Citizens United: The Aftermath
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The Supreme Court's recent decision in *Citizens United* rivals *Bush v. Gore* for the most aggressive intervention into politics by the Supreme Court in the modern era. Indeed, *Bush v. Gore* affected only one election; *Citizens United* will affect every election for years to come. The 5-4 decision undermined 100 years of law that restrained the role of special interests in elections. By holding – for the first time – that corporations have the same First Amendment rights to engage in political spending as people, the Supreme Court re-ordered the priorities in our democracy – placing special interest dollars at the center of our democracy, and displacing the rightful role of voters.

More specifically, the decision held that corporations, nonprofits and unions have a First Amendment right to use their general treasury funds for campaign ads that directly support or oppose federal candidates, so long as such ads are not directly coordinated with a candidate's campaign. The decision overruled, in whole or in part, two of the Court's own precedents – *Austin v. Michigan Chamber of Commerce*[1] (1990) and *McConnell v. Federal Election Commission*[2] (2003) – and struck down a significant portion of the the Bipartisan Campaign Reform Act of 2002 (BCRA) (also known as "McCain-Feingold") It called into question dozens of state laws, which will now have to be repealed or amended to comply with the decision.

Four different polls conducted in the weeks after the *Citizens United* decision was announced all indicate that the Court's analysis was profoundly at odds with the American public's understanding of the role corporate money plays in politics.

- In a *Washington Post-ABC News* poll "[e]ight in 10 poll respondents opposed the decision, with 65% 'strongly' opposed."[3]
- In a Common Cause poll, 64% of voters disapproved of the decision, with 47% strongly opposed. Only 27% of voters agreed. [4]
- In a People for the American Way poll, 78% believed that corporations should be limited in how much they can spend to influence elections, and 70% believed they already have too much influence over elections.[5]

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[1] 494 U. S. 652 (1990).
[2] 540 U.S. 93 (2003).
[3] Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASHINGTON POST, Feb. 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.
[4] Stan Greenberg et al., *Strong Campaign Finance Reform: Good Policy, Good Politics* 2 (Feb. 8, 2010), *available at* http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf.
[5] People for the American Way, *New Poll Shows Broad Support for "Fixing" Citizens United* (Feb. 18, 2010), *available at*

- In a Pew Research Center for the People & the Press poll, 68% disapproved of the decision, and only 17% approved of it.[6]

Two of the polls broke support or opposition to the decision down by party affiliation, and both found that opposition to the decision was strong among voters of all political beliefs.

- In the Common Cause poll, a majority of Democrats, Republicans and independents were opposed, but independents showed the strongest antagonism, with 72% disagreeing with the ruling.[7]
- In the Pew poll, among Republicans 22% approve of the decision while 65% disapprove; and, among Democrats, 13% approve of the ruling while 76% disapprove.[8]

Finally, a poll of voters in 19 battleground congressional districts showed significant disapproval of the *Citizens United* decision and support for reforms.[9] Although there was some variation among the 19 districts, the findings in each district, with few exceptions, tracked the overall composite results. The poll found that:

- 67% of voters disagreed with the Supreme Court's decision that corporations should be able to spend money on elections.
- 72% of voters—including 77% of independents—didn't believe that Congress has done enough to address special interest money in politics.
- 87% believed that members of Congress are influenced more by donors than by constituents' views.

As the consistency among these polls strongly indicates, Americans of all political stripes disagree with *Citizens United* and support strong reforms that can ameliorate the damage wrought by the decision.

This Issue Brief describes the political impact of *Citizens United* and explains how corporate political spending can subvert our democratic values. The brief outlines

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http://site.pfaw.org/site/PageServer?pagename=media_2010_02_new_poll_shows_support_for_fixing_citizens_united.

[6] The Pew Research Center for the People & the Press, *Midterm Election Challenges for both Parties* 31 (Feb. 12, 2010), *available at* http://people-press.org/reports/pdf/589.pdf.

[7] Stan Greenberg et al., *Strong Campaign Finance Reform: Good Policy, Good Politics* 2 (Feb. 8, 2010), *available at* http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf.

[8] The Pew Research Center for the People & the Press, *Midterm Election Challenges for both Parties* 31 (Feb. 12, 2010), *available at* http://people-press.org/reports/pdf/589.pdf.

[9] This poll was conducted from March 10 to 14, 2010 by SurveyUSA commissioned by Common Cause, MoveOn.org Political Action, and Public Campaign Action. David Donnelly, *Polling in 19 Battleground Districts Finds Voters Will Reward Candidates who Support Fair Elections Now Act*, March 16, 2010, *available at* http://www.fairelectionsnow.org/files/statepolling/national-polling-memo.pdf.

constructive responses to *Citizens United* that would buttress existing campaign finance safeguards from further attacks and mitigate some of the harmful effects of *Citizens United*.

1. The Political Stakes of *Citizens United*

After news of the *Citizens United* ruling sent shockwaves through political, legal, and news media circles throughout the nation, some commentators took a somewhat jaundiced view, arguing, in essence, that since the political system is already awash in special-interest dollars, this particular decision may have little impact.[10] It is undoubtedly true that heretofore, corporations have engaged in large-scale spending in federal politics –primarily through political action committees ("PACs") and through more indirect means such as lobbying and nonprofit advocacy groups.[11] However, the sums spent by corporations in previous elections are miniscule in comparison to the billions of dollars in corporate profits that the Supreme Court has now authorized corporations to spend to influence the outcome of federal elections. The difference, in short, changes the rules of federal politics.

Prior to *Citizens United,* a corporation that wished to support or oppose a federal candidate had to do so using PAC funds – funds amassed through voluntary contributions from individual employees and shareholders who wished to support the corporation's political agenda. Such funds were subject to federal contribution limits and other regulations.[12] Now however, the *Citizens United* decision will allow corporations that wish to directly influence the outcome of federal elections to draw from their general treasury funds, rather than PAC funds, to support or oppose a particular candidate. This difference is significant enough to amount to a difference in kind rather merely a difference in degree, as demonstrated by the following:

- In the 2008 election cycle, the nation's largest corporation, Exxon-Mobil, formed a PAC that collected approximately $700,000 in individual contributions.[13] Thus, Exxon-Mobil was limited to spending this amount on advertisements directly supporting or opposing a federal candidate. During the same 2008 election cycle,

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[10] *See, e.g.*, Nathaniel Persily, *The Floodgates Were Already Open*, SLATE, Jan 25, 2010, http://www.slate.com/id/2242558/; Joseph Sandler and Neil Reiff, *Beware the Fortunetellers*, THE NAT'L LAW J., Feb. 1, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202439595364.

