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FINANCING ELECTIONS AND “APPEARANCE OF CORRUPTION”:
CITIZEN ATTITUDES AND BEHAVIOR IN 2012

Molly J. Walker Wilson*

ABSTRACT

As political spending reaches new highs in the 2012 election cycle, and as the controversy surrounding wealthy donors and interest groups grows, polls demonstrate a surge of cynicism among Americans who profess a belief that the American political system is corrupt. The Supreme Court’s 2010 decision in *Citizens United* made possible the most recent expansion of political spending. In this case, the question was whether allowing corporations and unions to spend unlimited amounts of money on political advertising would result in corruption or the appearance of corruption. The majority on the Court determined that it would not. Many observers have disputed the majority’s conclusion with respect to corruption; the effect on the *appearance* of corruption has received far less attention. This Article focuses on this latter question, arguing that there is a growing appearance-of-corruption problem in American politics. The 2012 election cycle saw a modest growth in small donor giving and volunteerism, but voter turnout was down from the previous two presidential elections. Meanwhile, polls reveal that more than ever, Americans’ believe that money is corrupting the political process. This Article explains the connection between the Court’s recent campaign finance decisions and the current disillusionment of the American public. The Article also explains why data from the 2012 election likely underestimates the problem, and why

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the repercussions of our appearance-of-corruption problem are likely to grow if the law continues to permit unchecked political campaign spending.

INTRODUCTION

Most Americans believe that their government is corrupt. Citizens United has come to represent a problem . . . that problem can be stated quite simply: the people have lost faith in their government. They have lost the faith that their government is responsive to them, because they have become convinced that their government is more responsive to those who fund your campaigns. . .

—Lawrence Lessig, testifying before Congress¹

Outside these walls, the public's perception is that not only is Congress a do-nothing institution, but that it is bought and paid for as well. And, in politics, perception is reality, and the perception is that it is getting worse, not better.

—Charles Roemer, testifying before Congress²

As far back as the early 1970's³, the Supreme Court has worried about preventing the appearance of corruption arising from political campaign spending. In *Buckley v. Valeo*, the Court articulated this concern when it said, "impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."⁴ The twin concerns of preventing actual corruption and preventing the appearance of corruption are the only interests

¹ *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 112th Cong.* (pg.-pg.) (2012) (statement of Lawrence Lessig, Professor, Harvard Law School).

² *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 112th Cong.* (pg.-pg.) (2012) (statement of Charles Roemer, former Governor of Louisiana).

³ See notes 12-13 *infra*, and accompanying text.

⁴ *Buckley v. Valeo* 424 U.S. 1, 27 (1976).

the Court has held to be sufficiently important to allow for restrictions on spending for campaign communication, which the Court has called “speech.” Although “appearance of corruption” is omnipresent in the Court’s campaign finance jurisprudence, this concern has received scant attention as compared to actual corruption, which has occupied center stage. Meanwhile, the Court’s narrow definition of corruption has yielded Supreme Court and lower court opinions that allow for unprecedented amounts of money to flood into political messaging.

As campaign spending has escalated, so has the controversy around new structures for bundling and spending campaign funds, so-called Super PACs. Members of the media, election law scholars, and watchdog groups have disseminated information regarding the political objectives of wealthy donors. Simultaneously, in the past two election cycles, the number of campaign advertisements—most of them negative—have increased dramatically.⁵ The public appears to be taking notice. Polls from 2010 through 2012 reveal that Americans are almost unanimous in feeling that there is too much money in political campaigns.⁶ The polls reveal that the Americans oppose Super PACs, would support a constitutional amendment banning corporate political spending, and feel that the current system allows wealthy interests to drown on the voice of ordinary citizens. Perhaps most importantly, survey respondents believe that the current system of campaign financing is corrupt, and many say that as a result, they are less likely to vote in elections.⁷

The current campaign finance landscape was profoundly influenced by the 2010 Supreme Court case *Citizens United v. FEC*.⁸ *Citizens United* removed the existing barrier to unlimited independent spending.⁹ Before *Citizens United*, individuals (but not corporations) could spend unlimited sums on independent (not coordinated with candidate) political advocacy.¹⁰

⁵ See fns 118-120 *infra* and accompanying text.

⁶ Part II C 2 *infra*, and accompanying text.

⁷ *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CENTER FOR JUSTICE (April 24, 2012), <http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>

⁸ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁹ *Id.*

¹⁰ Under § 100.16 (a), an “Independent Expenditure” is defined as “an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or

However, those contributions could not be pooled with the money of other individuals. Individual contributions could be combined under the auspices of a political action committee (PAC), but in this instance, there was a contribution cap of \$5,000. As a result of the Court's decision in *Citizens United*, the law changed. When the D.C. Circuit Court was required to interpret the law in *Speechnow.org*,¹¹ the court concluded that *Citizens United* had removed the limits on individual donations to independent groups. This decision led to the birth of the Super PACs.¹² Whereas in the past, traditional PACs could only receive donations up to \$5,000 per year, after *Speechnow.org*, donations to Super PACs were unlimited. According to the Center for Responsible Politics, in 2012, super PACs spent a record \$65 million on independent expenditures and were major players in more than a dozen congressional races.¹³

Empirical data suggests that the proliferation of money available to influence politics undercuts citizens' sense of political efficacy.¹⁴ Political efficacy relates to the responsiveness of government to its citizens' involvement in politics.¹⁵ Social scientists have noted that when the citizenry lacks a minimum level of political efficacy, members of the public either in opposition or out of a sense of futility, stop participating in

a political party committee or its agents." A communication is "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents" if it is a coordinated communication under 11 C.F.R §109.21 or a party coordinated communication under 11 CFR 109.37. See 2 U.S.C. § 431(17) (2002).

