SYMPOSIUM: *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: IMPLICATIONS FOR THE AMERICAN ELECTORAL PROCESS

CORPORATIONS, CORRUPTION, AND COMPLEXITY: CAMPAIGN FINANCE AFTER *CITIZENS UNITED*

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INTRODUCTION

Few campaign finance cases have drawn more public attention than the Supreme Court's decision in *Citizens United v. FEC*.[1] The Court's invalidation of a sixty-year-old federal law—and comparable laws in two dozen states[2]—banning corporations from engaging in independent spending in support of or opposition to candidates strongly affirms the right of corporations to engage in electoral advocacy. Critics—and most, albeit not all, of both the popular and academic commentary on the decision has been critical—have condemned the idea that corporations enjoy the same rights to spend on elections as natural persons. As one satirical YouTube video suggested, the logical follow-on to the *Citizens United* decision is to have a corporation run for election to Congress.[3] As the corporate "candidate's" website proclaims, "Corporations are people,

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1 130 S. Ct. 876 (2010).

2 *See Life After* Citizens United*: State Laws Affected by* Citizens United, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 2010), http://www.ncsl.org/default.aspz?tabid=19607.

3 *See* Murrayhillcongress, *Murray Hill Incorporated is Running for Congress*, YOUTUBE (Jan. 25, 2010), http://www.youtube.com/watch?v=HHRKkXtxDRA.

too!"[4] Following closely on the heels of massive multi-billion dollar bailouts for financial institutions and major automobile manufacturers, the *Citizens United* decision crystallized for many people the concern that corporate money dominates American politics.

Although anxiety about the role of corporate money in politics may be well-founded, the impact of *Citizens United* may ultimately have less to do with corporate spending and more with the changes the decision could lead to in other areas of campaign finance—including areas that the Court itself insisted were not at issue in the case. Prior to *Citizens United*, corporations were already able to spend virtually as much as they wanted in connection with elections, due in part to a prior decision of the Supreme Court that received far less attention. Moreover, even though *Citizens United* overturned two Court precedents, the decision actually follows from the main lines of the Court's campaign finance jurisprudence. The decision was predictable, even if not inevitable. To the extent that observers were shocked by the decision, they simply had not been paying attention to the Court's earlier cases.

On the other hand, the rhetoric and reasoning in *Citizens United* may well provide the foundation for a doctrinal shift with respect to other aspects of campaign finance law. First, in the course of rejecting the argument that corporate independent spending may give corporations the kind of undue influence over elected officials that in other settings has justified the regulation of campaign money, Justice Kennedy's majority opinion reopened the question of what counts as the kind of "corruption" that can support restrictions on campaign money. In *McConnell v. FEC*,[5] the Court embraced a fairly capacious definition of corruption, concluding that Congress could regulate not only to "prevent[ ] simple cash-for-votes corruption"[6] but also the "sale of access" and the use of campaign funds to obtain "undue influence" with officeholders.[7] Justice Kennedy dissented sharply on this point, emphasizing the need to restrict the "corruption" that would justify campaign finance limits to *quid pro quo* arrangements between donors and candidates.[8] In *Citizens United*, Justice Kennedy turned his *McConnell* dissent into part of the reasoning of the majority opinion. Indeed, he cited and quoted at length from his *McConnell* opinion without indicating that the opinion had been a dissent.[9] Although *Citizens United* emphasized the distinction between expenditures and contributions in striking down the longstanding limits on corporate and union spending, Justice Kennedy's importation of his *McConnell*

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4 *See id.*
5 540 U.S. 93 (2003).
6 *Id.* at 150.
7 *Id.* at 154.
8 *Id.* at 291–98 (Kennedy, J., dissenting).
9 Citizens United v. FEC, 130 S. Ct. 876, 909–10 (2010).

dissent into his *Citizens United* majority opinion could provide the basis for a restrictive approach to contribution limits as well. Indeed, it would not be surprising to see *Citizens United* converted into a springboard for reopening the constitutionality of the limits on party soft money once thought to have been settled by *McConnell*.[10]

Second, the *Citizens United* Court expressed concern about the complexity of campaign finance law,[11] suggesting that the law's many fine distinctions and administrative requirements amount to burdens on constitutional rights. Justice Kennedy cited and quoted from an amicus brief filed by seven former Federal Election Commission chairs concerning the "unique and complex rules" of campaign finance law,[12] and cited the administrative burdens placed on corporate political action committees (PACs) in reasoning that the availability of the PAC mechanism for corporate spending did not adequately protect the constitutional rights of corporations. This could provide significant ammunition for future challenges to campaign finance regulation. Campaign finance law is bound to be complex. It involves drawing multiple fine distinctions—including some mandated by the Court itself; exemptions and exclusions intended to meet constitutional requirements; and detailed explications of rules and restrictions in order to respond to, or preclude, the inevitable efforts by politicians, parties, and interest groups to circumvent legal requirements. If complexity is itself a problem, much of campaign finance regulation will be under a cloud. Ironically, a concern about complexity could undermine the one form of regulation that *Citizens United* itself celebrated—disclosure.[13] Justice Kennedy asserted that the best response to popular concern about corporate participation in elections is disclosure.[14] But effective disclosure of corporate campaign spending is likely to require complex and detailed rules.[15] With many business corporations likely to channel their funds through other organizations, disclosure will have to address not merely the spender of record, but the corporations and other donors contributing to those organizations. Effective disclosure may also entail detailed "disclaimer" provisions that would indicate the primary funders of the sponsoring organization in the body of its ad. The DISCLOSE Act that passed the House of Represent-

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[10] *Cf.* Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 158 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3544 (2010) (mem.).

[11] *Citizens United*, 130 S. Ct. at 895.

[12] *Id.*

[13] *Id.* at 913–16.

[14] *Id.*

[15] *Cf.* National Ass'n of Manufacturers v. Taylor, 582 F.3d 1 (D.C. Cir. 2009) (affirming new lobbying law provision requiring lobbyists to disclose the identity not just of its clients but of any organization that "actively participates" in the planning, supervision, or control of lobbying activities for a client).

atives in June 2010 contained many complex disclosure provisions,[16] and was sharply criticized by campaign finance reform opponents for its complexity. If, as *Citizens United* suggests, regulatory complexity is itself a constitutional burden, campaign finance law in general—and disclosure in particular—may be in trouble.

Part I of this Article addresses *Citizens United* and corporations. It suggests that *Citizens United* is unlikely to "unleash" corporate campaign spending since corporate spending was not really leashed by the law prior to the decision. It also examines the place of *Citizens United* in the Court's evolving thinking about the proper treatment of corporate electoral activity. Part II then considers the *Citizens United* statements about the meaning of corruption. Although the holding in *Citizens United* emphasizes the differences between independent spending and contributions,[17] the Court's discussion of corruption is also directly applicable to contributions and could provide the basis for easing or undoing restrictions on soft money donations. Finally, Part III examines *Citizens United*'s discussion of the constitutional burdens posed by regulatory complexity and the potential implications of the Court's new concern with complexity for disclosure and disclaimer requirements.

I. CORPORATIONS

A. *Corporate Spending Before* Citizens United

The movement to limit corporate participation in electoral politics began in the 1890s, in tandem with the rise of corporate spending in elections. By 1905, five states had barred corporate campaign contributions;[18] by 1928, twenty-seven states had banned all corporate contributions and an additional nine barred contributions from certain categories of corporations, such as banks, public utilities, and insurance companies.[19] Congress first banned corporate contributions to federal candidates in 1907. That restriction was extended to corporate spending, accompanied by a parallel restriction on contributions and expenditures by labor unions, in the Taft-Hartley Act of 1947. Prior to the *Citizens United* decision, twenty-four states similarly prohibited corporate spending in support of or opposition to election candidates.[20]

16 *See* Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. § 2 (2010).

