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Citizens United Five Years Later

By Daniel I. Weiner

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INTRODUCTION

Five years ago in *Citizens United v. FEC*, a narrow majority of the Supreme Court upended a century of precedent to declare that corporations (and, by extension, labor unions) have a First Amendment right to spend unlimited money on elections.

Few modern Supreme Court decisions have received as much public attention, or backlash. Justice Ruth Bader Ginsburg called it the worst ruling of the current Court, saying “[i]f there was one decision I would overrule, it would be *Citizens United*.”¹ Sixteen state legislatures and almost 600 cities, towns, villages, and other organizations have voted to support a constitutional amendment to overturn the ruling.²

But what, exactly did *Citizens United* do? Aside from the majority’s controversial interpretation of the Constitution, how has the case actually impacted American democracy in the last five years?

At the time of the decision, many critics (including the Brennan Center) predicted that political spending by for-profit corporations would explode, and election spending would skyrocket. By contrast, the Court majority and its supporters saw the decision as a critical victory for the First Amendment, arguing that the ban on direct corporate spending that the Court struck down had “muffled the voices that best represent the most significant segments of the economy.”³

Five years later, evidence from three national election cycles permits a more definitive assessment of how *Citizens United* has altered the landscape. A clear-eyed analysis shows that the impact of the case was significant and troubling, but not necessarily in the way many predicted in 2010, or even presume today.

Perhaps most important, the singular focus on the decision’s empowerment of for-profit corporations to spend in (and perhaps dominate) our elections may be misplaced. Although their influence has increased, for-profit corporations have not been the most visible beneficiaries of the Court’s jurisprudence. Instead — thanks to super PACs and a variety of other entities that can raise unlimited funds after *Citizens United* — the biggest money (that can be traced) has come from an elite club of wealthy mega-donors. These individuals — fewer than 200 people and their spouses — have bankrolled nearly 60 percent of all super PAC spending since 2010.

And while spending by this wealthy club has exploded, we have seen neither the increased diversity of voices that the *Citizens United* majority imagined, nor a massive upsurge in total election spending. In fact, for the first time in decades, the total number of reported donors has begun to fall, as has the total contributed by small donors (giving \$200 or less). In 2014, the top 100 donors to super PACs spent almost as much as all 4.75 million small donors combined.

In short, thanks to the Supreme Court’s jurisprudence, a tiny sliver of Americans now wield more power than at any time since Watergate, while many of the rest seem to be disengaging from politics. This is perhaps the most troubling result of *Citizens United*: in a time of historic wealth inequality, the decision has helped reinforce the growing sense that our democracy primarily serves the interests of the wealthy few, and that democratic participation for the vast majority of citizens is of relatively little value.

Citizens United also has resulted in at least three other disturbing trends (none acknowledged by the Court):

- A tidal wave of dark money: In striking down limits on corporate spending, the Court extolled disclosure as a remaining safeguard: “With the advent of the Internet,” it proclaimed, “prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable.”⁴ The truth, however, is that *Citizens United* has enabled election spending by a variety of “dark money” groups who do not disclose their donors, and who have spent more than \$600 million on federal elections to date.
- Weakening of contribution limits: The Court said that it was only eliminating limits on “independent” election spending, which in its view raises no corruption concerns. It purported to leave another pillar of campaign finance regulation, limits on direct contributions to candidates and political parties, untouched. In reality, though, the post-*Citizens United* era has seen rampant collaboration between outside (i.e. non-candidate, non-party) groups and candidates, along with broader efforts to roll back contribution limits altogether.
- Trampling of shareholder and employee rights: The Court suggested that disclosure would be sufficient to ensure that nobody — especially corporate shareholders — would be forced to subsidize speech with which they disagree. But shareholders are often kept in the dark about corporate spending, and there are troubling reports of at least a few corporations (and unions) trying to impose their political views on employees and even coerce them into participating in political speech.

All of this is deeply disheartening to Americans who believe in transparency and think that all citizens, regardless of wealth, should be heard. But while the current Court is unlikely to change course, it alone does not determine the future of our democracy. Other branches of government at the state and federal levels have the opportunity to address much of the damage the Court has caused. In particular, nothing in the Court’s jurisprudence prevents measures to boost political participation through public financing of elections, expose dark money through new disclosure requirements, push for the actual independence of outside spending through tougher coordination laws, or protect the political rights of corporate and union employees.

Overwhelming majorities of Americans support such policies. An astounding 80 percent disapproved of *Citizens United*. So far this disapproval has failed to translate into major reforms, thanks largely to the indifference or outright hostility of many elected leaders. The question for the next five years is whether that inaction is sustainable, or whether it will finally give way to a real movement for change.

I. UNDERSTANDING THE *CITIZENS UNITED* DECISION

The question addressed in *Citizens United* was not complicated: Could a corporation, Citizens United, use its general treasury money to air what was essentially “a feature-length negative advertisement” against Sen. Hillary Rodham Clinton just weeks before an election in which she was running?⁵ Citizens United’s actions appeared to violate a federal statute prohibiting corporate “electioneering communications.”⁶ But the Court found the corporation was within its First Amendment rights to produce and air the piece. In doing so, it struck down a prohibition on corporate independent spending that had existed in some form in the United States for more than a century.⁷

While unprecedented, the Court’s decision did not appear out of thin air. Majorities of the Court have deemed political spending to be a type of “speech” since *Buckley v. Valeo* in 1976.⁸ The *Buckley* Court was also hostile towards efforts to limit so-called “independent” expenditures, although in subsequent cases the Court tempered that hostility by upholding prohibitions on corporate and union spending.⁹ *Citizens United* overruled these later precedents, essentially doubling-down on *Buckley*’s original conclusion.

