that more channels for money are open, freeing political actors to use the channel best suited for the situation, regardless of the normative consequences. It allows political actors to have even more cake and still eat it, too.

*B. The Way Forward Outside of Campaign Finance Regulation: Ex Post Versus Ex Ante Regulation*

In campaign finance law, the Court's fixation on the government's interest in preventing corruption is misleading. The Court's claim that independent expenditures categorically pose no risk of actual or apparent corruption is belied flatly by its ruling in *Caperton*. What motivates the different results in *Caperton*, where the Court found independent expenditures to pose a corruption worry, and *Citizens United*, where it held that they do not as a matter of law, reflects no empirical judgment by the Court about the likelihood of corruption in the two cases. The Court, including Justice Kennedy, obviously believed that the independent expenditures in *Caperton* presented a reasonable probability of actual bias that moved the majority to impose, as a constitutional matter, the extraordinary remedy of judicial recusal in *Caperton*. Instead, the difference between the two cases must be the ex post treatment of that corruption risk in *Caperton* instead of the ex ante treatment of the same risk through campaign finance regulation in *Citizens United*.

Campaign finance regulation is an ex ante restriction of money in the political process. Campaign finance regulation limits, channels, and otherwise conditions how campaign money enters the political process in the first place. Campaign finance regulation guards prophylactically against corruption by complicating the ability of candidates and officeholders even to receive the quids of a potential quid pro quo exchange in the first place. It limits the flow of money and increases the transaction costs of that flow of money into the political process. Campaign money is limited in terms of its source and amount, and what money candidates and officeholders

receive, or whose benefit they otherwise realize, must be properly disclosed. Campaign finance regulation therefore tends to discourage the flow of money into the political process as a check on corruption.

The constitutional problem with this type of ex ante regulation of campaign finance money is that it restricts political speech. Regulated campaign finance money is spent ultimately to persuade voters through political speech.<sup>195</sup> As Issacharoff and Karlan explain, campaign money “becomes valuable only when it can be ‘exchanged’ for a different form of currency—votes.”<sup>196</sup> Campaign finance regulation, as this type of prophylactic ex ante regulation of money, runs against the traditional First Amendment hostility toward restraint of the political speech that campaign finance money by definition funds. Indeed, this constitutional tension places exacting scrutiny on campaign finance regulation in the first place.

*Caperton* therefore suggests the way forward for campaign finance reform. *Caperton* signals that the Court actually may be sympathetic to concerns about campaign finance corruption, even from independent expenditures, but only when the responsive regulation is structured to cabin the effects of campaign money ex post, rather than restrict the entry of campaign money ex ante. The remedy in *Caperton* was judicial recusal after the election, when the campaign supporter’s case arrived before the elected candidate. Lost amid an otherwise unconvincing attempt to distinguish *Caperton*, Justice Kennedy’s majority opinion in *Citizens United* explained 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>197</sup> This latter concern has nothing to do with the Court’s preoccupation with corruption in *Citizens United*, but it helps explain why the majority would be willing to allow recusal as an ex post measure after the independent expenditures had already been made. Ex post regulation addresses the corruption risk only after speech has already occurred and benefitted the democratic discourse, while ex ante regulation of money’s entry into the political system addresses corruption only by discouraging speech.

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<sup>195</sup> See Strauss, *supra* note 57, at 1372.

<sup>196</sup> Issacharoff & Karlan, *supra* note 155, at 1720.

<sup>197</sup> *Citizens United*, 130 S. Ct. at 910.