17 *Citizens United*, 130 S. Ct. at 901–02.

18 LOUISE OVERACKER, MONEY IN ELECTIONS 294 (1932).

19 EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 127–28 (1928).

20 See *Life After* Citizens United*: State Laws Affected by* Citizens United, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 4, 2010), http://www.ncsl.org/default.aspx?tabid=19607.

But the fact that a law prohibits corporate campaign spending does not mean that a corporation may not legally spend money in support of or opposition to a candidate. Rather, even before *Citizens United* there were multiple legal channels enabling a corporation to deploy considerable amounts of money in elections.

First, corporations were free to engage in so-called "internal communications," that is, campaign communications from the corporation to its shareholders and executive and administrative personnel and their families.[21] These internal communications, which were not subject to any monetary limit, could include messages expressly advocating the election of the corporation's favored candidate or the defeat of her opponent. Second, federal law permitted corporations to spend without limit on "nonpartisan activity designed to encourage individuals to vote or register to vote,"[22] and to undertake "nonpartisan registration and get-out-the-vote campaigns" aimed at their own stockholders and executive and administrative personnel.[23] Although such campaigns had to be nonpartisan in content, nothing in the law precluded a corporation from targeting its registration and get-out-the-vote efforts on groups it believed were likely to support the corporation's favored candidates. Third, under federal law a corporation is free to spend corporate resources to establish and pay for the administrative expenses of a "separate segregated fund to be utilized for political purposes"[24]—better known as a political action committee or PAC. The corporation may also pay for the costs of soliciting donations—from shareholders, executive and administrative personnel and their families, or under certain circumstances from all corporate employees and their families—to the PAC, which could be used by the PAC to make contributions or undertake independent spending in support of or opposition to candidates.[25] There were no monetary limits on the amount of independent spending a PAC could undertake—although the contribution a shareholder, executive, or other employee or family member could make to the PAC was capped at $5,000 per year.[26] Although *Citizens United* referred to a PAC as "a separate association from the corporation,"[27] legally it is entirely controlled by the corporation that creates it. The corporation selects its officers and staff and, most importantly, the corporation can determine which candidates the PAC supports and how much money it can spend with respect to each of those candi-

[21] 2 U.S.C. § 441b(b)(2)(A) (2006). This exemption was implicitly constitutionally required. *See* United States v. CIO, 335 U.S. 106, 121 (1948).

[22] *Id.* § 431 (9)(B)(ii) (excluding such activity from the definition of "expenditure").

[23] *Id.* § 441b(b)(2)(B).

[24] *Id.* § 441b(b)(2)(C).

[25] *Id.* §§ 441b(b)(2)(C), 441b(b)(4)(A), (B).

[26] *Id.* § 441a(a)(1)(C).

[27] 130 S. Ct. 876, 897 (2010).

dates.[28] The PAC is the corporation's legally authorized campaign spending alter ego, although it can spend only what it raises in voluntary donations from corporate stockholders and personnel, not from the corporation's general treasury.[29]

Fourth, and most important, the restrictions on corporate spending apply only to a narrowly defined category of election-related communications. The precise scope of that category has varied over time, from relatively constrained at first, to somewhat broader in 2003–2007, to more limited in the years immediately preceding *Citizens United*. *Buckley v. Valeo* limited the definition of campaign "expenditure" for all groups other than candidates and political parties to communications that expressly advocate the election or defeat of a clearly identified candidate for federal office, and then went on to define express advocacy as consisting of terms like "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"[30] These became known as the "magic words" of express advocacy. All other activity came to be known as "issue advocacy," even though it need not involve the discussion of issues.

The express advocacy standard proved extremely easy for corporations and other campaign participants to evade. An advertisement could warmly praise or sharply criticize a candidate for office, but so long as it avoided literally calling on voters to elect or defeat that candidate it would be treated as issue advocacy, not express advocacy. Even discussion of a candidate's character, personality, or private life was issue advocacy so long as there was no call to vote for or against that candidate. To guarantee that an ad would be treated as issue advocacy not express advocacy, a sponsor could include a tag line urging the viewer or listener to call the sponsor for more information, or to call the candidate depicted in the ad and tell him or her what the caller thinks of the candidate's actions or positions. As such advocacy was not electoral, the ad would not be considered express advocacy. With most campaign professionals recognizing that many of the most successful election ads by candidates relied on more subtle pitches than literally calling on voters to vote a certain way, the express advocacy standard assured that the vast majority

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28 *Cf.* Pipefitters Union Local No. 562 v. United States, 407 U.S. 385, 414–17 (1972).

29 Most states that limited corporate spending in state elections also permitted corporations to create and use PACs for state campaign activity. The limits on individual donations to corporate PACs varied according to state law, but federal constitutional law barred limits on state PAC independent spending just as it permitted unlimited federal PAC independent spending.

30 Buckley v. Valeo, 424 U.S. 1, 39–44 & n.52 (1976).

of election ads placed by campaign participants other than candidates would be exempt from campaign finance regulation.[31]

In *McConnell v. FEC*,[32] the Court acknowledged the inadequacy of the express advocacy test and upheld the provision in the Bipartisan Campaign Reform Act of 2002 (BCRA) extending the prohibition on corporate and union campaign expenditures to a newly defined category of "electioneering communications," which consist of broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office, are targeted on that candidate's constituency, and are aired within the thirty days before a primary or the sixty days before a general election in which that candidate is running.[33] The Court agreed that based on the evidence before Congress and the record developed in the district court during the litigation challenging the new law that "*Buckley*'s magic-words requirement is functionally meaningless" and that as a result "*Buckley*'s express advocacy line . . . has not aided the legislative effort to combat real or apparent corruption."[34] The Court agreed that the new electioneering communication standard avoided vagueness, and was sufficiently narrowly tailored to rebut the claim that it was unconstitutionally overbroad. Although the Court acknowledged that some advertisements that met the statutory standard might be true issue ads, it found that the "vast majority of ads" covered by the statute had an "electioneering purpose" and were thus the "functional equivalent of express advocacy" and so could, constitutionally, be subject to regulation.[35]

However, much of *McConnell*'s incorporation of the reality of campaign practices into the standard for defining election-related advertising was undone four years later in *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*).[36] In *WRTL*, a closely divided Court, acting without a majority opinion, effectively eviscerated *McConnell*. Although the case began as an attempt to create an as-applied exception to the "electioneering communication" standard for an ad that could plausibly be treated as either electioneering or grass-roots lobbying over a legislative issue, the Court effectively invalidated the statutory standard. The Court found that although, consistent with *McConnell*, the First Amendment does not require the literal "magic words" express advocacy standard adopted in *Buckley*, it does forbid the regulation of any campaign activity that is not

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31 *See generally* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999) (explaining that issue advocacy campaigns may not be subject to dollar limitations).

32 540 U.S. 93, 218, 224 (2003).

33 2 U.S.C. §§ 434(f)(3), 441b(b)(2), 441b(c)(1) (2006).

34 540 U.S. at 193–94.

35 *Id.* at 206.