The truly new part of *Citizens United* was the Court’s radical narrowing of the traditional anti-corruption rationale used to justify most campaign finance limits.¹⁰ Preventing the reality or appearance of corruption is the only state interest that *Buckley* recognized to justify such measures. But for decades corruption had been defined broadly to mean the use of campaign spending to obtain any type of “undue influence” over those in power.¹¹ The majority in *Citizens United* repudiated this line of reasoning, proclaiming that the “ingratiation and access” connoted by the concept of undue influence “are not corruption.”¹² Henceforth, campaign finance laws could only aim to prevent literal *quid pro quo* exchanges (e.g. cash for votes) or their appearance.¹³ Truly “independent” expenditures, said the majority, simply do not create a risk of this type of corruption, because they are not sufficiently valuable to candidates.¹⁴ Remarkably the justices, none of whom had ever run for office, reached this empirical conclusion without considering any factual record in the case.

The Court’s conclusion that “independent” expenditures cannot corrupt had implications far beyond the specific provision struck down in *Citizens United*. Based on this holding, the influential D.C. Circuit Court of Appeals promptly invalidated *all* limits on outside spending, as well as limits on contributions to groups that purport to engage only in such spending.¹⁵ And so “super PACs” entered the political scene, along with a variety of other more shadowy organizations that raise unlimited funds to influence voters.¹⁶

II. OUTSIDE SPENDING SKYROCKETS

Citizens United and related decisions freed outside groups to raise and spend unlimited funds for core electoral advocacy.¹⁷ In the five years since, super PACs, corporations, labor unions, and other outside groups have spent almost \$2 billion targeting federal elections.¹⁸ That is about two-and-a-half times the total for the 18 years between 1990 and 2008.¹⁹ Outside spending almost tripled between the 2008 and 2012 presidential elections, more than quadrupled between the 2006 and 2010 midterm elections, and then almost doubled again between the 2010 and 2014 midterm elections.²⁰ Most of this spending has been concentrated in the most hotly contested races, in which outside groups now routinely outspend both candidates and parties.²¹

There is less comprehensive data for state and local races, but they appear to have seen similar or even more pronounced increases. For example, according to Brennan Center calculations in mid-October 2014, outside spending was between 4 and 20 times higher in certain competitive governor's races than it had been at the same point in 2010.²² Even local races have been affected. For example, the oil giant Chevron recently poured roughly \$3 million into elections in the city of Richmond, Calif., (population: roughly 104,000), where it owns a refinery.²³

While outside spending increased dramatically in the wake of *Citizens United*, overall election spending did not, contrary to the expectations of some.²⁴ The entire 2012 federal election, for example, cost between \$6 and \$7 billion (depending on the method of calculation).²⁵ It was about 18 percent more expensive than the 2008 election—actually a slower rate of growth than in the two previous presidential cycles.²⁶ This is because both candidate and political party spending stayed relatively flat.²⁷

III. GIVING THE VERY WEALTHY AN EVEN GREATER VOICE

One of the most unexpected features of the post-*Citizens United* landscape has been the dominance of super-wealthy individual contributors to super PACs. At the time of the decision, both the Court and many of its critics (including the Brennan Center) focused on political spending by for-profit corporations.²⁸ Such entities have indeed spent millions of dollars — usually at the direction of senior managers — but they have not been *Citizens United*'s most visible beneficiaries.²⁹ That distinction goes to a small club of individual mega-donors drawing on their own personal wealth.

The numbers tell an arresting story. *Citizens United* and related decisions freed super PACs to spend approximately \$1 billion on federal elections since 2010; just 195 individuals and their spouses gave nearly 60 percent of that total.³⁰ Just 209 individuals funded more than a third of *all* outside spending in 2010-2014.³¹ And the trend towards mega-donor dominance appears to be increasing. The top 100 donors to super PACs in the 2014 election cycle contributed almost 70 percent of total super PAC spending.³²

Meanwhile, individual reported contributions to candidates and parties within the legal limits actually declined for the first time in decades.³³ Small donations (\$200 and under) from average citizens also declined relative to 2010.³⁴ In 2014, the top 100 individual donors spent nearly as much as the estimated 4.75 million small donors in federal elections.³⁵

One couple, casino magnate Sheldon Adelson and his wife Miriam, epitomize the new era of mega-donor influence, where some top donors literally sponsor candidates like racehorses. In 2012, the Adelsons gave approximately \$93 million to super PACs — a sum greater than the total of *all* reported contributions from 12 states.³⁶ The Adelsons' donations to a super PAC backing Newt Gingrich likely kept his campaign viable for months longer than it otherwise would have been, a fact not lost on any leading Republican contender for 2016. Last March, a number of these contenders traveled to Las Vegas, Sheldon Adelson's base of operations, for a series of meetings dubbed the "Sheldon Primary."³⁷ One strategist told *The Washington Post*: "It's a bunch of people out scrounging for the same dollars, and Sheldon represents the largest or second-largest box of money."³⁸

The Adelsons are far from the only billionaires to have become heavily involved in Republican politics—in fact, a number of the leading contenders for the 2012 Republican nomination had equivalent patrons backing them through outside spending. Some, like Rick Santorum backer Foster Friess, routinely appeared at campaign events.³⁹

Nor is mega-donor dominance the sole preserve of one party. In 2014, the leading donor to super PACs was liberal investor Tom Steyer, who spent approximately \$74 million on federal elections and millions more on key state contests, like the race for Governor of Florida.⁴⁰

But at the state level, outsized influence does not always come with a massive price tag.⁴¹ For example, North Carolina businessman Art Pope spent a mere \$2.2 million approximately in 2010 (about 75 percent of total outside spending in the state that year) to help Republicans take control of the state legislature. Two years later, Pope became Gov. Pat McCrory's budget director; as one veteran North Carolina legislator told *The Washington Post*: "my buddy Art is in position."⁴²

In recent years, political scientists have amassed a wealth of data indicating that the views of the donor class (which has long been small and unrepresentative of the public at large) have an outsized impact on policy decisions. The views of middle and low income voters, on the other hand, often barely register.⁴³ *Citizens United* did not create this phenomenon, but it may have significantly exacerbated it. Whereas the wealthy always gave to candidates disproportionately compared to the non-wealthy, after *Citizens United*, an even tinier slice of Americans has come to dominate political spending.