[11] Victoria McGrane, *Lobbyists on Pace for Record Year*, POLITICO, Dec. 22, 2009, http://www.politico.com/news/stories/1209/30882.html.

[12] CIARA TORRES-SPELLISCY, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 7 (Brennan Center 2010), *available at* http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice/.

[13] Statistics on Exxon Mobile, Corp.'s Political Spending, Center for Responsive Politics, http://www.opensecrets.org/orgs/summary.php?cycle=A&type=P&id=D000000129.

Exxon-Mobil's corporate profits totaled more than $80 billion.[14] Thus, *Citizens United* frees this one corporation to increase its direct spending in support or opposition to federal candidates by more than 100,000 fold.

- During the 2008 election cycle, all winning congressional candidates spent a total of $861 million on their campaigns – less than one percent of Exxon-Mobil's corporate profits over the same period.[15]

Corporate political spending has generally taken the form of lobbying, and the amounts that corporations have spent to influence the political process through lobbying dwarf the amounts they have spent in federal elections.

- In the same year that it was able to raise only $700,000 for its federal PAC, Exxon Mobil spent $29 million on lobbying.[16]
- The health care industry in 2009 spent approximately $1 million per day to lobby Congress on health care reform.[17]

Indeed, corporations have spent dramatically more on lobbying than federal candidates have spent in their own elections. During the 2008 election, all congressional candidates combined spent a total of $1.4 billion on their campaigns,[18] only 26% of the $5.2 billion corporations spent on lobbying during the same two-year period.[19] If corporations diverted even a small fraction of their political spending budgets from lobbying to campaigns, they could easily outspend candidates by many multiples.

Lobbying organizations—the most powerful of which are funded by corporations— already spend more money than the major political parties, and, as a result of *Citizens United*, will be able to spend their money to directly influence federal campaigns.

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[14] EXXON MOBILE, CORP., 2008 SUMMARY ANNUAL REPORT 16, 38 (2009), *available at* http://www.exxonmobil.com/Corporate/Files/news_pub_sar_2008.pdf.

[15] COMMON CAUSE, CORPORATE DEMOCRACY: POTENTIAL FALLOUT FROM A SUPREME COURT DECISION ON *CITIZENS UNITED* (OCT. 29, 2009), *available at* http://www.commoncause.org/atf/cf/{fb3c17e2-cdd1-4df6-92be-bd4429893665}/CORPORATEDEMOCRACY.PDF.

[16] Statistics on Exxon Mobile, Corp.'s Lobbying Efforts, Center for Responsive Politics, *available at* http://www.opensecrets.org/lobby/clientsum.php?year=2008&lname=Exxon+Mobil&id=.

[17] JOSH ZAHAROFF, LEGISLATING UNDER THE INFLUENCE (COMMON CAUSE, 2009), *available at* http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/COMMONCAUSE_HEALTHCAREREPORT2009-1.PDF.

[18] Statistics on Total Cost of Congressional Races in 2008, Center for Responsive Politics, http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&Type=A&Display=T.

[19] COMMON CAUSE, CORPORATE DEMOCRACY: POTENTIAL FALLOUT FROM A SUPREME COURT DECISION ON *CITIZENS UNITED* (OCT. 29, 2009), *available at* http://www.commoncause.org/atf/cf/{fb3c17e2-cdd1-4df6-92be-bd4429893665}/CORPORATEDEMOCRACY.PDF..

- The single largest lobbying organization – the U.S. Chamber of Commerce – spent more than $144 million in lobbying, grassroots efforts, and advertising in 2009, compared to $97.9 million spent by the RNC and $71.6 million spent by the DNC.[20] Thus, this single corporate-backed trade association is able to outspend the national committees of both political parties.
- According to *The Atlantic*'s Marc Ambinder, the Chamber's spending included electioneering in the Virginia off-year and Massachusetts special election, as well as "sizeable spending on advertising campaigns in key states and districts aimed at defeating health care, climate change, and financial reform legislation."[21]
- The Chamber is expanding its grass-roots operation and concentrating on electing its preferred (primarily Republican) candidates in key districts. The Chamber plans to spend at least $50 million on political races and related activities in 2010, a 40% increase from 2008. It expects to focus its new efforts on about 10 Senate races and as many as 40 House districts, targeting vulnerable Democrats with campaign advertisements, among other efforts.[22]

Indeed, despite the campaign finance regulations that – until *Citizens United* – attempted to protect our democracy against overt influence-peddling, there are numerous examples to demonstrate special interests will attempt to use all means at their disposal to insure favorable legislative treatment.

- In 1998, a Native American tribe offered to undertake a substantial independent spending campaign on behalf of a Kansas Congressman in an extremely close reelection race, if the Congressman would switch his position on—and subsequently support—legislation that would allow the tribe to build a casino.[23]
- In 2006, the FEC levied a $3.8 million fine against mortgage giant Freddie Mac for illegally using corporate treasury funds to raise over $3 million for members of the House subcommittee that had regulatory authority over it. Approximately 90% of those funds directly benefited the chair of the subcommittee.[24] Now, post-*Citizens United*, Freddie Mac could accomplish a similar result legally by spending treasury funds to run campaign ads that directly benefit those legislators responsible for regulating it.

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[20] Marc Ambinder, *The Corporations Already Outspend The Parties*, THE ATLANTIC, Feb. 1, 2010, *available at* http://politics.theatlantic.com/2010/02/the_corporations_already_outspend_the_parties.php.
[21] *Id.*
[22] Dan Eggen, *U.S. Chamber of Commerce Sets Sights on Democrats Ahead of Midterm Elections*, WASHINGTON POST, March 16, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031602040.html?referrer.
[23] Def.'s Proposed Findings of Facts, *Speechnow.org v. FEC* 1:08-cv-00248-JR at ¶¶ 288- 297 (D.C. 2008).
[24] Jim Drinkard, *Freddie Mac to Pay Record $3.8 M to Settle FEC Allegations*, USA TODAY, April, 18, 2006, at 04A, *available at* http://www.usatoday.com/money/companies/regulation/2006-04-18-freddie-mac_x.htm.