36 551 U.S. 449 (2007).

the "functional equivalent" of *Buckley*-style express advocacy.[37] The Court then turned *McConnell*'s use of the "functional equivalent" phrase on its ear, converting it from an expansive term intended to capture the creativity of contemporary election advertising to a rule of limitation. According to Chief Justice Roberts, an ad is the functional equivalent of express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[38] *WRTL*, thus, sharply constrained the scope of constitutionally permissible campaign finance regulation—returning almost, but perhaps not quite, back to *Buckley*'s narrow express advocacy requirement. So long as they paid a little attention to the wording of their messages, corporations and unions were once again free to spend as much as they wanted on broadcast ads intended to help or harm candidates in the pre-election period. Indeed, even though *WRTL* left untouched BCRA's requirements concerning the disclosure of electioneering communications, the *Washington Post* found a considerable drop in the disclosure of the funding of such ads following *WRTL*.[39]

Citizens United has gotten the public's attention as the decision that opened up federal and many state elections to corporate ads concerning candidates, but *WRTL* did much of the real work of legally enabling corporate electioneering. This is not to say that the more clear-cut green light given to corporate spending by *Citizens United*, plus the enormous public attention to the issue following the decision in the case, might not affect the actual level of corporate spending. However, under the combination of statutory and case law prior to *Citizens United*, any corporation that really wanted to spend money to back or oppose a candidate was free to do so.

B. The Place of the Corporation in Campaign Finance Doctrine

The regulation of corporate campaign spending marks a central tension in American campaign finance law. On the one hand, for more than a century the corporation has been seen as a special problem for campaign finance. The oldest federal campaign finance law—the Tillman Act of 1907[40]—dealt specifically and exclusively with corporate campaign contributions. The aggregation of wealth symbolized by the corporate war chest, and the threat to democracy said to result from the transfer of huge economic resources into the political process—the concern that one person, one vote will become one dollar, one vote—has

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37 *Id.* at 453.

38 *Id.* at 451.

39 T.W. Farnam, *Despite Supreme Court Support, Disclosure of Funding for 'Issue Ads' Has Decreased*, WASH. POST, Sept. 15, 2010, at A23.

40 Pub. L. No. 59-36, 34 Stat. 864 (1907).

long been a driving force in campaign finance regulation. Since *Buckley v. Valeo*, however, modern campaign finance jurisprudence has been rooted in an effort to provide constitutional protection for campaign money and has dismissed the idea that disproportionate resources for electoral activity and unequal campaign spending are problems that can be addressed by limits on spending.

The Court's jurisprudence on corporate campaign restrictions prior to *Citizens United* can best be seen as an effort to hold together these two very disparate and yet equally well-established themes in our campaign law. The Court upheld the older prohibitions on corporate contributions[41] and expenditures,[42] but buffered their effect and made room for corporate speech through the statutory exceptions already noted—for partisan registration and get-out-the-vote drives and for internal communications; the constitutional limitation on election regulation to express advocacy, and two special additional constitutional exemptions for corporate spending—for not-for-profit corporations, and for corporate spending on ballot proposition elections.

In *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*),[43] the Court held that not-for-profit corporations that did not make money from business activities, did not take money from businesses, and received contributions based on voluntary support of the corporation's views were constitutionally exempted from the spending restraints applicable to business corporations. *MCFL* reasoned that such not-for-profits do not present the dangers of the transfer of large war chests generated through market transactions to political activities.[44] Not-for-profits are corporate in form but do not raise the concerns underlying, and justifying, the restrictions on corporations, which were motivated by the ability of business corporations to amass funds unrelated to support for their political ideas.[45] As a result, the exemption for not-for-profits was entirely consistent with both the older logic that treated corporations as posing a special danger to the political process and the *Buckley* philosophy that campaign finance must accord the greatest constitutional protection to campaign speech.

The exemption for corporate spending on ballot propositions is much less easily reconcilable with the ban on corporate spending in general elections. Indeed, the case in which the Court struck down the pro-

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41 FEC v. Beaumont, 539 U.S. 146, 149 (2003); *see also* FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) (upholding limits on the ability of a corporation to solicit donations to its PAC).

42 McConnell v. FEC, 540 U.S. 93, 102 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654–55 (1990).

43 479 U.S. 238 (1986).

44 *Id.* at 258.

45 *Id.* at 257.

hibition on corporate spending on propositions—*First National Bank of Boston v. Bellotti*[46]—provides the clearest statement before *Citizens United* of the post-*Buckley* view that when it comes to campaign finance regulation it is not the speaker but the speech which really matters for constitutional purposes. Electioneering, said the *Bellotti* Court,

> is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation than from an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source, whether corporation, association, union, or individual.[47]

This was *not* at all consistent with the logic underlying the traditional special treatment of corporations.

Indeed, the tension between *Bellotti*'s invocation of the voting public's interest in what corporations have to say about elections and the concern in *Austin v. Michigan Chamber of Commerce*[48] that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries . . . [which] can unfairly influence elections when it is deployed in the form of independent expenditures"[49] is palpable. *Bellotti* is much closer to *Buckley*'s First Amendment-centered model, which dominates the Court's modern campaign finance jurisprudence. But *Austin*, along with *MCFL* before it, and *FEC v. Beaumont*[50] and *McConnell* afterwards, demonstrate the persistent pull of older political ideas concerning the need to control the role of private wealth and power, particularly the corporation, in elections. In these cases, the post-*Buckley*, post-*Bellotti* Court repeatedly found that Congress and the states could determine that the "substantial aggregations of wealth amassed by the special advantages that go with the corporate form" and enable corporations potentially to create political "war chests" justify especially restrictive regulation of corporate campaign finance practices.[51]

Bellotti and *Austin* did not fit easily in the same jurisprudential space. The same "unique state-conferred corporate structure that facilitates the amassing of large treasuries" describes corporations in both ballot proposition and candidate elections.[52] So, too, the value of corporate

46 435 U.S. 765 (1978).

47 *Id.* at 777.

48 494 U.S. 652 (1990).

49 *Id.* at 660.

50 539 U.S. 146 (2003).

51 *See, e.g.*, *id.* at 159–60; *Austin*, 494 U.S. at 640; FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207–11 (1982).

52 *Austin*, 494 U.S. at 660.

speech in presenting relevant facts and arguments concerning elections is equally applicable in both types of elections. Certainly, one thing that can be said for the *Citizens United* decision is that it eliminated a glaring anomaly in the law and made campaign finance doctrine more coherent, even at the price of dismissing a long-established and widely-held political concern about the corporate role in elections. From the perspective of the internal integrity of campaign finance doctrine developed since *Buckley*, *Citizens United* was reasonable even if it wasn't right.

There were, perhaps, three ways of holding *Bellotti* and *Austin* together. The first would have required the Court to take a much more deferential stance towards the political process on issues of campaign finance regulation. This would accord greater legitimacy to the decisions of elected representatives—or the voters who enact campaign finance measures in ballot propositions—in deciding which values ought to be given weight in regulating campaign money, and how to balance the competing concerns about free speech and political participation, voter information, political equality, undue influence over government actions, and electoral competitiveness that shape the field. Given the lack of clear constitutional rules for setting this balance, and the greater ability of elected officials—as opposed to appointed judges—to understand how campaign finance practices actually affect both elections and government, there is an argument that courts should give greater deference to the regulations produced through the political process—especially laws that have been accepted in many jurisdictions over a long period of time—with judicial review focused on whether these rules exclude particular points of view, distort the political process, or appear to have been targeted at political or other minorities. Under this approach, the federal restrictions on corporate spending would clearly have survived. The ban on corporate independent spending was longstanding and widely adopted. Given PACs, issue advocacy, lobbying, and the enormous influence of corporations on the political process and governance generally, the corporate voice could be heard loud and clear in elections and in Washington. And there was no evidence that the corporate ban was targeted on any particular political or other group. *Bellotti* might also have survived—at least the specific disposition of that case albeit not the broader prohibition on corporate spending on ballot propositions generally—because of the evidence that the prohibition against corporate spending that was at issue in that case had been imposed by Massachusetts in order to block corporate spending concerning a particular constitutional amendment that the state legislature sought to have approved by the voters.[53]

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[53] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 769–70, n.3 (1978).