The Court affirmed its sympathy for the ex post regulation of corruption in another case decided five months after *Citizens United*. In *Skilling v. United States*, the Court upheld the application of the federal honest-services statute to criminal prosecution of bribery and kickback schemes involving public officials.<sup>198</sup> Bribery, of course, represents the most egregious and explicit form of quid pro quo corruption.<sup>199</sup> Bribery laws apply in only the clearest instances of actual quid pro quo exchanges after proof of the fact, rather than seeking to complicate ex ante the possibility of quid pro quo exchange as a preventive measure.<sup>200</sup> Criminal prosecution certainly occurs ex post, in the sense that it occurs after the quid pro quo has actually been agreed to. Indeed, a credible threat of ex post prosecution may be the only response to this most certain version of quid pro quo corruption. Officeholders who are willing to participate in outright bribery are unlikely to be deterred ex ante by, or comply fully with, campaign finance limitations. Those undeterred by criminal prosecution and a prison sentence will not worry about the predominantly civil penalties associated with violations of source restrictions, contribution limits, and disclosure obligations under federal campaign finance law. What is more, federal prosecution may be necessary in many instances of state and local bribery that compromise criminal enforcement at those lower levels of government.<sup>201</sup>

Unlike campaign finance regulation, ex post prosecution of bribery has little direct impact on political speech. Prosecution of bribery narrowly applies only to proved cases of quid pro quo exchange and deters no more campaign financing than the explicit exchanges that fall within that narrow category. Indeed, bribery prosecutions

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<sup>198</sup> 130 S. Ct. 2896, 2931 (2010).

<sup>199</sup> See generally George D. Brown, *The Gratuities Debate and Campaign Reform: How Strong Is the Link?*, 52 *Wayne L. Rev.* 1371, 1397–1413 (2006) (discussing the overlapping conception of corruption across bribery and campaign finance law); Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 *First Amendment L. Rev.* 363, 385–412 (2010) (same).

<sup>200</sup> *Buckley*, 424 U.S. at 27–28 (“[L]aws 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>201</sup> See George D. Brown, *New Federalism’s Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 *Wash. & Lee L. Rev.* 417, 491–95 (2003).

typically involve payments directly to officeholders for their personal enrichment, as opposed to campaign finance contributions dedicated for campaign advocacy.<sup>202</sup> Bribery prosecutions thus rarely implicate speech concerns and target precisely the quid pro quo exchanges that the Court identifies at the heart of the government's corruption interest. In this light, the Court had little hesitation in deferring to Congress and saving the federal prosecution of bribery from a vagueness challenge.<sup>203</sup> The Court was willing to aggressively construe bribery and kickbacks as schemes to defraud the public of the honest services of public officials in violation of the mail fraud statute.<sup>204</sup>

A few legal scholars are turning toward yet a different type of ex post regulation of campaign finance—lobbying reform.<sup>205</sup> Lobbying reform is ex post regulation of campaign finance money because lobbying is tightly linked to campaign financing as part of an overarching effort by contributors to influence government policy in their interest.<sup>206</sup> Campaign finance support for an officeholder does not necessarily “buy” her vote or decision in a direct way, but the empirical evidence strongly suggests that campaign finance support buys enhanced lobbying access to the officeholder.<sup>207</sup> Lobbying access allows contributors to educate appreciative officeholders of their interests and effectively cash in their past financial support of

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<sup>202</sup> See Dorie Apollonio, Bruce E. Cain & Lee Drutman, Access and Lobbying: Looking Beyond the Corruption Paradigm, 36 *Hastings Const. L.Q.* 13, 15–16 (2008).

<sup>203</sup> *Skilling*, 130 S. Ct. at 2931.

<sup>204</sup> *Id.* But see *id.* at 2938–40 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the majority in *Skilling* effectively rewrites the statute and defines new federal crimes).

<sup>205</sup> See, e.g., Heather K. Gerken, Keynote Address: Lobbying as the New Campaign Finance, 27 *Ga. St. U. L. Rev.* 1155, 1161–68 (2011); Richard L. Hasen, Lobbying, Rent Seeking, and the Constitution, 64 *Stan. L. Rev.* (forthcoming 2012), available at <http://ssrn.com/abstract=1734428>.

<sup>206</sup> See Richard Briffault, Lobbying and Campaign Finance: Separate and Together, 19 *Stan. L. & Pol'y Rev.* 105 (2008); Elisabeth Bassett, Comment, Reform Through Exposure, 57 *Emory L.J.* 1049 (2008).