Moreover, corporate campaign ads—or even the threat of unleashing such an ad—may be a more direct route than lobbying for corporations to pressure elected officials. Such campaign ads allow corporations to threaten politicians' ability to remain in office. An example in which an independent expenditure ad campaign unseated an elected official who was at odds with a corporate agenda came before the Supreme Court just last year in *Caperton v. Massey Coal Co.*[25] In *Caperton*, Don Blankenship, the CEO of Massey Coal, which had $50 million at stake in a case before the West Virginia Supreme Court, spent almost $3 million dollars in independent expenditures to defeat an incumbent member of the West Virginia Supreme Court and to support the campaign of another candidate. The winning candidate then refused to recuse himself multiple times, and instead voted to support Massey Coal's position. Writing for the majority, Justice Kennedy, ruled that such large expenditures—expenditures which exceeded the combined expenditures of both candidate committees by $1 million— had "a significant and disproportionate influence on the electoral outcome" and created a "serious, objective risk of actual bias" on the part of the judge who had benefited from the independent expenditure campaign.[26]

Indeed, corporations may be able to use their new ability to run campaign attack ads to coerce elected officials into compliance with a particular agenda, even if the corporations never have to make good on their threats by actually running the ads. One egregious example arose in North Carolina and is discussed at length in Judge M. Blane Michael's dissenting opinion in the 4th Circuit case *North Carolina Right to Life, Inc. v. Leake*:

> The campaign waged in North Carolina by the independent group Farmers for Fairness (Farmers) provides another example of the corruptive influence of independent expenditures. Farmers created advertisements directly opposing certain legislative candidates. Instead of simply running the advertisements during election time, Farmers scheduled meetings with legislators and screened the advertisements for

[25] 129 S.Ct. 2252 (2009).

[26] *Id.* at 2264-65. Justice Kennedy – the author of both the *Caperton* opinion and the *Citizens United* opinion – attempts to distinguish the holding of *Caperton* as irrelevant to the question raised in *Citizens United:* whether independent expenditures have the potential to corrupt elected officials. He claims that *Caperton* was limited to the context of judicial elections, where a litigant possesses a "due process right to a fair trial before an unbiased judge." *Citizens United*, Slip op. at 44. Justice Kennedy's reasoning, however, is unconvincing. As Justice Stevens' dissent pointed out, in *Caperton*, the Court recognized that "some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes." *Id.* at 69 (Stevens, J., dissenting). If an independent expenditure campaign could create "bias" in an elected judge, then it is logical to believe that an identical independent expenditure campaign could create equivalent "bias" if deployed on behalf a legislative candidate. Although Justice Kennedy is willing to uphold litigants' due process rights to have their case decided by an unbiased judge, he gives no weight whatsoever to the electorate's constitutional interests in elected officeholders who have not been bought and paid for with special interest dollars.

> them in private. Farmers then explained that, unless the legislators supported its positions, it would run the advertisements that attacked the candidates on positions unrelated to those advocated by Farmers. The majority interprets this activity as the "group feel[ing] passionately about an issue and discuss[ing] it." *Ante* at 294. This could not be further from reality. The record reveals that Farmers did not discuss its central issue, deregulation of the hog industry, in its advertisements. Instead, it threatened and coerced candidates to adopt its position, and, if the candidate refused, ran negative advertisements having no connection with the position it advocated.[27]

As this example demonstrates, the *Citizens United* decision gives corporations a new and powerful weapon – whether they ever actually use this weapon is, arguably, beside the point. Mere awareness of a corporation's potential general treasury fund war chest can be expected to affect the decision-making of elected officials in ways that will often be difficult to trace.

Even those corporations that are reluctant to engage in electoral politics may find themselves pulled into a "race to the bottom," where they are subject to the "competitive need to maintain access to and avoid retribution from elected officials of both parties." [28] Such a situation existed prior to BCRA's ban on soft money, where corporations often gave to both national parties – political expenditures made with the intent to secure preferential access and to avoid antagonizing elected officials, rather than to advance political ideas. The *Citizens United* decision reinstates this corporate influence-bidding arms race.

Perhaps even more profoundly, the Court in *Citizens United* has given the stamp of constitutional approval to corporate electioneering. The Court has invited corporations into elections, telling them that they have a First Amendment right to spend their vast resources to try to influence the outcome of an election. Although before this decision corporations were able to spend on ads that mentioned the candidate's name, as long as they refrained from direct advocacy or opposition to the election of that candidate, many corporations likely held back for fear of violating complex spending laws as well as concern that such spending would open the corporation to criticism.[29] According to corporate lawyers, the norm of corporate

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[27] 525 F.3d 274, 335-36 (4th Cir. 2008) (Michael, J. dissenting).
[28] Supplemental Brief of the Committee for Economic Development as Amicus Curiae in Support of Appellee, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_ced_supp_brief_amici.pdf *at* 10-16.
[29] Tom Hamburger, *U.S. Chamber of Commerce Grows into a Political Force*, LOS ANGELES TIMES, March 8, 2010, *available at* http://www.latimes.com/news/nation-and-world/la-na-chamber9-2010mar09,0,4230154,full.story.

political spending articulated by the *Citizens United* majority may have allayed such fears.[30]

Thus, there are strong reasons to believe that some corporations will take the Court up on its invitation, and that corporate funded campaign attack ads and the threat of these ads will distort policy priorities, allowing special interests to play a greater role in federal politics, and undermining the foundations of our democracy.

2. The Roberts Court's "Deregulatory Turn"

The limits on corporate campaign spending at issue in *Citizens United* represent the fourth time challenges to campaign finance laws have been argued before the Roberts Court, and the fourth time the Roberts Court majority has struck down such provisions as unconstitutional.[31] As Professor Richard Hasen has explained, this "deregulatory turn" represents an about-face, as the Rehnquist Court had generally taken a deferential approach to campaign finance reform regulations enacted by federal and state lawmakers.[32] However, now that Chief Justice Roberts and Justice Alito have replaced Chief Justice Rehnquist and Justice O'Connor on the Supreme Court, the newly constituted majority has moved with stunning haste to dismantle decades-old safeguards intended to limit the effect of special interest money in politics. Indeed, as Justice Stevens wryly noted, "The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court."[33]

With *Citizens United*, the current Supreme Court's majority's ideological hostility to campaign finance reforms has become apparent to even the most casual observer. At oral argument in *Citizens United*, Justice Antonin Scalia comments exemplified the majority's unwarranted suspicion of long-standing campaign finance reform safeguards, assuming in his questions that such safeguards represented nothing more than incumbent self-dealing:

> Congress has a self-interest. I mean, we – we are suspicious of congressional action in the First Amendment area precisely because we – at least I am – I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don't think so.[34]

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[30] *Id.*

[31] *Randall v. Sorrell*, 548 U.S. 230 (2006); *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007); *Davis v. FEC*, 128 S.Ct. 2759 (2008).