However, deference is the exact opposite of the stance the Roberts Court has taken to campaign finance regulation. Whereas in its final years, the Rehnquist Court handed down four major decisions upholding federal and state campaign finance laws, including BCRA's sweeping provisions regulating soft money and electioneering communications,[54] the Roberts Court, in its first five years, issued four major campaign finance decisions, and each one of them either invalidated or drastically narrowed a federal or state campaign finance law, including the BCRA provisions that the Rehnquist Court had previously upheld.[55] When it comes to campaign finance, deference to the elected branches of government has, thus far, simply not been in the Roberts Court's skill set. Indeed, I suspect one of the reasons for the intensity of the public's reaction to the *Citizens United* decision was not simply the substance of the Court's determination concerning corporate spending but the way the decision dramatically underscored the Court's assertion of primacy in making campaign finance policy. No matter how much the President rails against the Court's action and how much public opinion is opposed to it, as a practical matter little or nothing can be done to undo it.

A second option would have been to try to reconcile the two decisions around the theme of the undue influence of corporate money over officeholders. Although a driving force behind efforts to limit corporate campaign spending has been the fear that corporate war chests can potentially give corporations an unfair advantage in trying to sway the voters,[56] the modern Court has generally been hostile to government efforts to equalize the electoral influence of different groups. As *Buckley* famously put it, "the concept that government may restrict the speech of some elements in our society in order to advance the relative voice of others is wholly foreign to the First Amendment."[57] However, the Court has been more sympathetic to arguments for regulating campaign money based on a concern that the deployment of private resources will unduly and improperly influence the decisions of government officials. As *Bellotti* pointed out, "[r]eferenda are held on issues, not candidates for public office" so that the "risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public

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54 *See* McConnell v. FEC, 540 U.S. 93 (2003); *Beaumont*, 539 U.S. 146; FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

55 *See* Citizens United v. FEC, 130 S. Ct. 876 (2010); Davis v. FEC, 554 U.S. 724 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007); Randall v. Sorrell, 548 U.S. 230 (2006).

56 *See Austin*, 494 U.S. at 660 ("[C]orporate wealth can unfairly influence *elections*.") (emphasis added); *Bellotti*, 435 U.S. at 789 ("According to appellee, corporations are wealthy and powerful, and their views may drown out other points of view.").

57 Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

issue."[58] But the possibility of corporate spending corrupting officeholders could arise in a candidate election if the candidate who has benefitted from corporate spending is elected to office with a sense of obligation to, or at least gratitude for, the corporate spending on her behalf.[59] To be sure, this would have involved pushing against *Buckley*'s holding that independent spending that is not prearranged or coordinated with a candidate generally does not raise the same concern about candidate gratitude as do campaign contributions and, thus, cannot be limited by the anti-corruption rationale that has justified contribution limits.[60] But it could be argued that due to their wealth and their frequent engagement with a host of government policies—antitrust, tax, environmental, workplace safety—that affect that wealth, corporate spending might be more likely to raise the concern about undue influence than would the spending of individuals, or at least Congress or a state legislature might so conclude. However, as I will discuss in Part II, not only did the Court in *Citizens United* reject the idea that unlimited corporate independent spending could have a corrupting effect on public officials, Justice Kennedy took the occasion to enunciate a narrower definition of corruption that could have implications for the regulation of contributions as well as expenditures.

Third, *Bellotti* and *Austin* could have been reconciled around the availability of the PAC as a device that allows the corporate voice to be heard in elections and enables people affiliated with the corporation—shareholders, directors, executive, and administrative personnel—to associate together, pool resources, and jointly advance the interests and viewpoint of the corporation in an election, while limiting the corporation's ability to deploy the full resources of its treasury. The Massachusetts law invalidated in *Bellotti* did not offer corporations the PAC option as a means of participating in ballot proposition elections,[61] whereas the Michigan law upheld in *Austin* authorized PACs in candidate elections, as the *Austin* Court emphasized.[62] Indeed, *Austin* and *McConnell*

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58 435 U.S. at 790.

59 *Cf.* Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2256–57 (2009) (holding due process requires a judge to recuse himself from a case when the judge had just won an election in which he benefited from substantial independent spending by an individual who was a party in the case; in that situation the "probability of actual bias . . . is too high to be tolerable").

60 424 U.S. at 45–47.

61 435 U.S. at 768–69, n.2.

62 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660–61 (1990); *see also* McConnell v. FEC, 540 U.S. 93, 204 (2003); FEC v. Beaumont, 539 U.S. 146, 146, 162–63 (2003). To be sure, this would have reconciled *Austin* only to the specific holding in *Bellotti*, and not to the broader principle prohibiting bans on corporate spending in ballot proposition contests, at least in states which permitted corporations to use their PACs in ballot proposition races.

stressed that the availability of the PAC mechanism meant that the prohibition on the use of corporate treasury funds in election campaigns was not an "absolute ban" at all,[63] but rather operated more as a channeling device which assured that corporate election spending actually enjoyed the backing of the shareholders and senior staff who contributed to the PAC.

Citizens United rejected this possibility, too. As I discuss further in Part III, Justice Kennedy treated the PAC option not as a means of reconciling the limits on corporate power with an opportunity for persons affiliated with a corporation to pool their resources for electoral purposes but as a burdensome imposition on First Amendment rights. Here, too, instead of looking for a means of holding together two precedents, the Court went off in a direction that not only favored the line of doctrine opposed to regulation, but did so in a manner that might give rise to new challenges to regulation.

Given the Court's general approach to campaign finance law since *Buckley*, *Citizens United* was a reasonable but not inevitable result. The special limits on corporations date from an older model of campaign finance law focused on a concern about private power in elections that is inconsistent with the modern Court's emphasis on the benefits of campaign spending. Moreover, the special restriction on corporations reflects a confusion of wealth and power with the corporate form. Corporations were targeted by law-makers because they epitomize private wealth earned in economic transactions that can be used to gain political power (and use that political power to gain more private wealth). But as the *MCFL* exception indicates not all corporations are wealthy or powerful or even engaged primarily in economic activity. So, too, as the role of very wealthy individuals in elections demonstrates, not all wealth and power takes the corporate form. The debate about limits on corporate spending has been in some respects a proxy for the debate on the role of private wealth—and the hugely unequal distribution of private wealth in contemporary America—in election campaigns. That latter debate— what Judge Guido Calabresi has called "the huge elephant—and donkey—in the living room in all discussions of campaign finance reform"[64]—was shut down by the refusal of the Court in *Buckley* and later cases to treat wealth inequality as a concern for limiting spending. As a result, one focus of reform shifted from inequality per se to corporate spending as a rough surrogate for inequality.

Notwithstanding the Court's general rejection of private wealthy inequality as a basis for limiting campaign money, a Court more sympa-

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63 494 U.S. at 660–61.