Meanwhile, income inequality in the United States was higher in the last decade than at any time since the 1920s, while real wages stagnated and social mobility dropped.⁴⁴ The Great Recession of 2007-09 erased some \$6.4 trillion in home values and \$2.7 trillion in retirement savings.⁴⁵ Our economy is now in recovery, but economic inequality is likely to be an enduring challenge, one that could hobble future growth and inflame social tensions. We are, in important respects, in the midst of a new Gilded Age.⁴⁶

By giving a tiny group of mega-donors an even greater voice relative to everyone else, the Court's jurisprudence exacerbated an already troubling situation. No other consequence of *Citizens United* has been more significant.

IV. DARK MONEY RISING

Aside from relegating the voices of everyday citizens to the sidelines, *Citizens United* also eviscerated transparency in political spending — contrary to the Court’s own assurances.

In its decision, the Court placed great weight on the ability of citizens “to make informed decisions and give proper weight to different speakers and messages.”⁴⁷ “With the advent of the Internet,” the Court said, “prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”⁴⁸ “A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed *before today*,” it proclaimed — implying it had just created such a system.⁴⁹

In retrospect, these assurances look terribly naïve at best. Transparency was indeed the norm in federal elections a decade ago.⁵⁰ By the time *Citizens United* was decided, however, that transparency had already started to erode, thanks to an earlier decision of the Court permitting some types of outside spending, coupled with shoddy rulemaking by the FEC.⁵¹ *Citizens United* further expanded the range of electoral spending available to outside groups, making the problem significantly worse. The decision likewise exacerbated loopholes in many state laws.⁵² Finally, *Citizens United* made it easier for donors to evade even strong disclosure rules, through the use of shell corporations and other fictive entities that can easily mask contributor identities.⁵³

As a consequence, “dark money” from unknown donors has flooded into U.S. elections. Of the almost \$2 billion in outside spending in the wake of the Court’s decision, at least \$618 million—almost one-third—has been dark.⁵⁴ There is no way to tell how much of this money has come from for-profit corporations, unions, or others who wish to hide their activities.

The vast majority of this spending is concentrated in the closest races. For example, of the \$226 million of dark money spent in the 2014 election cycle, \$203 million (roughly 91 percent) was spent on 11 toss-up Senate contests.⁵⁵ Outside spending in these races often dwarfed both candidate and party spending, was in aggregate almost 60 percent dark, and went overwhelmingly to support the winning candidates.⁵⁶ Dark money accounted for a full 89 percent of outside spending in favor of the winning candidate in Colorado, 86 percent in Georgia, 85 percent in Alaska, 81 percent in North Carolina, and 78 percent in Kansas.⁵⁷ In a very real sense, then, dark money played a critical role in electing our current United States Senate.

Of course, responsibility for the explosion in dark money does not lie solely with the Court. The FEC has repeatedly failed to shore up its flawed regulations or meaningfully enforce the law.⁵⁸ Congress has failed to pass the DISCLOSE Act, which would go even farther towards fixing the worst loopholes in federal law.⁵⁹ And while there has been more progress at the state and local level, many of these jurisdictions also continue to have incomplete, ineffective laws.⁶⁰

Nevertheless, the gap between what the *Citizens United* Court seemed to think disclosure laws would cover and their actual reach is striking — especially given the Court’s emphasis on transparency as an alternative to other types of regulation. The system the Court promised — more spending with more accountability — is simply not what it delivered.

V. WEAKENING CONTRIBUTION LIMITS

Along with disclosure, *Citizens United* has undermined another remaining pillar of campaign finance law: Direct limits on contributions to candidates and political parties.

The Court has long recognized that direct contributions carry a heightened risk of corruption and the appearance of corruption. For this reason, echoing *Buckley*, the *Citizens United* majority was careful to note that while it was deregulating supposedly non-corrupting “independent” spending, it was leaving in place direct contribution limits.⁶¹

In order for contribution limits to have any real meaning, they must extend beyond direct donations of cash to include outside spending that is “coordinated” with candidates or political parties. Effective coordination laws mitigate the risk of corruption where it is highest, by classifying election spending that is most valuable to those in power (spending they themselves can direct), and therefore most likely to be traded for official favors, as a type of contribution.

The *Citizens United* Court seems to have assumed that effective laws were already in place. Independent expenditures, the Court proclaimed, are “by definition...not coordinated with a candidate,” and so could not possibly implicate *quid pro quo* corruption concerns.⁶² Reality has not borne this theory out.

In virtually all jurisdictions, the legal definition of “coordination” actually covers only a subset of the cooperation taking place between outside groups and both candidates and parties — sometimes quite a small subset.⁶³ Furthermore, all such restrictions are too infrequently enforced. The FEC has in recent years failed to launch a single notable investigation, let alone levy any significant penalties.⁶⁴

As a result, coordination under any common-sense meaning of the word is rampant, and in pure dollar values has probably reached levels never before seen in American politics.⁶⁵ Several recent studies have documented how outside groups, spending hundreds of millions of dollars in excess of what any single candidate could directly receive, have “worked hand in glove” with those candidates.⁶⁶

In fact, it is often the candidates themselves who are raising the money. Wisconsin Governor Scott Walker, for example, reportedly solicited millions of dollars for the Wisconsin Club for Growth, a dark money group that backed him in Wisconsin’s 2012 recall election.⁶⁷ Connecticut Governor Dan Malloy announced similar plans to solicit funds for the Democratic Governors Association, which spent \$1.7 million on his 2014 race.⁶⁸ And, in a particularly notorious example, Utah Attorney General John Swallow solicited hundreds of thousands of dollars for supportive dark money groups from payday lenders in exchange for promises of light regulation.⁶⁹