<sup>207</sup> See David Austen-Smith, Campaign Contributions and Access, 89 *Am. Pol. Sci. Rev.* 566, 566 (1995); John M. de Figueiredo & Elizabeth Garrett, Paying for Politics, 78 *S. Cal. L. Rev.* 591, 593, 609–11 (2005); Richard L. Hall & Frank W. Wayman, Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees, 84 *Am. Pol. Sci. Rev.* 797, 798–99 (1990); James F. Herndon, Access, Record, and Competition as Influences on Interest Group Contributions to Congressional Campaigns, 44 *J. Pol.* 996, 999–1001 (1982); Laura I. Langbein, Money and Access: Some Empirical Evidence, 48 *J. Pol.* 1052 (1986).

officeholders' campaigns.<sup>208</sup> To the degree that bribery prosecutions police the most explicit quid pro quo exchanges, lobbying reform seeks to discourage subtler ways that officeholders may reciprocate past campaign support with government favoritism. Lobbying reform thus does not restrict campaign finance and corruption on the front end by blocking the initial quid from contributor to officeholder. It instead complicates the ability of contributors and officeholders to complete the reciprocating payoff on any quid pro quo arrangements, direct or subtle, on the back end.

Even as ex post regulation of campaign finance, lobbying reform faces its own constitutional challenges under the First Amendment. Regulation of the lobbying process, in fact, may be even more analytically complex and difficult than regulation of campaign finance. Lobbying boasts its own special constitutional pedigree under the First Amendment right to petition the government for redress of grievances.<sup>209</sup> For this reason, at least in part, lobbying regulation has generally been limited to disclosure of lobbying activity, with only a few exceptions.<sup>210</sup> Federal lobbying regulation, for example, does not limit the total amount of money that can be spent on lobbying activity or limit the sources of money.<sup>211</sup> What is more, the basic definition of lobbying activity for purposes of its regulation is very difficult. Significant amounts of lobbying activity can be characterized as informal and social in a political culture where social and professional connections overlap a great deal, and the substance of much lobbying activity is the provision of information to officeholders that is elusive to define legally as lobbying activity.<sup>212</sup>

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<sup>208</sup> As a consequence, the top lobbyists in Washington play influential roles in campaign financing. See Apollonio et al., *supra* note 202, at 37–40; Briffault, *supra* note 206, at 111–12.

<sup>209</sup> See *United States v. Harriss*, 347 U.S. 612, 625–26 (1954).

<sup>210</sup> See Briffault, *supra* note 206, at 109–10 (observing that lobbying regulation is “much less ambitious” than campaign finance regulation).

<sup>211</sup> See *id.* at 110.

<sup>212</sup> See, e.g., Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 *Stan. L. & Pol’y Rev.* 23, 42–46 (2008) (describing the provision of expertise and information as central to lobbying); Apollonio et al., *supra* note 202, at 29–30 (identifying the provision of information as a key element of lobbying); Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 *Am. Pol. Sci. Rev.* 69, 69 (2006) (characterizing lobbying as an informational subsidy).

Given these concerns regarding lobbying regulation, in addition to its intrinsic connection with campaign finance law, it is not surprising that courts already have begun to strike down lobbying regulation on the basis of *Citizens United*.<sup>213</sup> In *Brinkman v. Budish*, a federal district court cited *Citizens United* for its skeptical reading of the government's interest in preventing corruption through an anti-revolving door restriction that prohibited former assembly members from state lobbying activity for one year.<sup>214</sup> By its terms, the Ohio anti-revolving door restriction applied only to former members of the assembly. The district court concluded that *Citizens United* disfavored such regulations that discriminate against certain speakers and are akin to the expenditure prohibition applicable to corporations and unions struck down in *Citizens United*.<sup>215</sup> What is more, the district court concluded more broadly that *Citizens United* directed a narrow reading of any government claim about its interest in the prevention of corruption.<sup>216</sup> The district court struck down the lobbying law for insufficient evidence of actual corruption, because "the Supreme Court's reasoning [in *Citizens United*] refutes the premise that [the Ohio lobbying law] is necessary to prevent former General Assembly members from having special access to the legislative process."<sup>217</sup>