64 Landell v. Sorrell, 406 F.3d 159, 162 (2d Cir. 2005) (concurring in denial of petition for rehearing en banc).

thetic to campaign finance regulation, or to the role of the elected branches of government in adopting campaign finance policies that reflect longstanding public concerns, could have held together the Court's conflicting precedents, and treated the entire body of statutes and case law—including the provisions protecting internal communications, enabling PACs, exempting non-profits, issue advocacy, and ballot propositions—dealing with corporate spending as a plausible, if not rigorously internally consistent, means of combining the strand of campaign finance law suspicious of the role of great private wealth and power in elections with the strand committed to robust protection of election speech. But that would have required the Court to be respectful either of the role of the other branches of government in making campaign finance law or of the legitimacy of the public's concern about private wealth and power. And those possibilities appear to be beyond the grasp of the current Court.

II. CORRUPTION

From *Buckley v. Valeo* on, the Court has struggled with the meaning and consequences of the concepts of "corruption and the appearance of corruption."[65] In *Buckley*, the Court found that corruption and its appearance—and only corruption and its appearance—can justify limits on campaign money.[66] But what exactly is corruption? *Buckley* fastened on the concept of the quid pro quo: "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."[67] And "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large financial contributions."[68] Quid pro quo suggests the conscious donation of a contributor's money to a candidate in exchange for that candidate's commitment to use her public office to benefit the contributor if she is elected—or something very much like a bribe. But bribery is already illegal, and if the problem posed by a campaign contribution is bribery, why not punish just those contributions which are given and accepted as bribes? *Buckley* responded to that argument by finding that bribery constitutes "only the most blatant and specific attempts of those with money to influence governmental action."[69] Of course, the use of money "to influence governmental action" is a much

65 424 U.S. at 45.
66 *Id.* at 67.
67 *Id.* at 26–27.
68 *Id.* at 27.
69 *Id.* at 28.

more capacious concept than a bribe, and could support far more government regulation of campaign money.

The concept of corruption has ranged between narrow bribery and broad influence over government action ever since. In *FEC v. National Conservative PAC*,[70] decided nine years after *Buckley*, the Court emphasized the narrower reading of corruption as close to bribery-like exchange when it stated that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors."[71] Fifteen years after that, in *Nixon v. Shrink Missouri Government PAC*,[72] the Court took a more capacious approach, underscoring that the corruption concern is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors."[73]

The issue came to a head in *McConnell v. FEC*, in 2003, when the Court addressed Congress's restrictions on soft money contributions, that is, donations by wealthy individuals, corporations, and unions that were dramatically greater than the dollar limitations ordinarily applicable to individual donations or that flatly violated the then-valid ban on corporate and union donations to federal candidates and parties.[74] The conceptual basis for soft money's evasion of federal contribution restrictions was that the donations did not go to specific candidates or to parties for direct support of specific candidates, but were given to the parties to finance party activities generally or to pay for party activities that aided the party's candidates across the board, like voter registration and get-out-the-vote drives, generic party advertising, or issue advocacy. In the absence of a direct relationship between the donor and a specific candidate, defenders of the practice contended that soft money did not raise an issue of corruption that could justify its suppression.[75] But *McConnell* found there was substantial evidence that federal officeholders and party leaders avidly sought soft money even if given to party accounts they could not control and or not even used by them for their own campaigns. By the same token, wealthy individuals, corporations, and unions provided soft money "for the express purpose of securing influence over federal officials"[76] even if not to advance specific measures or obtain identifiable votes or actions from the beneficiaries. The Court found there was no need for an express donor–candidate relationship or for a connection between a donation and a specific legislative or other governmental goal of the donor for there to be "corruption." Instead, the Court

70 470 U.S. 480 (1985).
71 *Id.* at 497.
72 528 U.S. 377 (2000).
73 *Id.* at 389.
74 McConnell v. FEC, 540 U.S. 93 (2003).
75 *Id.* at 93–94.
76 *Id.* at 147.

took a much broader approach, finding that Congress could reasonably conclude that money given to party committees to enable donors to obtain preferential access to government officials and to pervasively influence government decision-making could constitute the kind of "corruption" that would justify limits on contributions.[77]

A second uncertainty in the Court's treatment of corruption has been the question whether the corruption concern could ever justify limits on independent spending. Large independent spending supporting a candidate or advocating the defeat of her opponent could, like a contribution, be helpful to a candidate, and thus serve as a source of "coercive influence."[78] But *Buckley* declared that such expenditures, as long as they were undertaken without "prearrangement" or "coordination" with a candidate, pose no corruption danger, so that limits on independent spending could not be sustained by the anti-corruption rationale.[79]

Buckley, however, did not totally shut the door to the possibility that independent spending could be regulated under an anti-corruption theory. *Buckley*'s holding that corruption cannot justify restrictions on independent expenditures was at least quasi-empirical in nature. The Court found only that independent expenditures "*may* well provide little assistance to the candidate's campaign and indeed *may* prove counterproductive."[80] In *Bellotti*, even as it struck down a state ban on corporate spending in ballot proposition elections, the Court acknowledged that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[81] Similarly, when it struck down limits on independent expenditures in support of or opposition to presidential candidates who had accepted public funding in *FEC v. National Conservative PAC*, the Court acknowledged that it is "hypothetically possible . . . that candidates may take notice of and reward those responsible for PAC [independent] expenditures by giving official favors to the latter in exchange for the supporting messages."[82]

In *Caperton v. A.T. Massey Coal Co., Inc.*,[83] the Court actually recognized that independent spending could be the functional equivalent of a contribution, and just as corrupting as a contribution of comparable size, when it held that a judge elected after an election campaign in which he had been the beneficiary of millions of dollars of independent expenditures was required by the Constitution to recuse himself from a

77 *Id.* at 142–54.
78 Buckley v. Valeo, 424 U.S. 1, 25 (1976).
79 *Id.* at 47.
80 *Id.* (emphasis added).
81 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 788 n.26 (1978).
82 470 U.S. 480, 498 (1985).
83 129 S. Ct. 2252, 2256–57 (2009).

case involving the independent spender. The Court determined that given the amount of campaign assistance the independent spending had provided "there is a serious risk of actual bias—based on objective and reasonable perceptions"—in favor of the independent spender in such a case. Stunningly, *Caperton* completely blurred the contribution/expenditure distinction which the Court had spent thirty-three years developing and sustaining when it repeatedly referred to the large independent expenditures in the case as "contributions,"[84] not independent expenditures. *Caperton* at least tacitly recognized that independent spending could have the same functional consequences, in terms of influencing the official actions of elected officeholders, as contributions.

But in *Citizens United*, barely six months after *Caperton*, the Court firmly and finally shut the door to any recognition that the potentially corrupting effects of at least some independent expenditures in practice could be treated as the kind of corruption that would justify spending limitation.[85] The Court acknowledged that independent spending might be corrupting when it observed that elected officials might "succumb to improper influences from independent expenditures."[86] Indeed, Justice Kennedy observed, "if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern."[87] But even that concern could not support limits on independent expenditures. *Citizens United* declared independent spending limits unconstitutional under all circumstances and regardless of the empirical evidence of their effects on the elected officials who benefit from them.