[32] Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1064 (2008).

[33] *Citizens United*, Slip op. at 23 (Stevens, J., dissenting).

[34] Transcript of Oral Argument at 50-51, *Citizens United*, No. 08–205 (Sept. 12, 2009).

Justice Kennedy also speculated during oral argument that "the Government [could] silence[] a corporate objector" who wished to protest a particular policy during an election cycle.[35] Similarly, in the *Citizens United* opinion, Justice Kennedy simply assumed, without any factual basis, that Congress' motives were invidious, stating of the law at issue, "[i]ts purpose and effect are to silence entities whose voices the Government deems to be suspect."[36] And Chief Justice Roberts famously expressed his impatience with campaign finance safeguards, striking down regulations on corporate electioneering in the *Federal Election Commission v. Wisconsin Right to Life* decision, saying "Enough is enough."[37]

The Court has used its skepticism of congressional motives – based not on facts or a record below but on the gut instincts of a majority of justices – to justify its utter lack of deference to legislative determinations in this arena. Such a cavalier dismissal of Congress' carefully considered legislation ignores the years of hearings, record, debate and deliberation involved in creating these reforms.

Unfortunately, *Citizens United* will not be the Roberts Court majority's last word on the issue. Seeking to take advantage of the majority's deregulatory agenda, the same coalition of corporate-backed groups that filed the *Citizens United* lawsuit have launched an armada of constitutional challenges to state and federal reforms, which are now advancing rapidly toward the Supreme Court.[38] These challenges include attacks on public financing systems, campaign finance disclosure requirements, "pay-to-play" restrictions on government contractors and lobbyists, and "soft money" restrictions on political parties and political action committees. Challengers seek to use the First Amendment as a constitutional "trump card" to strike down any reform that attempts to mitigate special interest domination of politics. Significantly, several of these challenges will be ripe for decision by the Supreme Court within the year. Indeed, *Doe v. Reed* – a case in which Plaintiffs advance a sweeping conception of the right of anonymous speech that is broad enough to call into question disclosure of campaign finance information – is scheduled for argument in the Supreme Court at the end of this month.

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[35] *Id.* at 52.

[36] *Citizens United*, Slip op. at 23.

[37] *See* 551 U.S. 449, 478 (2007).

[38] *See* David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, at A11, *available at* http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse; *see also* Marcia Coyle, *Opinion Roils Dozens of Cases*, THE NAT'L LAW J., Feb. 1, 2010; Mike Scarcella, *D.C. Circuit's First Shot at Citizens United*, THE NAT'L LAW J., Feb. 1, 2010.

3. Surviving Strict Scrutiny: Creating A Record For Reform

Legislative repair of our system of campaign finance safeguards will be extraordinarily challenging because the Court has awarded its deregulatory agenda the imprimatur of the First Amendment. Since the Court has granted corporate political spending First Amendment protection, it has now indicated that it will treat restrictions on such corporate political spending as burdens on political speech, justifying the application of strict scrutiny. This standard requires that if a challenged regulation is to pass constitutional muster, the government must demonstrate that it be "narrowly" tailored to advance a "compelling state interest." This is a high bar to meet – indeed, as the late Professor Gerald Gunther famously noted , such a non-deferential standard of review is often considered "'strict' in theory and fatal in fact."[39] However, campaign finance reform laws have survived the application of strict scrutiny in the past,[40] and will continue to survive even the skepticism of the Roberts Court if one key condition is realized: an adequate factual record evidencing the real threat to democracy that stems from special interest domination of politics as well as the efficacy of campaign finance reform regulations in mitigating such threats.

It was the absence of such a developed factual record that allowed the majority in *Citizens United* to enact into constitutional doctrine their own untested assumptions about money in politics. In taking the rare step of requesting reargument, the Court took the relatively narrow case before it – whether the 90 minute video-on-demand *Hillary: The Movie* should be deemed a corporate campaign advertisement or not – and drastically expanded the issue, calling into question the constitutionality of decades-old restrictions on the use of corporate treasury funds to directly support or oppose candidates. Moreover, the Court required parties and *amici* to brief these broad issues on an expedited basis, allowing them no time to develop and present a factual record regarding the influence of money in politics. Accordingly, in deciding this landmark case, the Court lacked a developed record on key factual issues, including (1) whether corporate independent expenditures posed similar risks of corruption as direct corporate donations to parties and candidates;[41] (2) whether disclosure requirements

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[39] Gerald Gunther, *The Supreme Court 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[40] As Professor Adam Winkler has pointed out, in cases between 1990 and 2003, where strict scrutiny was applied to campaign finance laws, such laws survived the application of strict scrutiny in 24% of cases. *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 845 (2006).

[41] Although Justice Kennedy's opinion claims that the 100,000 page factual record in *McConnell v. Federal Election Commission* contains no evidence of "quid pro quo" corruption, and only "scant evidence" that independent expenditures even ingratiate, *Citizens United*, Slip op. at 45 (citing *McConnell v. Federal Election Comm.,* 251 F.Supp.2d 176, 555–557 (D.D.C. 2003) (opinion of Kollar-Kotelly, J)), this claim is somewhat disingenuous. However voluminous the factual record in *McConnell,* that case is not on point since it focused on two different issues – the constitutionality of restrictions on "soft money"

can adequately ensure that voters and shareholders can track the uses and abuses of money in politics; and (3) what benefits and burdens have resulted from the real-world functioning of campaign finance regulations.[42] Rather than remanding the case to the district court for development of these central factual issues, the majority simply enacted into law its own deeply flawed assumptions about political and financial behavior, as explained at greater length below.