The Court, however, may not be as hostile to such lobbying restrictions as federal courts so far appear to anticipate. As I have argued, *Citizens United* is motivated sub rosa less by empirical judgments about some absence of corruption risk in the political process than by concerns about the structure and attendant costs of ex ante regulation of that risk. The ex post nature of lobbying regulation, as opposed to the ex ante nature of campaign finance regulation, avoids the most important of these concerns.<sup>218</sup> Ohio's anti-

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<sup>213</sup> See *Green Party of Conn. v. Garfield*, 616 F.3d 189, 205–07 (2d Cir. 2010); *Brinkman v. Budish*, 692 F. Supp. 2d 855, 862–64 (S.D. Ohio 2010); cf. *Vannatta v. Or. Gov't Ethics Comm'n*, 222 P.3d 1077, 1089 (Or. 2009) ("Plaintiffs fail to demonstrate that the United States Supreme Court would construe and apply the First Amendment to those restrictions, and yet reach a different conclusion under federal law.").

<sup>214</sup> 692 F. Supp. 2d at 863–64.

<sup>215</sup> *Id.* at 864.

<sup>216</sup> *Id.* at 863–64.

<sup>217</sup> *Id.* at 864.

<sup>218</sup> *Citizens United* itself cites with approval at least the Court's earlier upholding of registration and disclosure requirements for lobbyists. See *Citizens United*, 130 S. Ct. at 915.

revolving door regulation, for instance, narrowly applies to former assembly members with special influence in the legislative process without suppressing campaign finance activity or implicating the speech interests usually threatened by campaign finance regulation.<sup>219</sup> The regulation thus avoids the overbroad prophylactic prohibitions of campaign finance regulation that the Court rejected in *Citizens United* and instead restricts ex post the ability of lobbyists to cement reciprocity by officeholders on the back end.

*Nevada Commission on Ethics v. Carrigan*, a case decided in the 2010 Term, further suggests this tendency toward judicial deference on ex post-style regulation of the legislative process.<sup>220</sup> The Court upheld a Nevada ethics law that requires legislator recusal from votes where independent judgment would be “materially affected by . . . [the officeholder’s] commitment in a private capacity to the interests of others.”<sup>221</sup> The plaintiff, who challenged the law under the First Amendment, was a city councilman who voted on a land use question, rather than recuse himself under the law, in favor of a business that employed his campaign manager and close friend as a consultant. The Court breezily dismissed any claim of First Amendment protection for legislative voting that would set aside what the Court viewed as broad, longstanding government discretion to require recusal as a means of regulating conflicts of interest in the lawmaking process.<sup>222</sup> *Carrigan* did not directly analyze questions of campaign finance, because the councilman’s conflict of interest in the case was basically personal, rather than campaign finance-related. *Carrigan*, however, supports the overarching conclusion that the government has wider discretion in regulating the lawmaking process as an ex post means of checking conflicts of

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<sup>219</sup> Lobbying, of course, implicates a different set of constitutional values in the right to petition the government. The contours of this right have not been articulated by courts to anywhere near the degree that courts have articulated and robustly protected free speech values in campaign finance law. It is therefore decidedly unclear whether the Court will apply the same level of exacting judicial scrutiny to lobbying regulation that it has applied to campaign finance regulation. I argue above that there is reason to believe, contrary to early consideration by lower courts, that the Court will not.

<sup>220</sup> 131 S. Ct. 2343 (2011).

<sup>221</sup> *Id.* at 2346, 2352 (citation omitted).

<sup>222</sup> *Id.* at 2347–49.

interest than it has in regulating the election process as an ex ante means of achieving the same ends.

In short, the Court's decisions on the regulation of the lawmaking process reveal that *Citizens United* is not simply a blanket judgment about the noncognizability of corruption, as a constitutional concern, that should encourage judicial hostility toward regulation of the influence of campaign money in politics. *Citizens United* may represent a negative judgment about the specific costs entailed by prospective ex ante regulation of corruption through campaign finance regulation that do not apply with the same force to ex post regulation through lobbying regulation. That is the bright side of *Citizens United* for those concerned about money in politics, and it suggests the way forward for campaign finance reform outside of campaign finance regulation.