This aspect of *Citizens United*'s ruling was prominently featured in a decision handed down by the United States Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. FEC*,[88] just two months later, which found that contributions to political committees that expressly advocate or oppose the election of federal candidates, but do so independently and do not make campaign contributions, cannot be limited.[89] *SpeechNow* found that after *Citizens United* "independent expenditures do not corrupt or give the appearance of corruption as a matter of law"[90] so that there is no anti-corruption justification for limiting contributions to political committees that make only independent expenditures. This constitutes a significant change in the law governing independent expenditure committees which will greatly expand the resources available to them and is likely to result in an increased role for

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84 *Id.* at 2257, 2263–65.
85 Citizens United v. FEC, 130 S. Ct. 876 (2010).
86 *Id.* at 911.
87 *Id.*
88 599 F.3d 686 (D.C. Cir. 2010).
89 *See id.* at 692–96.
90 *Id.* at 696.

them in elections. Strikingly, *SpeechNow* relied on *Citizens United* not to address the rights of corporations or to directly protect independent spending—the two questions directly at issue in *Citizens United*—but to make it easier for wealthy individuals[91] to make unlimited contributions for electoral purposes. *SpeechNow* thus demonstrates that *Citizens United*'s consequences for campaign finance law are unlikely to be limited to corporate spending.[92]

Indeed, *Citizens United*'s statements about corruption could have implications for the regulation of contributions, not just expenditures. *Citizens United* directly challenged the more expansive definition of corruption embraced by *McConnell* just seven years earlier, by moving to sharply distinguish concerns about undue influence, special access, or favoritism, which had loomed so large in *McConnell*, from the "corruption" that justifies campaign finance restrictions: "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."[93] Again, "ingratiation and access, in any event, are not corruption."[94] So, too, the "appearance of influence or access," Justice Kennedy flatly declared, "will not cause the electorate to lose faith in our democracy"[95] and thus cannot provide the same justification for regulation as the "appearance of corruption."[96]

Strikingly, Justice Kennedy cited and quoted at length from his *McConnell* dissent—which he cited as an "opinion" and not a "dissenting opinion." He reiterated his central point—which had failed to muster a majority in *McConnell*—that "generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle."[97]

The argument that the First Amendment requires a narrow quid pro quo-focused definition of corruption, which lost in *McConnell,* appears to have become the law in *Citizens United*, with the Court asserting that the governmental interest in preventing corruption and the appearance of corruption is "limited to *quid pro quo* corruption."[98] To be sure, Justice

91 SpeechNow's bylaws provided that it would take contributions only from private individuals, not from corporations or unions. SpeechNow.org v. FEC, 567 F. Supp. 2d 70, 71 (D.D.C. 2008).

92 *Citizens United*'s narrowing definition of corruption was also relied on by the United States Court of Appeals for the Ninth Circuit to strike down a city ordinance, akin to the federal statute at issue in *SpeechNow*, which prohibited political committees from making campaign expenditures if they received contributions above a monetary ceiling. *See* Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 694–98 & n.5 (9th Cir. 2010).

93 Citizens United v. FEC, 130 S. Ct. 876, 910 (2010).

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* (quoting McConnell v. FEC, 540 U.S. 93, 296 (2003) (dissenting opinion)).

98 *Id.*

Kennedy avoided directly challenging *McConnell*'s holding, noting that "[t]his case . . . is about independent expenditures, not soft money."[99] However, *Citizens United*'s reasoning and its express invocation of the *McConnell* dissent suggest that *McConnell*'s soft money holding may be ripe for reconsideration.

That would be consistent with the fate of the electioneering communications provisions of BCRA. In *WRTL*, the Court first held that *McConnell* had addressed only a facial challenge to the extension of the ban on corporate and union spending to electioneering communications, which did not preclude an as-applied challenge, and then used the as-applied challenge to eviscerate most of the measure, which was then completely invalidated in *Citizens United*. The "corruption" analysis in *Citizens United* would appear to provide an invitation at least to an as-applied challenge to BCRA's soft money restriction if not a direct assault on the measure's constitutionality.

Indeed, such a challenge was mounted even before *Citizens United* was decided. In *Republican National Committee v. FEC*,[100] the national Republican Party, along with a state and a local party brought as-applied challenges to BCRA's soft money provisions. The principal goal of the national party was to establish the right to take soft money for purposes unrelated to federal elections, such as to support state candidates in elections where only state candidates appear on the ballot. In a decision handed down just two months after *Citizens United,* a three-judge court agreed with the RNC that *Citizens United* "undermines any theory of limiting contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officeholders and candidates."[101] The court, however, drew back from creating the exception the RNC had sought, noting that *McConnell* also rested on the idea that there is a close relationship between parties and their candidates, as well as on findings that federal officeholders and candidates value contributions to the national parties, regardless of whether those contributions are actually used to advance their own campaigns. As a result, donations to the parties could be seen as "hav[ing] much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or the appearance of *quid pro quo* corruption."[102] The district court concluded that *McConnell* was "ambiguous on the question"[103] of whether the officeholder-party relationship was strong enough, even without *McCon-*

99 *Id.* at 911.
100 698 F. Supp. 2d 150 (D.D.C. 2010).
101 *Id.* at 158.
102 *Id.* at 160.
103 *Id.*

nell's focus on gratitude, access, and influence more generally, to support the soft money ban, so it determined that any exceptions to the soft money rules would have to come from the Supreme Court.[104] The Supreme Court subsequently affirmed the district court's ruling without an opinion,[105] which keeps open the uncertainty that *RNC* found *Citizens United* had created.

Citizens United was very much a "corporations" and an "expenditures" case. Indeed, the Court made much of the contribution/expenditure distinction in invalidating the limits on corporate spending. But the decision's effects may range well beyond corporations and expenditures. As both *SpeechNow* and *RNC* suggest, Justice Kennedy's narrowing of the meaning of "corruption" may affect the regulation of contributions, leading to closer judicial review of contribution restrictions than previously.[106]

III. COMPLEXITY

A striking feature of the *Citizens United* opinion is the majority's concern with the complexity of campaign finance law, with the implication that complexity itself may be a matter of constitutional moment. Indeed, the concern about complexity was pivotal to the broad sweep of the decision. There were several legal theories that would have enabled Citizens United to use its corporate funds to pay for *Hillary: The Movie* that would not have required the Court to invalidate the laws banning corporate campaign spending. Although Citizens United did not qualify for the *MCFL* exemption for spending by not-for-profits because it took some business corporation money, the exemption could have been tweaked to enable it to apply to nonprofits like Citizens United that receive only a modest portion of their funding from business corporations.[107] Alternatively, Citizens United's expenses for *Hillary: The*

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[104] *Id.*

[105] Republican Nat'l Comm. v. FEC, 130 S. Ct. 3544 (2010) (mem.).

[106] One example of this is the decision of the United States Court of Appeals for the Second Circuit in *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010), invalidating a Connecticut law banning contributions by lobbyists. Although the state offered evidence concerning the special influence lobbyists have, or are perceived to have, over the political process, the court, citing and quoting from *Citizens United*, concluded that "[i]nfluence and access . . . are not sinister in nature" so that lobbyists presented no special corruption concern. *Id.* at 207.

[107] Indeed, a number of lower courts had so extended the *MCFL* exception. *See, e.g.*, N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 714 (4th Cir. 1999) (up to 8%); Minn. Citizens Concerned for Life v. FEC, 113 F.3d 129, 130 (8th Cir. 1997) (exemption available even if nonprofit "engages in minor business activities or accepts insignificant contributions from business corporations"); Ctr. for Individual Freedom, Inc. v. Ireland, 613 F. Supp. 2d 777, 778 (S.D. W. Va. 2009) (4.4% of revenues from business corporations). The *Citizens United* Court found that Citizens United was "funded overwhelmingly by individuals." Citizens United v. FEC, 130 S. Ct. 876, 891–92 (2010).