A. Connecting the Dots between Corporate Political Spending and Corruption

In oral argument in *Citizens United,* Justice Alito noted that:

> [M]ore than half the States, including California and Oregon, Virginia, Washington State, Delaware, Maryland, [and] a great many others, permit independent corporate expenditures for just these purposes? Now have they all been overwhelmed by corruption? A lot of money is spent on elections in California; has – is there a record that the corporations have corrupted the political process there?

The *Citizens United* majority did not wait for these questions to be answered. Instead of remanding to the lower court for a factual determination upon the nexus between corporate independent expenditures and political corruption, the majority simply ruled by judicial fiat that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[43] In reaching this conclusion, the Supreme Court has constitutionally enshrined what Senator John McCain has described as the Court's "extreme naivete" regarding the influence of corporate money in politics.[44]

Even in the absence of a developed factual record, examples from the real world of money and politics cast substantial doubt upon the Court's premature conclusion:

- In a 2006 state legislative race in California, where corporate expenditures have long been unregulated, a group headed by Indian gaming tribes spent $404,323 in independent expenditures in support of the successful candidate. This

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contributions to political parties and the use of so-called "sham issue ads" to circumvent regulations on corporate electioneering.

[42] Supplemental Brief of Amici Curiae Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 9-10 (2009), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_mccain_supp_brief_amici.pdf.

[43] *Citizens United*, Slip. op. at 45.
Transcript of Oral Argument at 50-51, *Citizens United*, No. 08–205 (Sept. 12, 2009)..

[44] *See* Reid Wilson, *Supreme Court Sharply Questions Ban on Corporate Spending*, THE HILL, Sept. 9, 2009, *available at* http://thehill.com/homenews/campaign/57887-court-sharply-questions-ban-on-corporate-spending.

independent expenditure by a single special-interest group equaled 29% of the total expenditures made by the candidate herself.[45]

- Also in California, Intuit, a software corporation that distributes the "Turbo Tax" software program funneled $1 million through a group called the Alliance for California Tomorrow, which spent that money on independent expenditures in support of a state controller who opposed the creation of a free-on-line tax preparation program for California residents.[46] The candidate himself spent only slightly more than $2 million on his own campaign.[47]
- In a 2000 Michigan senate race, Microsoft used the Chamber of Commerce to fund $250,000 in attack ads against a candidate. Because the tax code does not require trade organizations such as the Chamber to disclose the identity of its donors, Microsoft's involvement in the election would be unknown but for a newspaper article that exposed its contribution.[48]
- In states that allow corporate independent expenditures, there is ample reason to believe that corporations use this loophole to circumvent contribution limits. For example, independent expenditures skyrocketed after California enacted contribution limits for the first time. According to a report by the state's Fair Political Practices Commission, in the six years after the enactment of these limits, independent expenditures increased by 6,144% in legislative races and 5,502% in statewide races.[49]

Fortunately, the Court has left a door open for Congress to craft regulation over corporate expenditures, as long as the regulation is based on a strong factual showing of the relationship between such expenditures and corruption. Despite its assumption that independent expenditures do not lead to corruption or the appearance of corruption, in *Citizens United* the Court indicated that it would be "concern[ed]" "[i]f elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle."[50] Thus, a potential response to *Citizens United* is an in-depth investigation into the link between corporate independent expenditures and the creation of political debt.

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[45] CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE 40 (2008), *available at* http://www.fppc.ca.gov/ie/IEReport2.pdf.

[46] *See* Campaign Finance Reports for Intuit and Alliance for California Tomorrow, *available at* http://cal-access.ss.ca.gov/default.aspx; Dennis J. Ventry Jr., *Intuit Uses Clout to Stymie State Innovation*, SACRAMENTO BEE, Oct. 6, 2009, *available at* http://www.sacbee.com/1190/story/2233219.html.

[47] Campaign Finance Reports for Tony Strickland's Candidate Committee, *available at* http://cal-access.ss.ca.gov/Campaign/Candidates/Detail.aspx?id=1005462&session=2005.

[48] *See* CENTER FOR POLITICAL ACCOUNTABILITY, HIDDEN RIVERS 13 (2006), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932; JOHN R. WILKE, *Microsoft Is Source of 'Soft Money' Funds Behind Ads in Michigan's Senate Race*, WALL STREET JOURNAL, Oct. 16, 2000.

[49] CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, *supra* n. 45 at 4.

[50] *Citizens United*, Slip op. at 45.

Moreover, as demonstrated by the Court's decisions in *McConnell v. Federal Election Commission*[51] and *Caperton*, the Supreme Court has been willing to find that corporate political spending and independent expenditures can lead to actual or apparent corruption when there was a strong factual record demonstrating such a connection. In *McConnell*, the court upheld Congress's soft money ban because of the strong record of soft-money influence peddling created by Congress in enacting BCRA. Similarly, in *Caperton*, the Court, shocked by the sordid factual record before it, was unable to deny that large independent expenditures can give rise to corruption. A developed factual record demonstrating the clear connections between corporate political spending and corruption of our elected officials can inject some much-needed reality into the Court's naïve view of money in politics.

B. Demanding Accountability Through Consent and Disclosure

Another troubling assumption adopted by the *Citizens United* majority is that current disclosure laws allow both the electorate and corporate shareholders to make informed decisions and give proper weight to different speakers and messages. In the opinion, Justice Kennedy makes the following unsupported assumption:

> With the advent of the Internet, 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. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[52]

However, Justice Kennedy's vision of transparency and free flow of information bears no relation to what occurs in real life.[53] Under the current laws, businesses can hide their political spending in several different ways.

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[51] 540 U.S. 93 (2003).

[52] *Citizens United*, Slip op. at 55 (citations omitted).