#### CONCLUSION

*Buckley v. Valeo* split the difference between political contributions and expenditures and offered what Professor Kathleen Sullivan called “a solomonic solution to an intractable analogical crisis.”<sup>223</sup> *Buckley* analogized contributions to voting, where the equality norm favored the constitutionality of contribution limits, but it analogized expenditures to speech, where the free speech norm disfavored the constitutionality of expenditure limits.<sup>224</sup> As a practical matter, though, the holding that expenditures received greater constitutional protection meant only that outright expenditure limits on individuals were unconstitutional. The three pillars of campaign finance regulation—source restrictions, contribution limits, and disclosure requirements—applied to different forms of expenditures even if independent expenditures themselves could not be limited in the aggregate. *Citizens United*, however, fully realized the promise in *Buckley* that independent expenditures do not “appear to pose dangers of real or apparent corruption”<sup>225</sup> by fully deregulating them as had not been the case following *Buckley*.

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<sup>223</sup> Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 313 (1998).

<sup>224</sup> See *Buckley*, 424 U.S. at 19–23.

<sup>225</sup> *Id.* at 46.

This is *Citizens United*'s profound impact on campaign finance law far beyond its limited extension of corporate electioneering.

Already this meant in the 2010 elections that money shifted away from candidates and parties to independent expenditures by outside groups that operate almost entirely beyond the ambit of campaign finance regulation. The 2010 elections were only a glimpse of what will be an accelerating trend toward independent expenditures by outside groups. Since those 2010 elections, the FEC has further conceded that even groups that make contributions can still collect unrestricted funds for independent expenditures provided those unrestricted funds are placed into a segregated account.<sup>226</sup> In short, outside groups now can make independent expenditures on a virtually unregulated basis whether or not they separately make contributions. The 2010 elections thus were only a glimpse ahead of what will be an accelerating trend toward independent expenditures by outside groups.

With independent expenditures now fully deregulated, a new question looms over the campaign finance regulation that remains: To what degree will the Court declare the government regulation of contributions unconstitutional as well? Although the Court has always deferred to legislatures on the regulation of contributions, the D.C. Circuit decision in *SpeechNow.org* suggests that the logic of *Citizens United* may inevitably eat away at the constitutional underpinnings of that longstanding deference. *Citizens United* defined the government interest in prevention of corruption so narrowly that courts may not be able to find the regulation of contributions sufficiently connected with that compelling government interest to uphold its constitutionality in many of its forms. That was the situation in *SpeechNow.org*, and it is likely one day to be the same for prohibitions on soft money contributions to political parties and for corporate and union contributions to parties and candidates. When the government interest in the prevention of corruption is so viciously limited, there is simply little ground for campaign finance regulation of any sort.

All this means that campaign finance reform, to survive the scrutiny of the Roberts Court post-*Citizens United*, must target the ex

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<sup>226</sup> See FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011).

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post influence of campaign money after it enters the political system, rather than attempt to restrict the ex ante entry of campaign money into the system. The Obama Administration has already tilted in this direction with its early initiatives on lobbying that, among other things, barred executive branch appointees from accepting gifts from registered lobbyists while in office and prohibited appointees from working on matters about which they lobbied during the previous two years.<sup>227</sup> Although these initiatives have been criticized,<sup>228</sup> they may point in the most promising direction for reform. What is surprising is that the Court may be sympathetic to this shift in regulatory strategy if it is pursued. The hidden lesson of *Caperton* may be that the Court does not mean what it says about the categorical absence of any corruption risk from independent expenditures and instead insists on ex post regulation of corruption that can more precisely target the risk of corruption without a prophylactic restraint on speech. The future of campaign finance reform therefore must leave traditional campaign finance regulation behind with the campaign finance law that ended with *Citizens United*.

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<sup>227</sup> Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009).

<sup>228</sup> See Claire Hill & Richard Painter, Compromised Fiduciaries: Conflicts of Interest in Government and Business, 95 Minn. L. Rev. 1637, 1666–69 (2011); William V. Luneberg, The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going, 41 McGeorge L. Rev. 85, 115–20 (2009).

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