Movie could have been treated as falling within the press or media exclusion from the definition of "electioneering communication" as Citizens United was in the regular business of making ideological films. Indeed, six months after the Supreme Court's decision the FEC issued an advisory opinion finding that Citizens United's production, distribution, and marketing costs for its films fit within the media exemption.[108] Moreover, *Hillary: The Movie* was distributed through video-on-demand (VOD) rather than broadcast television; an exemption from the restriction on corporate electioneering communication could have been created for VOD spending as VOD involves viewer requests to receive a communication rather than a sponsor's bombardment of the viewer with an unsought message. As VOD "has a lower risk of distorting the political process than do television ads"[109] and was not the focus of Congress's concern when it adopted the restriction on corporate electioneering communication, VOD could have been excluded from the ban.[110]

The Court, however, determined not to resolve Citizens United's complaint on any of these narrower grounds, which would have left in place most of the prohibitions on corporate independent spending and corporate electioneering communication. Indeed, the Court found that the very creation of exemptions and exclusions from the general ban on corporate spending was itself fraught with constitutional difficulty. The Court gave extensive attention to an amicus brief filed by seven former chairmen of the FEC that focused on the complexity of campaign finance law. As quoted by the Court, the brief asserted "[c]ampaign finance regulations now impose 'unique and complex rules' on '71 distinct entities'" and addressed "33 different types of political speech."[111] Citing the brief, the Court noted that "[t]he FEC has adopted 568 pages of regulations, 1,278 pages of explanations, and 1,771 advisory opinions since 1975" as if the sheer volume of campaign finance law was itself offensive.[112]

The Court used the asserted jungle of regulations to make the case that "[a]s a practical matter . . . given the complexity of the regulations

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108 FEC Advisory Op. 2010-08 (June 11, 2010), *available at* http://www.fec.gov/agenda/2010/mtgdoc1034.pdf.

109 130 S. Ct. at 890–91.

110 Citizens United had also argued that the prohibition on corporate electioneering communications should not be applied to its expenditures on *Hillary: The Movie* because the movie's critical treatment of then-Senator Clinton did not constitute the "functional equivalent of express advocacy" as that term was defined in *WRTL*. *Id.* at 889–90. The Court, however, found that the movie was "in essence, a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President" and, thus, was "equivalent to express advocacy." *Id.* at 890.

111 *Id.* at 895.

112 *Id.*

and the deference courts show to administrative determinations,"[113] speakers concerned to "avoid litigation and the possibility of civil and criminal penalties" would be compelled to "either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question."[114] In other words, "[t]hese onerous restrictions thus function as the equivalent of a prior restraint."[115] Interpreting the law to exempt *Hillary: The Movie* by creating a statutory or constitutional exception for video-on-demand; extending the exemption for ideological organizations to include those that take a modest amount of business corporation money; or construing and applying the media exemption would simply add to the law's complexity, create new uncertainties, and increase the need for administrative or judicial resolution of future disputes.

But most of the complexity cited with such dismay by the Court had little or nothing to do with corporations, or even with spending. Many of the "71 distinct entities" consisted of party committees—with separate references to national party committees, Senate and House campaign committees, state and local party committees—as well as different categories of candidate committees, again separately listing presidential, vice presidential, Senate, House, primary and general election committees—and different rules for different campaign actors, including treasurers, vendors, fundraising representatives, and volunteers.[116] Similarly, at least a dozen of the "33 different types of political speech" concerned contributions, not expenditures. Other FECA categories of speech cited in the amicus brief invoked by Justice Kennedy dealt with issues as diverse as the treatment of disclaimer requirements, fraudulent misrepresentation of campaign authority, donations to and spending by inaugural committees, and the special rules for the financing of campaign events at public educational institutions and debates.[117] What any of this had to do with the complexity or uncertainty of the regulations governing whether a particular corporation could engage in a specific type of expenditure is far from clear.

But that may very well have been the point. The Court's blast was aimed at the asserted byzantine complexity of campaign finance law as a whole, not just the rules governing corporations. Campaign finance law in general was treated as "analogous to licensing laws implemented in 16th and 17th century England, laws and governmental practices of the

113 *Id.*

114 *Id.* at 896.

115 *Id.* at 895–96.

116 Brief Amici Curiae of Seven Former Chairmen and One Former Commissioner of the Federal Election Commission Supporting Appellant on Supplemental Question at 12–13, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2349018 at *12–*13.

117 *Id.* at 14–15.

sort that the First Amendment was drawn to prohibit."[118] Going well beyond the issues presented in *Citizens United*, the Court appears to have gone out of its way to condemn campaign finance regulation as a whole, not just restrictions on corporate spending.

The Court continued this theme that the legal complexity of the campaign finance regime itself presents a constitutional problem in its rejection of the argument that the availability of PACs enables corporations to engage in campaign spending and thus ameliorates the First Amendment burden posed by the ban on the use of corporate treasury funds. The Court dismissed PACs as "burdensome alternatives; they are expensive to administer and subject to extensive regulations,"[119] including the requirements to appoint a treasurer; "forward donations to the treasurer promptly"; keep "detailed records" concerning the identities of donors; preserve receipts; file an organizing statement, and report any changes in the statement; and file "detailed" monthly reports concerning cash on hand, receipts, donors, expenditures, and outstanding debts and obligations.[120] These would appear to be pretty basic requirements essential to any campaign finance regime for assuring the regularity, responsibility, and transparency of campaign finance participants. Indeed, these or similar requirements are applicable not just to corporate PACs but to all election campaign actors, including candidates, party committees, and multi-candidate political committees generally. Nonetheless, the Court decried these "onerous restrictions"[121] and treated these organizational and reporting requirements as themselves imposing constitutionally troublesome constraints on corporate campaign participation.

Administrative requirements and complex line-drawing rules are not limited to the treatment of corporate campaign money but are pervasive, if not intrinsic, to campaign finance law. As the preceding discussion of the former FEC commissioners' amicus brief indicates, some of this is driven by the complexity of the American political system. It may be necessary or appropriate to have different rules dealing with national, state and local parties; primary and general elections; and presidential, vice-presidential, Senate, and House contests before even turning to the particular issues raised by campaign finance itself. So, too, it may make sense to provide separate treatment for candidates, political parties, and non-party campaign actors. Campaign finance law requires the definition of key terms and, like all forms of regulation, the drawing of distinctions between regulated and unregulated activities. This may require detailed descriptions or variations in light of specific campaign practices

118 130 S. Ct. at 896.
119 *Id.* at 897.
120 *Id.*
121 *Id.* at 898.

or other circumstances. Moreover, one widespread response to campaign finance law—like many other modes of regulation—is evasion by the regulated actors, in this case candidates, donors, parties, political committees, and other electorally engaged interest groups, organizations, and individuals. Combating evasion may require further specification of legal requirements and further detailed descriptions.

The Court itself has been the source of some of the legal complexity which has in turn bred regulatory detail. The Court's sharp distinctions between contributions and expenditures, and between express advocacy and issue advocacy require that there be different rules for activities that fall within these different categories, as well as rules for determining where to place an activity which arguably straddles two categories. In one area—electioneering communications—the Court is the major source of the complexity problem. In *WRTL*, it replaced Congress's relatively straightforward and unambiguous four-part test for determining whether a message is electioneering communication—based on whether it specifically referred to a candidate and was broadcast to that candidate's electoral constituency in a precisely defined pre-election period—with the muddy and ambiguous "functional equivalent of express advocacy" test. Justice Kennedy treated the "two-part, 11-factor balancing test to implement *WRTL*'s ruling"[122] as the poster child of the constitutionally problematic campaign finance complexity that generates "an unprecedented governmental intervention into the realm of speech"[123] without acknowledging the Court's role central in creating that complexity or the need to balance multiple constitutional concerns and empirical concerns that went into that test.