[53] For example, independent expenditures – the very type of political expenditures unleashed by *Citizens United* – are underreported in most states. As one report explained, "holes in the laws – combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws – results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public." LINDA KING, INDECENT DISCLOSURE PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE

First, it is perfectly legal for businesses that want to influence politics to funnel money through nonprofit trade associations such as the Chamber of Commerce to avoid disclosure.[54] Although businesses must reveal their identities to the FEC on public reports if they buy advertising on their own, they can anonymously give money to nonprofits, which only have to disclosure the sources of their advertising money if the donors specified that their contributions were intended for political ads—a requirement most sophisticated players avoid.[55] Thus, most money coming through trade associations cannot be traced back to corporations and is never disclosed to the public. Examples of corporations hiding their involvement through the use of trade associations abound:

- As mentioned in the first section, in 2009 the Chamber of Commerce spent $144.5 million on advertising, lobbying and grass-roots activism, all while legally concealing the names of its funders.[56]
- Included in this $144.5 million was a $2 million campaign to defeat financial regulatory reform legislation. Additionally, a Chamber-backed group pledged to spend $200 million to fight the Employee Free choice Act in 2009. It hasn't disclosed which corporations funded either of these campaigns.[57]
- The America's Health Insurance Plans (AHIP), a trade association, was recently found to have solicited $10 million to $20 million from six leading health insurers, and funneled this money secretly to the US Chamber of Commerce to underwrite anti-health reform attack ads.[58]
- A 2007 study of independent expenditures in state politics found that, although 39 states required some disclosure by political advertisers, the laws in most were riddled with loopholes, such that only five states required enough detail to link sponsors with specific ads.[59]

STATE LEVEL 4 (National Institute of Money in Politics 2007), *available at* https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1.

[54] TORRES-SPELLISCY, *supra* note 12, at 12.

[55] Although trade associations must report contributions received from other corporations to the Internal Revenue Service, the document itself remains confidential and is not made available to the public. *See* I.R.S. Instructions for Form 990 Return of Organization Exempt From Income Tax 4 (2009), http://www.irs.gov/pub/irs-pdf/i990.pdf.

[56] Chisun Lee, *Higher Corporate Spending on Election Ads Could Be All but Invisible*, PROPUBLICA, March 10, 2010, *available at* http://www.propublica.org/article/higher-corporate-spending-on-election-ads-could-be-all-but-invisible.

[57] Zachary Roth, *Chamber CEO's 'Striking Innovation': Helping Corporate Backers Fund Attack Ads On The Down-Low*, TALKING POINTS MEMO, Jan. 14, 2010, *available at* http://tpmmuckraker.talkingpointsmemo.com/2010/01/chamber_ceos_striking_innovation_helping_corporate.php.

[58] Brad Jacobson, *Exclusive: How Corporations Secretly Move Millions to Fund Political Ads*, THE RAW STORY, Feb. 4, 2010, *available at* http://rawstory.com/2010/02/exclusive-trade-groups-swiss-bank-accounts-campaign-finance/.

[59] LINDA KING, *supra* note 53.

Indeed, in the wake of *Citizens United*, law firms have advised clients that the law allows them to contribute to trade associations to avoid public scrutiny.[60] As demonstrated in the first section of this paper, trade associations plan to take full advantage of this new ability— all without disclosing which corporations have donated the money to fund the ads.

Second, corporations have regularly cloaked their political spending by using conduit organizations to disguise their true identity, often making it difficult for voters to determine the true agenda of those funding the passage of their laws:

- In a recent Colorado election, a group called "Littleton Neighbors Voting No," spent $170,000 to defeat a restriction that would have prevented Wal-Mart from coming to town. When the disclosure reports for these groups were filed, however, it was revealed that "Littleton Neighbors" was merely a front for Wal-Mart —the group was exclusively funded by Wal-Mart, and not a grass roots organization at all. Another group called "Littleton Pride," a true grassroots organization, spent only $35,000 in support of the prohibition. Thus, Wal-Mart was able to outspend the true grassroots group by a 5:1 ratio.[61]
- As the record in *McConnell* demonstrated, corporations commonly veil their political expenditures with misleading names. For example, "The Coalition-Americans Working for Real Change" was a business organization opposed to organized labor and "Citizens for Better Medicare" was funded by the pharmaceutical industry.[62]
- The North Carolina Association of Realtors spent $2.7 million to defeat 20 local referendums on land transfer taxes and pushed this money through nearly 30 organizations. Nearly $1 million of this money went to a group misleadingly named the "North Carolina Homeowner's Alliance," which developed ads and mailers critical of the tax proposal. The rest went to almost two dozen local referendum committees, which filed money with their local boards of election, and not with the state, to make the money harder to track.[63]

Moreover, the majority's assumption that corporate political spending must be disclosed to shareholders is similarly incorrect. Under current laws regulating

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[60] *See, e.g.*, Tim L. Peckinpaugh and Stephen P. Roberts, *Citizens United: Questions and Answers Public Policy and Law Alert*, K&L Gates Client Alert, Feb. 12, 2010, *available at* http://www.klgates.com/newsstand/Detail.aspx?publication=6214.

[61] Def.'s Response Br. to Pls.'s Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

[62] *See* 540 U.S. at 128, 197.

[63] Scott Mooneyham, *State Legislators Playing Whack-a-Mole with Campaign Finance Laws*, THE DAILY REFLECTOR, Mar. 12, 2010, *available at* http://www.reflector.com/opinion/scott-mooneyham-state-legislators-playing-whack-mole-campaign-finance-laws-26683.

corporations, nothing requires corporations to disclose to shareholders whether funds are being used to fund politicians or ballot measures, or how the political money is being spent.[64] In short, corporate managers could be using shareholder funds for political spending, without the knowledge or consent of investors.

1. Giving Shareholders a Voice

The Brennan Center has proposed a remedy to this disclosure gap in our recently-issued report *Corporate Campaign Spending: Giving Shareholders a Voice*.[65] We suggest two specific reforms: first, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require managers to report corporate political spending directly to shareholders.

These requirements will increase corporate accountability by placing the power directly in the hands of the shareholders, thereby ensuring that shareholders' funds are used for political spending only if that is how the shareholders want their money spent. Moreover, the disclosure requirement serves valuable information interests, leaving shareholders better able to evaluate their investments and voters better-equipped to make informed choices at the polls. The report includes model legislation to effectuate the proposed reforms.

2. Empowering Voters Through Disclosure

Although disclosure laws alone are not sufficient to safeguard democracy, the importance of disclosure to the health of our democracy cannot be overstated.

Unfortunately, there is currently a sustained and unrelenting wave of legal challenges aimed at eliminating the (already weak) disclosure requirements for independent expenditures. Indeed, the *New York Times* recently quoted the attorneys who brought the *Citizens United* suit as stating that disclosure was their next target in a ten-year strategy to eliminate campaign finance regulations.[66] As noted above, *Doe v. Reed*, which was brought by the same lawyers as *Citizens United*, will be argued before the Court in several weeks.[67] Although that case does not implicate campaign finance disclosures directly (it involves the disclosure of ballot petition signatures), the

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[64] *See* Jill Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006) ("Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls.").