Recently, moreover, single-candidate “buddy PACs” (or “buddy groups,” since many shun the PAC label to avoid disclosure) have taken coordination to a new level.⁷⁰ Buddy groups, which accounted for almost half of all super PAC spending in 2012,⁷¹ are often established, funded, and/or run by a candidate’s former staff, consultants, other close associates, or even family.⁷² While they started as a mostly presidential phenomenon, in 2014 buddy groups appeared in almost every close Senate race.⁷³ They are also becoming common at the state and local level; a group formed by a top aide to Chicago Mayor Rahm Emanuel reportedly raised \$1

million to support his 2015 reelection effort in single day from seven business executives (roughly 27 times what they could have given directly to Emanuel’s campaign).⁷⁴

Organizations that fill the same role as buddy groups for political parties — dubbed “shadow parties” — are also proliferating.⁷⁵ The most active of these in 2014, Senate Majority PAC, spent over \$76 million and employed a former top campaign aide to Senate Democratic Leader Harry Reid.⁷⁶

Where buddy groups disclose their donors, it is apparent that many of the latter view them as the alter-egos of candidates’ campaigns. Recent Brennan Center analysis shows that direct contributors to Senate campaigns also gave millions of dollars to the same candidates’ buddy PACs.⁷⁷ In Senate Majority Leader Mitch McConnell’s race, 66 percent of the donors to one of his buddy groups, Kentuckians for Strong Leadership, also maxed out to his campaign.⁷⁸

In short, as former Sen. Kent Conrad (D-N.D.) recently told researchers, the “whole idea” that candidates and outside groups operate independently of each other in the post-*Citizens United* world is “just nonsense.”⁷⁹ While a few states and localities enacted stronger coordination laws in the wake of *Citizens United*,⁸⁰ in most jurisdictions the independence of many outside groups continues to be notional at best.

Beyond tacitly undermining contribution limits, moreover, at least some of the justices who decided *Citizens United* plainly would like to overturn them entirely. For these justices, last year’s ruling in *McCutcheon v. FEC* — which invalidated “aggregate” limits on how much individuals can give to candidates and parties overall — was just the first step.⁸¹ Justice Clarence Thomas made his views on this subject quite clear, as he has in the past.⁸² Justice Antonin Scalia was more coy, but he too hinted at broader intentions, at least with respect to political party limits. As he said during the *McCutcheon* oral argument:

It seems to me fanciful to think that the sense of gratitude that an individual senator or congressman is going to feel because of a substantial contribution to the Republican National Committee or Democratic National Committee is any greater than the sense of gratitude that that senator or congressman will feel to a PAC which is spending enormous amount of money in his district or in his state for his election.⁸³

Under *Citizens United*, mere gratitude — or “ingratiation” — is not corruption. There is, at the very least, an implication in these words that Justice Scalia would apply *Citizens United*’s reasoning to strike down contribution limits for political parties as well as outside groups.

He may never have to, however, because *Citizens United* has also fueled legislative efforts to roll back contribution limits. When the decision was handed down, many Beltway insiders worried that it would redirect funds away from political party coffers.⁸⁴ Such fears, correct or not, helped drive the successful effort to insert a last-minute rider into last year’s omnibus spending package lifting overall party contribution limits by a factor of five, to \$324,000 annually.⁸⁵ Several states also increased or eliminated contribution limits following *Citizens United*, again citing the need for candidates and parties to compete with outside groups.⁸⁶ While such changes obviously were not the Court’s doing, they likely would not have happened otherwise. As a result, total outside spending may rise more quickly in coming years, as candidates, parties, and outside groups now compete for large donors.

VI. TRAMPLING SHAREHOLDER AND EMPLOYEE RIGHTS

Finally, a lesser-known but disturbing legacy of *Citizens United* is an increased trampling of shareholder and employee rights.

Unshackling corporations from “discriminatory” spending limits was a principal focus for the *Citizens United* majority.⁸⁷ The majority’s reasoning is sometimes caricatured (a bit unfairly) with the phrase “corporations are people.”⁸⁸ To give the Court its due, however, the majority’s actual argument was more nuanced, relying heavily on the notion that corporations are, in the end, just “associations of citizens,” each of whom has a fundamental right to speak as part of a collective.⁸⁹ As Justice Scalia wrote in his concurrence, “the individual person’s right to speak includes the right to speak *in association with other individual persons*.” Thus, “a business corporation ... cannot be denied the right to speak on the simplistic ground that it is not an individual American.”⁹⁰

The problem with this argument is that it ignores how most publicly-traded companies actually work. Shareholders in these companies usually hold stock for reasons having nothing to do with a desire to participate in collective political expression.⁹¹ In fact, such activity may harm their interests; studies have shown that it correlates negatively to shareholder value.⁹²

When for-profit companies nevertheless choose to “speak” through political advocacy, that speech typically reflects not the views and priorities of the shareholders, but those of high-level corporate managers.⁹³ These managers may be trying to advance their personal beliefs, or they may feel the need to spend money for strategic reasons (corporate PACs, for example, commonly give to both political parties).⁹⁴ Regardless, shareholders typically have no input over such decisions.⁹⁵

In freeing corporate managers to spend general treasury funds on elections, the Court was not entirely blind to the possibility that some shareholders would object. It suggested, however, that there was “little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.”⁹⁶

Yet in reality, shareholders often do not even know when their money is being spent on electoral advocacy. Many large corporations funnel their election spending through 501(c) nonprofits and trade associations that can keep their donors secret. Periodically, the tip of this iceberg becomes visible. For example, in a 2012 regulatory filing, the insurance giant Aetna inadvertently disclosed contributions to two conservative-leaning 501(c)(4) organizations, totaling over \$7 million.⁹⁷ While a growing number of companies “voluntarily” disclose such spending,⁹⁸ without a legal requirement, many do not. And even when they do, there is frequently no way to verify the information they provide.