More importantly, *Citizens United*'s denunciation of regulatory complexity and its treatment of the rules governing PAC organization and reporting as "onerous restrictions" could set up a conflict with the one mode of campaign finance regulation that the current Court has endorsed—disclosure. *Citizens United* rejected Citizens United's effort to exempt *Hillary* and three advertisements for the movie from federal disclosure and disclaimer requirements. The Court minimized the burden on speech posed by these requirements and then went on to hail both the public benefits of disclosure and disclaimer and their consistency with First Amendment norms:

> [P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials and elected officials accountable for their positions and supporters . . . . The

[122] *Id.* at 895.
[123] *Id.* at 896.

> 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.[124]

But, of course, obtaining the "transparency" that will enable citizens and shareholders to respond to corporate expenditures "in a proper way" will require precisely the recordkeeping, detailed reporting of campaign finance activities, issuance of frequent reports during the campaign period, and designation of a treasurer responsible for seeing these obligations are met that so troubled the Court in its recapitulation of the law governing PACs.

The clash between the perceived vices of complex administrative requirements and the virtues of disclosure and disclaimers is likely to be particularly intense in the context of corporate spending. Prior to *Citizens United* there was not much need to consider at the federal level what disclosure by business corporations engaged in express advocacy campaign spending would entail as business corporations were barred from engaging in such spending. With corporations now free to spend without limit, effective corporate disclosure—that is, disclosure that is effective in letting the public know who is paying for campaign ads financed by corporations—is likely to involve detailed requirements. There is evidence that business corporations prefer not to sponsor ads in their own names, but rather seek to channel their funds through intermediary organizations that nominally sponsor the independent spending but are really acting for the donor firms that set up or control them. These intermediaries are willing to disclose the amounts and beneficiaries of their expenditures, but the names of these front organizations tell little or nothing about their underlying purposes or the identities or interests of their backers and funders. It doesn't do the voters much good to know that "Americans for Good Government" have paid for an ad without also telling the voters who exactly are "Americans for Good Government" and who is paying for their ads. But getting that information out and to the voters in a form the voters can use is likely to involve detailed and arguably burdensome recordkeeping, disclosure, and disclaimer rules.

The DISCLOSE Act[125] illustrates the tension between the goals of achieving effective disclosure and avoiding assertedly burdensome regulation. Passed by the House of Representatives on June 24, 2010, but filibustered to death in the Senate, the Act responded to *Citizens United*

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124 *Id.* at 916.

125 Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010).

by addressing, inter alia, disclosure by corporations that undertake campaign expenditures in federal elections. The Act would have required not just the disclosure of the identity of corporations and other organizations engaged in independent spending, but also the identities of donors of sums above a monetary threshold, transfers by these organizations to other organizations that make independent expenditures, and transfers among affiliated organizations, as well as information concerning whether any of the donations were designated or earmarked for specific campaign purposes.[126] The Act would have also significantly enhanced disclaimer requirements—that is, statements made in the body of the ad itself identifying the sponsors of the ad—to provide for the identification of "significant funders" and, if a significant funder is not an individual but a corporation or other organization, the identification of the highest ranking officer of the organization.[127] All this would also entail significant statutory specification. In their Minority Views, the Republican members of the House Committee on House Administration, in language echoing Justice Kennedy's in *Citizens United*, complained of the "legal thicket one must navigate to comply with the campaign finance law" and asserted that the bill would impose "still-higher compliance costs and deter speech."[128] The disclaimer provisions were labeled "exceptionally onerous."[129]

Without getting into the specifics of the DISCLOSE Act or of the concerns raised by its critics, it does seem clear that effective presentation of the amounts and sources of corporate and other organizational independent spending will require some detailed requirements. Given the ability of corporations to proliferate new corporations for campaign purposes, it is likely that more recordkeeping and reporting will be necessary to make corporate disclosure effective than for comparable spending by individuals. Such extensive recordkeeping and reporting obligations will, no doubt, be challenged as unduly burdensome by campaign participants. *Citizens United* may change the constitutional framework for assessing those claims and may provide new legal ammunition for those resisting disclosure. Instead of the debate about disclosure turning on whether disclosure of campaign finance information can result in threats to, harassment of, or reprisals against donors to controversial candidates or causes—which has been the traditional focus of the constitutional debate about disclosure[130] and which has proven difficult to es-

126 *See id.* at §§ 211–13.
127 *See id.* at § 214.
128 H.R. REP. NO. 111-492, pt. 1, at 90 (2010).
129 *Id.*
130 *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 916 (2010); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. 1, 71–74 (1976).

tablish[131]—*Citizens United* may make it possible for opponents of disclosure simply to rely on the administrative burden of keeping records, filing reports, and abiding by certain organizational requirements.

Indeed, *Citizens United* has already been invoked for this purpose. Although the plaintiff in the *SpeechNow* litigation prevailed in the District of Columbia Circuit Court of Appeals on its argument that the donations it receives to support independent spending cannot be limited, it failed to win an exemption from the requirement that it comply with the organizational and reporting requirements applicable to PACs.[132] In July 2010, SpeechNow filed a petition for certiorari claiming that under *Citizens United* these PAC requirements are "burdensome as a matter of law" and so must be subject to strict scrutiny rather than the less stringent judicial review hitherto applied to such rules;[133] more than seven months later, as of late January 2011, that petition was still pending. So, too, the United States Court of Appeals for the Tenth Circuit repeatedly cited and quoted from *Citizens United* in relying, in part, on complexity and administrative burden concerns in holding that Colorado's campaign finance reporting and disclosure law could not be applied to a small ballot proposition committee.[134]

It would be more than a little ironic if the same case which gave rise to the need for more disclosure and warmly endorsed disclosure as the preferred campaign finance regulatory technique would also serve as a precedent for constitutional challenges to the administrative requirements entailed in disclosure. But the vehemence of the Court's rhetoric certainly creates that possibility.

CONCLUSION

Citizens United is, and has been treated as, a corporations case and a spending case. But its potential significance goes far beyond corporate campaign spending. As I have suggested, even before *Citizens United* corporations had multiple avenues for deploying money in elections, so that the decision was much less legally transformative for the legality of corporate spending than many observers assumed. So, too, despite the shocked reaction of many critics, the decision was consistent with, if not exactly required by, the Court's general approach to campaign finance law over the past thirty-five years. Yet, supporters of campaign finance regulation are right to be concerned about *Citizens United* for it demon-

131 *Citizens United*, 130 S. Ct. at 916.

132 *SpeechNow*, 599 F.3d at 696–97.

133 *See* Petition for Writ of Certiorari at 14–25, Keating v. FEC, 131 S. Ct. 553 (2010) (No. 10-145), 2010 WL 2967797.

134 *See* Sampson v. Buescher, 625 F.3d 1247, 1260 (10th Cir. 2010) at *7, *12.

strates just how hostile the five-justice majority in the Roberts Court is to campaign finance regulation. This comes out most not in the invalidation of the restraints on corporate spending but in the Court's discussions of corruption and complexity. These not only implicate aspects of campaign finance law not at issue in the case but could, potentially, provide the basis for future constitutional challenges that would unsettle fundamental elements of modern campaign finance law and greatly limit the possibilities for effective regulation even in areas like contributions and disclosure that the Court has indicated may be subject to constitutionally valid restrictions and requirements.