[65] *See* TORRES-SPELLISCY, *supra* n.12 .

[66] *See* Kirkpatrick, *supra* n.38.

[67] *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, __ S.Ct.__, 2010 WL 144074 (2010) (No. 09-559).

plaintiffs advance a broad conception of a right to anonymous speech, which would clearly undermine campaign finance disclosure regimes.

To be sure, *Citizens United* upheld BCRA's disclosure requirements, and expressly affirmed the importance of disclosure as a means of "'provid[ing] the electorate with information' about the sources of election-related spending." [68] Nonetheless, the majority opinion dropped several hints that could provide opponents of disclosure with a roadmap for a successful constitutional challenge to these laws.

First, the Court sent a subtle message that evidence of harassment or retaliation might be a sufficient foundation for a successful challenge to disclosure laws.[69] The majority specifically remarked that examples of harassment against contributors to various initiatives were "cause for concern," but noted that Citizens United had demonstrated no record of harassment. However, as the dissent noted, striking down valuable disclosure laws on constitutional grounds to guard against harassment would be using "a sledgehammer rather than a scalpel."[70] A more tailored approach would increase the robustness of anti-harassment laws to protect the constitutional interests of both contributors and the public at large.

Second, the Court sent a worrying signal for supporters of disclosure in holding that requiring corporations to form a PAC for corporate political expenditures was so burdensome as to constitute a ban on political speech.[71] The Court assumed the existence of an unconstitutional burden despite the absence of any factual record demonstrating any "chill" or other harm.

A vision of the First Amendment which privileges secrecy and anonymity over transparency and accountability has no place in our representative democracy. To defend existing laws and enact new reforms, a factual record is needed. Specifically, we must push back against arguments that disclosure requirements chill speech as a matter of course, or are necessarily unduly burdensome.

C. Combating the Majority's Myth of Government Censorship

Finally, as indicated by Justices Scalia's and Kennedy's questions at oral argument, the *Citizens United* majority appears to believe that the true purpose of campaign finance disclosure laws is to silence potential critics who might otherwise be able to use corporate resources to criticize governmental policy and decision makers. The majority states:

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[68] *Citizens United*, Slip op. at 52 (quoting *Buckley v. Valeo*, 424 U. S. 1, 66 (1976)).
[69] *Id*. at 54-55.
[70] *Id*. at 7 (Stevens, J., dissenting).
[71] *Id*. at 21.

> The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.[72]

Not surprisingly, the Court cites no evidentiary basis whatsoever for its conclusions on government censorship. Accordingly, there is no support for the Court's assumption that regulations on corporate political spending had in any way "silenced" any corporation from effectively expressing its "opinions" regarding any policy, candidate, or any other matter. As Justice Stevens wryly notes in dissent:

> While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.[73]

In short, the majority bases its censorship analysis on nothing other than the personal views of five justices.

In fact, as Solicitor General Kagan pointed out at oral argument and as a Brennan Center study has demonstrated, the available evidence shows that campaign finance reforms such as contribution limits and public financing appear to benefit challengers rather than incumbents.[74] Further investigation of the effects of campaign finance laws on such factors as incumbency rates, electoral competition, fundraising patterns, and candidate diversity is urgently needed to push back against the majority's censorship myth.

4. Enhancing First Amendment Values by Empowering Voters

A. Public Funding of Political Campaigns

The Court in *Citizens United* reaffirmed that "it is our law and our tradition that more speech, not less, is the governing rule."[75] The Court thus reiterated the "more

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[72] *Citizens United*, Slip. op. at 38-39 (citations omitted).. At another point in the decision Justice Kennedy similarly assumed that Congress's motives were invidious, stating "[the law's] purpose and effect are to silence entities whose voices the Government deems to be suspect." *Citizens United*, Slip op. at 23

[73] *Id*. at 90 (Stevens, J., dissenting).

[74] *See* Transcript of Oral Argument at 50-51; CIARA TORRES-SPELLISCY, KAHLIL WILLIAMS, DR. THOMAS STRATMANN, ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS (The Brennan Center for Justice 2009); Thomas Stratman, "The Effect of Public Financing on the Competitiveness of Elections" (May 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400809.

[75] *Citizens United*, Slip op. at 45.

speech" principle on which the Court upheld the presidential public financing system in *Buckley v. Valeo*. The *Buckley* Court broadly approved of public funding programs, finding that they represent a governmental effort, "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[76] By making it possible for candidates to run a viable, competitive campaign through grassroots outreach alone, public funding programs decrease the need for deep-pocketed supporters. By opting into such a system, candidates can choose to be beholden to the electorate, rather than to deep-pocketed special interests.

Public funding programs also have the potential to promote meaningful electoral participation by a diverse range of citizens. Systems that award multiple matching funds for small contributions, like that proposed in the *Fair Elections Now Act,* introduced by Illinois Senator Richard Durbin and Connecticut Representative John Larson, as well as the public financing system in New York City, amplify the voices of actual citizens, and can be an effective counterbalance to unrestrained corporate spending. Moreover, by encouraging candidates to seek donations from a large number of voters, such programs facilitate broad participation in the election process.

The swing district polling discussed above indicates that strong reforms – and particularly public financing – have become issues that will affect voters' choices at the ballot box:

- A significant segment of respondents—by a 40% to 23% margin—would be more likely to vote for their member of Congress if he or she supported the Fair Elections Now Act.
- By a margin of 6% (36% to 30%) respondents would be more likely to support a politician voting for a transparency and disclosure measure.[77]

It is worth noting that, in the above polling, public financing – a large-scale reform – significantly outpolled transparency and disclosure reforms, which are less comprehensive. A significant segment of swing-district voters appear to realize that public financing – a political game-changer – is the appropriate response to the Court's deregulation of our campaign finance laws.

Ever since public financing systems were enacted, they have faced constitutional challenges brought by those who claim that their First Amendment rights are violated when the state awards funds to qualified publicly-financed candidates.[78] Courts,

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[76] *Buckley*, 424 U.S. at 92-93.

[77] *See* Donnelly, *supra* n. 9.