Tellingly, politically-oriented dark money organizations that subsist largely on corporate funds, like the Chamber of Commerce and the American Legislative Exchange Council (ALEC), have fought tooth-and-nail to prevent even *voluntary* disclosure. According to Tom Donahue, the Chamber’s president, “[t]he whole thing comes down to efforts by some to stop the business community” from engaging in political advocacy.⁹⁹

Assertions like these demonstrate the inadequacy of “corporate democracy” as a means to protect shareholders’ interests. Many in the upper echelons of the corporate world want nothing of the sort. They are

firmly committed to excluding shareholders from decisions about whether and how their money will be spent on politics. They do not, in fact, even want shareholders to know.

It is not only shareholders, moreover, who may find themselves subsidizing speech with which they disagree after *Citizens United*. Recently, a few corporate and union employers have asserted a right to coerce their employees into participating in political advocacy — often without pay. Federal law prohibits coercing employees to assist with the activities of corporate and union PACs, but contains no parallel provision prohibiting such coercion with respect to electoral activities of corporations and unions themselves.¹⁰⁰ In 2012, the FEC deadlocked on whether a union could compel its employees to “volunteer” for sign-waving and other duties to support a Democratic congressional candidate, opening the door for such conduct by other employers.¹⁰¹ Another notorious example involved Murray Energy, a mining company, which reportedly forced its miners to attend a rally on their personal time in support of Mitt Romney’s 2012 presidential campaign (their images wound up in a Romney political ad).¹⁰²

While such episodes appear relatively rare, subtler efforts at indoctrination, like mandatory meetings and enclosing political advertisements with pay-slips, are more common. The CEO of one company, Westgate Resorts, sent a memo in 2012 to 7000 employees threatening layoffs if President Obama was reelected.¹⁰³ Executives at another, the casino company Harrah’s, warned employees in 2010 of “devastating” consequences should then-Senate Majority Leader Harry Reid be defeated, and set up elaborate mechanisms to track who had voted.¹⁰⁴ There is even a PAC dedicated to helping businesses indoctrinate their employees through “employee political education.”¹⁰⁵

As with the overall surge of dark money in U.S. elections, the trampling of shareholder and employee rights results not only from the Court’s decision in *Citizens United*, but from legislative and regulatory inaction that have followed. Again, though, there is a striking gap between what the Court seems to have thought would be the result of its decision and what has actually happened.

VII. CONCLUSION: THE NEXT FIVE YEARS?

One of the most striking features of the debate over campaign finance laws is how much agreement there is among the general public about the nature and scope of the problem and the need for legislative solutions. Eighty percent of the public disapproved of *Citizens United*.¹⁰⁶ According to a recent survey by veteran pollster Joel Benenson, an extraordinary 88 percent of respondents agreed that Congress should prevent unions, corporations, and other outside groups from spending unlimited amounts of money to influence elections.¹⁰⁷ Fifty-nine percent strongly agreed, including 62 percent of Democrats, 64 percent of Independents and 52 percent of Republicans.¹⁰⁸ In another survey, 70 percent of respondents favored government initiatives to match small donor contributions through public financing.¹⁰⁹ Disclosure is also overwhelmingly popular. In a 2012 survey, 85 percent of respondents said they favored increased disclosure of outside money.¹¹⁰

These numbers do not tell the entire story, of course. To some degree, the challenge for campaign finance reformers has always been lack of public engagement, not actual opposition to their agenda.¹¹¹ This may be why many elected officials, especially at the federal level, often seem content to ignore the public's preferences. That indifference to public sentiment was on display in last year's deal to roll back political party contribution limits. The bipartisan negotiators who decided, without debate, to tack the measure onto a must-pass spending bill clearly did not believe voters would hold them accountable.¹¹²

Over the long term, however, it is not at all clear that this inside-the-Beltway approach is sustainable. The last five years have seen trust in all three branches of government fall to record lows.¹¹³ Congress's rating is mired in the single digits, at 7 percent.¹¹⁴

Money in politics is part of this story. Three-quarters of respondents in a recent ABC News survey said that "wealthy Americans ... have more of a chance to influence the elections process than other Americans."¹¹⁵ Another poll indicated that just 11 percent of Democrats and 15 percent of Republicans believe that constituents have more influence over how members of Congress vote than "[s]pecial interest groups, lobbyists, and campaign contributors."¹¹⁶ It is difficult to see how trust in government can be restored while the public feels this way.

Such arguments are unlikely to move the Court itself. In the last five years, it has continued to chip away at remaining campaign finance protections in *McCutcheon* and other cases. All signs point to the current majority digging in for the long haul on this set of issues.

Fortunately, the Court alone does not get to dictate the contours of our democracy. There are growing signs of progress at the state and local level, with legislators and regulators taking steps to shore up disclosure laws¹¹⁷ and enact more robust coordination regulations,¹¹⁸ to name two examples. Effective public financing of elections is also gaining traction — three states and several large cities have implemented matching or other small donor-oriented programs, for example, and last year small donor matching also came close to passage in a fourth state, New York.¹¹⁹ Even at the federal level, there is some movement in favor of disclosure. The Internal Revenue Service continues to push forward with a rulemaking that would curtail dark money groups seeking tax exempt status—albeit very slowly.¹²⁰ The Securities Exchange Commission is likewise considering whether to require publicly-traded companies to disclose their political spending, and has received over 1 million comments in favor of the proposal.¹²¹ Even the FEC has sought public comment about potential areas for reform.¹²²

Such developments do not add up to a full-fledged movement for change — but one is certainly possible. If it does come about, reformers may ironically have the Court and its overreaching campaign finance jurisprudence partly to thank. That, in the end, could be *Citizens United*'s silver lining.

ENDNOTES

¹ Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, NEW REPUBLIC, Sept. 28, 2014, <http://www.newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise>.

² Press Release, Move to Amend, Election Shows Americans Ready to Amend the Constitution (Nov. 5, 2014), *available at* <https://movetoamend.org/press-release/election-shows-americans-ready-amend-constitution>.

³ *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 257-58 (2003)) (internal bracket omitted).

⁴ *Id.* at 352.

⁵ *Id.* at 325.

⁶ *Id.* at 320-21.

⁷ *Citizens United*, 558 U.S. at 432-33 (Stevens, J., dissenting) (“A century of more recent history puts to rest any notion that today’s ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates.”).

⁸ *Buckley v. Valeo*, 424 U.S. 1, 17-18 (1976).

⁹ *See* *McConnell*, 540 U.S. at 203-09 (2003); *Buckley*, 424 U.S. at 45.

¹⁰ Heather K. Gerken, *The Real Problem with Citizens United*, 97 MARQ. L. REV. 903, 908 (2014), *available at* <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5205&context=mulr>.

¹¹ *Id.*

¹² *Citizens United*, 558 U.S. at 360.

¹³ *Id.* at 356-57.

¹⁴ *Id.* at 357-58.

¹⁵ *See* *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc).

¹⁶ *See* FEC Advisory Opinion No. 2010-11 (Commonsense Ten), July 22, 2010, *available at* <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (recognizing that political committees that do not make direct contributions to candidates can raise unlimited funds). The term “super PAC” was coined by Eliza Newlin Carney, a reporter for *Roll Call*. *See* Dave Levinthal, *How Super PACs got their name*, POLITICO, Jan. 10, 2012, *available at* <http://www.politico.com/news/stories/0112/71285.html>. Subsequently, a federal district judge in the District of Columbia held that even groups that make direct contributions to candidates can also raise unlimited funds for outside spending, provided they use separate accounts for these two activities. *See* *Carey v. FEC*, 791 F. Supp. 2d 121, 131-32 (D.D.C. 2011). The FEC chose not to appeal this ruling, although other courts have subsequently called it into question. *See* *Vermont Right to Life, Inc. v. Sorrell*, 758 F.3d 118, 141 (2d Cir. 2014); *Stop This Insanity Employee Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 43-44 (D.D.C. 2012).

¹⁷ In particular, *Citizens United* and *SpeechNow* freed outside spenders to engage in “express advocacy” or its functional equivalent—communications containing an explicit or otherwise unmistakable call to vote for or against a particular candidate. See *Citizens United*, 558 U.S. at 325. Prior to the Court’s ruling, only a small class of 501(c)(4) “ideological” corporations could engage in such advocacy, and they accounted for a miniscule percentage of outside spending. See Steve Weissman & Suraj Sazawal, *Soft Money Political Spending by 501(c)(4) Organizations Tripled in 2008 Election*, CAMPAIGN FIN. INST., Feb. 25, 2009, available at http://www.cfinst.org/press/preleases/09-02-25/Soft_Money_Political_Spending_by_Nonprofits_Tripled_in_2008.aspx. A precursor to *Citizens United* decided several years earlier, *Wisconsin Right to Life v. Federal Election Commission*, 551 U.S. 449 (2007), freed corporations and unions to engage in so-called “electioneering communications” (“ECs”) – sham issue ads mentioning candidates in the run-up to elections. See 52 U.S.C. § 30104(f). Together, these decisions made a range of new advocacy available to outside groups. To be sure, even before then, these groups had some means to influence voters, like “issue advertising” outside the EC windows. See Francis Barry, *Forget the Dictionary: Super PACs Aren’t New*, BLOOMBERG VIEW, Mar. 21, 2014, <http://www.bloombergtv.com/articles/2014-03-21/forget-the-dictionary-super-pacs-aren-t-new>. But they gained access to a far greater range of methods, while the government lost the ability to meaningfully curtail their activities.

¹⁸ *Outside Spending*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/> (last visited Jan. 9, 2015).

¹⁹ *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Jan. 7, 2015).

²⁰ *Id.*

²¹ IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 1 (forthcoming Jan. 2015).

²² CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES 5, nn. 21-22 (2014), available at <http://www.brennancenter.org/publication/after-citizens-united-story-states>.

²³ Ciara Torres-Spelliscy, *Why is Chevron Spending Millions on a Municipal Election*, BRENNAN CTR. FOR JUSTICE, Oct. 21, 2014, <http://www.brennancenter.org/blog/why-chevron-spending-millions-municipal-election>.

²⁴ *E.g.*, President Barack Obama, State of the Union Address (Jan. 27, 2010) (“[T]he Supreme Court reversed a century of law that I believe will open the floodgates for special interests –including foreign corporations – to spend without limit in our elections.”).

²⁵ Ellen L. Weintraub & Alexander Tausanovitch, *Reflections on Campaign Finance*, 49 WILLAMETTE L. REV. 541, 548-49 (2013), available at <http://www.willamette.edu/wucl/resources/journals/review/pdf/Volume%2049/49-4%20WEINTRAUB.pdf>.

²⁶ *Total Cost of Elections (1998-2012)*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/index.php?cycle=2012> (last visited Jan. 9, 2015).