[78] Matching fund provisions, that disburse additional money to participating candidates when they are targeted by independent expenditures or high spending opponents, have been particularly targeted.

agreeing that public financing furthers First Amendment values, have consistently upheld such systems against constitutional challenge.[79] Recently, however, a new slew of challenges have been launched. These new challenges claim that the Roberts Court's 2008 decision in *Davis v. FEC*[80] has cast doubt on this previously well-settled area of the law. As a result, lawsuits challenging the public funding programs in Connecticut and Arizona are pending before the Second and Ninth Circuits respectively; and two new challenges were recently launched in Wisconsin, again by the same opponents of reform who brought the *Citizens United* lawsuit.[81]

B. Voter Registration Modernization

Bringing new eligible voters into the political process is another "more speech" solution to *Citizens United*. This can be accomplished by bringing our voter registration system into the 21st century, an initiative which, in the words of Attorney General Eric Holder, would "remove the single biggest barrier to voting in the United States."[82] Indeed, if today's system were modernized, it could bring as many as 65 million eligible Americans into the electoral system permanently – while curbing the potential for fraud and abuse.

Voter registration modernization ("VRM") necessitates that the government automatically and permanently register all eligible citizens, and provide failsafe mechanisms to ensure same-day registration. A bipartisan coalition actively supports federal VRM legislation, and states from around the country are currently moving to implement the idea. A dozen states have already adopted internet registration; at least nine have implemented parts of automated registration; eight others have permanent registration; and another eight have Election Day registration.

These mechanisms, usually known as matching funds, are used to incentive participation in public financing programs while still preserving public monies.

[79] *See North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008) (affirming denial of preliminary injunction against North Carolina's public financing system for appellate judicial elections); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding system for elections); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (upholding Rhode Island's public funding system).

[80] 128 S.Ct. 2759 (2008).

[81] Matching fund provisions were struck down at the district court level in Connecticut and in Arizona. *See Green Party v. Garfield*, 648 F.Supp.2d 298 (D.Conn. Aug. 27, 2009), *argued* (2d Cir. Jan. 13, 2010); *McComish v. Brewer*, No. CV-08-1550 (D.Ariz. Jan. 20, 1010), *appeal docketed* (9th Cir. Jan. 26, 2010). In Wisconsin, recently-filed lawsuits challenge the mechanism by which Wisconsin's program distributes money to participants and the reporting requirements of the system. *Wisconsin Right to Life v. Brennan*, 09-cv-764 (W.D. Wi. 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D. Wi. 2009).

[82] Eric Holder, Attorney General, Remarks at the Brennan Center for Justice Brennan Legacy Awards Dinner on Indigent Defense Reform (Nov. 16, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html.

Voter registration modernization would help us live up to our ideal of being a nation governed with the consent of the governed. We should aspire to get as close to full registration of eligible voters as possible. If enacted, voter registration modernization could be the most significant voting measure since the Voting Rights Act.

C. Advancing A Voter-Centric View of the First Amendment

Perhaps the most troubling aspect of *Citizens United* – worse than its political implications, and worse than its aggressive deregulatory stance – is that the Court embraces a First Amendment where voters are conspicuously on the sidelines. At the start of the *Citizens United* opinion, Justice Kennedy correctly noted that "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[83] As the opinion proceeded, however, it became evident that the majority was in fact taking a myopic view of campaign finance jurisprudence, one that focuses exclusively on campaigns, candidates, parties and corporate interests – at the expense of the voters.[84] The Court's ultimate judgment held, in effect, that whatever interest is willing to spend the most money has a constitutional right to monopolize political discourse, no matter what the catastrophic result to democracy.

This aspect of *Citizens United* – like many others – constitutes a break with prior constitutional law. The Court has long recognized that "constitutionally protected interests lie on both sides of the legal equation."[85] Accordingly, our constitutional system has traditionally sought to maintain a balance between the rights of candidates, parties, and special interests to advance their own views, and the rights of the electorate to participate in public discourse and to receive information from a variety of speakers.[86]

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[83] *Citizens United*, Slip op. at 23.

[84] The Court's central concern was that "[t]he Government ha[d] 'muffle[d] the voices that best represent the most significant segments of the economy.'" *Id*. at 38. *See also id*. at 35-37 (finding differential treatment of media corporations and other corporations troubling); 38-40 (worrying that "smaller corporations may not have the resources" to lobby elected officials like larger corporations); 43 ("'It is well understood that a substantial and legitimate reason, if not the only reason . . . to make a contribution . . . is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.'" (quoting Kenndy, J., dissenting in *McConnell*, 540 U. S. at 297)).

[85] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 590 (1957) (noting "delicate process" of reconciling labor union's rights with value in promoting "active, alert responsibility of the individual citizen in a democracy").

[86] *See, e.g.*, *Shrink Missouri*, 528 U.S. at 390 (balancing candidate's and political committee's claims with threat that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"); *Federal Election Commission v. Mass. Citizens for Life*, 479

It is essential to recognize the Roberts Court's one-sided view of the First Amendment as a distortion – one which threatens to erode First Amendment values under the guise of protecting them. In truth, our constitutional jurisprudence incorporates a strong First Amendment tradition of deliberative democracy – an understanding that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate. This is why our electoral process must be structured in a way that "build(s) public confidence in that process," thereby "encouraging the public participation and open discussion that the First Amendment itself presupposes."[87]

Conclusion

In this post-*Citizens United* era, a robust legislative response, supported by an equally robust factual record, will be necessary to restore the primacy of voters in our democracy. The immediate enactment of stop-gap measures such as shareholder consent and increased disclosure, as well as structural reforms such as public financing and voter registration modernization, will mitigate the damage that *Citizens United* may cause.

However, in the long term, reclaiming the First Amendment for the voters will be the best weapon against those who seek to use the "First Amendment" for the good of the few, rather than for the many.

U.S. 238, 257-58 & n.10 (1986) (balancing nonprofit organization's interests with importance of protecting "the integrity of the marketplace of political ideas" necessary for citizens to "develop their faculties"); *Federal Election Commission v. National Right to Work Comm.*, 459 U.S. 197, 560 (1982) (balancing corporate interests against the value of promoting "the responsibility of the individual citizen for the successful functioning of that process").

[87] *Shrink Missouri*, 528 U.S. at 400.