²⁷ See *Political Parties Overview*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/parties/> (last visited Jan. 9, 2015); *Overall Spending Inches Up in 2014: Megadonors Equip Outside Groups to Capture a Bigger Share of the Pie*, CTR. FOR RESPONSIVE POLITICS, Oct. 29, 2014, <http://www.opensecrets.org/news/2014/10/overall-spending-inches-up-in-2014-megadonors-equip-outside-groups-to-capture-a-bigger-share-of-the-pie/>

²⁸ Citizens United, 558 U.S. at 354; Press Release, Common Cause, Supreme Court Decision Creates Political Crisis (Jan. 21, 2010), <http://www.commoncause.org/press/press-releases/supreme-court-decision-creates-political-crisis.html>; Fred Wertheimer, *Supreme Court Decision in Citizens United Case is Disaster for American People and Dark Day for the Court*, ACSBLOG, Jan. 21, 2010, <http://www.acslaw.org/acsblog/node/15151>; Press Release, Brennan Ctr. For Justice, With Corporations' New Outsize Voice, Can Shareholders Speak? (Jan. 28, 2010), <http://www.brennancenter.org/press-release/corporations-new-outsize-voice-can-shareholders-speak>.

²⁹ Business corporations contributed approximately \$113 million to super PACs between 2010 and 2014. See Jacob Fenton, *Corporate donors still prefer the shadows*, SUNLIGHT FOUNDATION, Oct. 29, 2014, <http://sunlightfoundation.com/blog/2014/10/29/corporate-donors-still-prefer-the-shadows/>; Michael Beckel & Reity O'Brien, *Mystery Firm is Election's Top Corporate Donor at \$5.3 Million*, CTR. FOR RESPONSIVE POLITICS, Nov. 5, 2012, <http://www.opensecrets.org/news/2012/11/mystery-firm-is-elections-top-corporate/>; CRAIG HOLMAN & VINCENT VU, PUBLIC CITIZEN, SNAPSHOT OF CORPORATE DONORS TO ELECTIONEERING GROUPS, 2010 ELECTION 7 (Oct. 28, 2010), available at www.citizen.org/documents/Snapshot-corporate-donors-chart-10282010.pdf; *Top Donors to Outside Spending Groups*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited Jan. 9, 2015). By contrast, the top 195 individual donors to super PACs have spent more than \$600 million. See IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 1 (forthcoming Jan. 2015). While anecdotal evidence suggests that significant additional corporate funds go to dark money groups, such groups also raise significant funds from individual mega-donors. See Kim Barker, Rick Young & Emma Schwartz, *Dark Money Group's Donors Revealed*, PBS FRONTLINE, Nov. 5, 2012, <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/dark-money-groups-donors-revealed/>; Theodor Mayer, *In Wisconsin, Dark Money Got a Mining Company What it Wanted*, PROPUBLICA, Oct. 14, 2014, <http://www.propublica.org/article/in-wisconsin-dark-money-got-a-mining-company-what-it-wanted>.

³⁰ *Top Donors to Outside Spending Groups*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited Jan. 9, 2015)

³¹ *Id.*

³² *2014 Top Donors to Outside Spending Groups*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited Jan. 13, 2015); *2014 Outside Spending, by Super PAC*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S> (last visited Jan. 13, 2015).

³³ Ross Choma, *Money Won on Tuesday, But Rules of the Game Changed*, CTR. FOR RESPONSIVE POLITICS, Nov. 5, 2014, <http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/>.

³⁴ *Donor Demographics*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/overview/donordemographics.php> (last visited Jan. 13, 2015); *Donor Demographics*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A> (last visited Jan. 13, 2015).

³⁵ Kenneth P. Vogel, *Big Money Breaks Out*, POLITICO, Dec. 29, 2014, available at <http://www.politico.com/story/2014/12/top-political-donors-113833.html>.

³⁶ DAVID CALLAHAN & J. MIJIN CHA, DEMOS, STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA 18-19 (2013), available at <http://www.demos.org/sites/default/files/publications/Demos-Stacked-Deck.pdf>.

³⁷ See Matea Gold, *Billionaire Mogul Sheldon Adelson Looks for Mainstream Republican Who Can Win in 2014*, WASH. POST, Mar. 25, 2014, available at http://www.washingtonpost.com/politics/billionaire-mogul-sheldon-adelson-looks-for-mainstream-republican-who-can-win-in-2016/2014/03/25/e2f47bb0-b3c2-11e3-8cb6-284052554d74_story.html.

³⁸ *Id.*

³⁹ Jim Rutenberg & Nicholas Confessore, *A Wealthy Backer Likes the Odds on Santorum*, N.Y. TIMES, Feb. 8, 2012, available at http://www.nytimes.com/2012/02/09/us/politics/foster-friess-a-deep-pocketed-santorum-super-pac-backer.html?_r=0.

⁴⁰ *Top Donors to Outside Spending Groups*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited Jan. 9, 2015); Jim Rutenberg, *How Billionaire Oligarchs Are Becoming Their Own Political Parties*, N.Y. TIMES MAGAZINE, Oct. 17, 2014, available at <http://www.nytimes.com/2014/10/19/magazine/how-billionaire-oligarchs-are-becoming-their-own-political-parties.html>.

⁴¹ CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES 1* (2014), available at <http://www.brennancenter.org/publication/after-citizens-united-story-states>.

⁴² *Id.* at 7. He was ostensibly referring to Pope's track record of political involvement, not his political spending. *See id.*

⁴³ *See e.g.*, MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1* (2012); LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 285 (2008).

⁴⁴ John Cassidy, *American Inequality in Six Charts*, THE NEW YORKER, Nov. 18, 2013, available at <http://www.newyorker.com/news/john-cassidy/american-inequality-in-six-charts>. Inequality actually dropped during the Great Recession due to plummeting markets, but is now rising again. *See id.*

⁴⁵ Meg Handley, *Home Values Down \$6.4 Trillion Since Housing Crash*, U.S. NEWS & WORLD REP., Dec. 23, 2011, <http://www.usnews.com/news/blogs/home-front/2011/12/23/home-values-down-64-trillion-since-housing-crash>; BARBARA A. BUTRICA, URBAN INSTITUTE, *RETIREMENT PLAN ASSETS 1* (April 2013), available at <http://www.urban.org/UploadedPDF/412622-Retirement-Plan-Assets.pdf>.

⁴⁶ *E.g.*, THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 347-50 (Arthur Goldhammer, trans.) (2014).

⁴⁷ *Citizens United*, 558 U.S. at 371. The four justices who dissented from the rest of the majority's opinion joined the portion upholding BCRA's disclaimer and disclosure requirements. *Id.* at 317. Justice Clarence Thomas alone would have struck down these requirements. *Id.* at 480 (Thomas, J., dissenting).

⁴⁸ *Id.* at 352.

⁴⁹ *Id.* at 370 (emphasis added).

⁵⁰ *See* TAYLOR LINCOLN, PUB. CITIZEN, *DISCLOSURE ECLIPSE 3-4* (Nov. 18, 2010), available at <http://www.citizen.org/documents/Eclipsed-Disclosure1182010.pdf>.

⁵¹ *See* Daniel I. Weiner, *D.C. Federal Judge Strikes a Blow Against Dark Money—But Will It Hold?*, BRENNAN CTR. FOR JUSTICE, Nov. 26, 2014, <http://www.brennancenter.org/blog/judge-strikes-blow-against-dark-money>.

⁵² *See States Expand the Definition of Electioneering Communications*, BRENNAN CTR. FOR JUSTICE, Feb. 7, 2013, <http://www.brennancenter.org/analysis/state-electioneering-communication-definitions>.

⁵³ See, e.g., Maggie Haberman, *Mystery Mitt Romney Donor Comes Forward*, POLITICO, Aug. 6, 2011, <http://www.politico.com/news/stories/0811/60776.html> (describing use of shell corporation to disguise \$1 million contribution to super PAC that backed Mitt Romney in 2012). While rules limiting the ability to “earmark” contributions or give in the name of another ostensibly address this problem, at the federal level, at least, such rules are almost never enforced. See *McCutcheon v. FEC*, 134 S.Ct. 1434, 1477 (2014) (Breyer, J., dissenting) (noting that there is only one recorded instance of the FEC enforcing its earmarking restrictions in the entire history of the rule).

⁵⁴ *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/disclosure.php> (last visited Jan. 12, 2015).

⁵⁵ IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, *ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE CITIZENS UNITED 13* (forthcoming Jan. 2015).

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* at 14.

⁵⁸ Daniel I. Weiner, *The FEC Deadlocks (Again) on Dark Money*, BRENNAN CTR. FOR JUSTICE, Aug. 1, 2014, <http://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.

⁵⁹ David Earley, *Disclose Act Crucial to Transparency of Federal Election Spending*, BRENNAN CTR. FOR JUSTICE, July 23, 2014, <http://www.brennancenter.org/blog/disclose-act-crucial-transparency-federal-election-spending>.

⁶⁰ Scorecard: Essential Disclosure Requirements for Independent Spending, 2013, NAT’L INST. ON MONEY IN ST. POL., May 16, 2013, <http://classic.followthemoney.org/press/ReportView.phtml?r=495>.

⁶¹ *Citizens United*, 558 U.S. at 357.

⁶² *Id.* at 360.

⁶³ CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES 19-21* (2014), available at <http://www.brennancenter.org/publication/after-citizens-united-story-states>.

⁶⁴ Rachael Marcus & John Dunbar, *Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce*, THE CTR. FOR PUB. INTEGRITY, Jan. 13, 2012, <http://www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce>.

⁶⁵ Single candidate “buddy PACs” alone have spent approximately \$321 million on federal elections. See *2012 Outside Spending, by Single-Candidate Super PAC*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C> (last visited Jan. 13, 2015); *2014 Outside Spending, by Single-Candidate Super PAC*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=C> (last visited Jan. 13, 2015). This is almost as much as the total of *all* reported outside spending from 1990 to 2004. See *Outside Spending by Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/> (last visited Jan. 13, 2015).

⁶⁶ DANIEL P. TOKAJI & RENATA E.B. STRAUSE, *ELECTION LAW @ MORITZ, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 64-68* (2014), available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>; CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES 1* (2014), available at <http://www.brennancenter.org/publication/after-citizens-united-story-states>.

⁶⁷ CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, AFTER CITIZENS UNITED: THE STORY IN THE STATES 10-11 (2014), available at <http://www.brennancenter.org/publication/after-citizens-united-story-states>.

⁶⁸ *Id.* at 11.

⁶⁹ *Id.* at 5.

⁷⁰ DANIEL P. TOKAJI & RENATA E.B. STRAUSE, ELECTION LAW @ MORITZ, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 49 (2014), available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>.

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⁷² *Id.* at 64; CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, AFTER CITIZENS UNITED: THE STORY IN THE STATES 5, 15 (2014), available at <http://www.brennancenter.org/publication/after-citizens-united-story-states> (noting overlapping consultants between the campaign of Alaska Senator Mark Begich and Put Alaska First, the super PAC supporting him); Robert Draper, *Can the Democrats Catch Up in the Super PAC Game?*, N.Y. TIMES MAGAZINE, July 8, 2012, available at http://www.nytimes.com/2012/07/08/magazine/can-the-democrats-catch-up-in-the-super-pac-game.html?_r=0; Melanie Mason, *Pro-Romney 'Super PAC' Reports \$12 million Haul*, L.A. TIMES, July 5, 2011, available at <http://articles.latimes.com/2011/jul/05/news/la-pn-romney-fundraising-20110705>.

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⁷⁷ IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 2, 11 (forthcoming Jan. 2015).

⁷⁸ *Id.* at 11.

⁷⁹ DANIEL P. TOKAJI & RENATA E.B. STRAUSE, ELECTION LAW @ MORITZ, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 65 (2014), available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>.

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⁸² *Id.* at 1464 (Thomas, J., concurring).

⁸³ McCutcheon v. FEC, No 12-536, Trans of Oral Arg., at 51, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_21o2.pdf.

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