¹¹ SPEECHNOW.ORG v. Federal Election Comm'n., 599 F.3d 686 (D.C. Cir. 2010). See discussion in Part I. B. *supra*.

¹² The Federal Election Commission recognizes Super PACs and hybrid PACs as political action committees engaged in uncoordinated spending. A Super PAC (Independent Expenditure-Only Political Committee) or Hybrid PAC (committee that maintains a non-contribution account) must register by filing FEC Form 1 [PDF] (Instructions [PDF]), Statement of Organization within 10 days after raising or spending in excess of \$1,000 in connection with federal elections. Under "Type of Committee," the PAC would check box 5(f). Additionally, the committee must submit a letter to identify itself as a Super PAC or Hybrid PAC." (See *Quick Answers to PAC Questions*, Federal Election Commission (last visited Feb. 14, 2013), http://www.fec.gov/ans/answers_pac.shtml#super_hybrid).

¹³ *2010 Outside Spending, by Super PACs*, *OpenSecrets.org*, Center for Responsive Politics (last updated Nov. 12, 2012), <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=S>.

¹⁴ See Part IV B *infra*, and accompanying text.

¹⁵ Richard G. Niemi, Stephen C. Craig & Franco Mattei, *Measuring Internal Political Efficacy in the 1988 National Election Study*, 85 AM. POL. SCI. REV 1407 (1991).; Timoth Vercellotti, Prepared for presentation at the 2011 annual meeting of the American Political Science association, Sept. 1-4, Seattle, WA.

politics.¹⁶ Recent polling data suggests that Americans may be responding to a lack of political efficacy by increasingly disengaging with the political process.¹⁷

An examination of the 2012 election reveals an interesting pattern: small donations and volunteering was strong, but voting was down—not only from 2008 numbers, but from 2004 levels as well. At first blush, this mixed picture seems curious. It is difficult to explain why high-investment participation would be up, while low investment participation would be down. However, certain features of the presidential campaign—and specifically Obama’s campaign tactics—may explain the anomaly. The ability of the Obama campaign to bolster political efficacy via various channels of communication—including most notably the Internet—proved to pay dividends in 2008.¹⁸ In particular, the campaign’s slogans involved a focus on the agency of the individual voter, and the power of the recipient of the message to make a difference in the election.¹⁹ The Obama campaign was rewarded for its efforts with record numbers of volunteers and small donations.²⁰ Obama was able to benefit from similar direct pleas for support in 2012. In a substantially closer race, Obama needed to up the ante in his

¹⁶ Albert Bandura, *Personal and Collective Efficacy in Human Adaptation and Change*, in *ADVANCES IN PSYCHOLOGICAL SCIENCE VOLUME 1* 51, 52 (John G. Adair, David Belanger, & Kenneth L. Dion eds. 1998).

¹⁶ David Easton & Jack Dennis, *The Child’s Acquisition of Regime Norms: Political Efficacy*, 61 *Am. Pol. Sci. Rev.* 25 (1967),

¹⁷ *See National Survey: Super PACs, Corruption, and Democracy*, Brennan Center for Justice (April 24, 2012), http://www.brennancenter.org/content/resource/national_survey_super_pacs_corruption_and_democracy; *see also*, Todd Paulson and David Schultz, *Bucking Buckley: Voter Attitudes, Tobacco Money, and Campaign Contribution Corruption in Minnesota Politics*, 19 *HAMLIN J. PUB. L. & POL’Y.* 449, 469 (1997-1998).

¹⁸ Beth Fouhy, *2012 Campaign: Obama, Romney Volunteers Hope to Make the Difference* in November, *HUFFINGTON POST* (Feb. 13, 2013), http://www.huffingtonpost.com/2012/07/03/2012-campaign-obama-romney_n_1647029.html

¹⁹ *Id.*

²⁰ For example, the Pew Research Center reported that “[In 2008,] young people provided not only their votes but also many enthusiastic campaign volunteers. Some may have helped persuade parents and older relatives to consider Obama’s candidacy. And far more young people than older voters reported attending a campaign event while nearly one-in-ten donated money to a presidential candidate.” The donations alone were an accomplishment for the Obama campaign, given that 66% of voters under age 30 voted for Obama. *See* Scott Keeter, Juliana Horowitz & Alec Tyson, *Young Voters in the 2008 Election*, *PEW RESEARCH CENTER* (Nov. 13, 2008), <http://www.pewresearch.org/2008/11/13/young-voters-in-the-2008-election/>

turn-out-the-vote strategy.²¹ On election day, in November 2012, the Democrats' turnout efforts were hailed by some as “historic.”²² In the Republican camp, Mitt Romney stepped up efforts in an attempt to compete. Yet, in spite of the proven success of direct appeals, after voter numbers were calculated, it became clear that voter participation was down. Polling of self-identified non-voters revealed that 54% professed belief that the political process was corrupt.²³ Although it is important to be cautious in drawing conclusions based upon these data, the numbers imply a connection between perceptions of corruption and depressing voter turnout. Moreover, in light of the success of the Obama campaign in drawing out volunteers, donors, and voters, the lower numbers from 2012 may portend a more substantial decline in future elections. As Americans' discontent with “big money”²⁴ in politics grows, increasingly, members of the public may decide not to participate in politics.²⁵ The appearance of corruption from the birth of Super PACs and other campaign finance bundling groups could usher in a new era of political apathy and citizen disengagement.

²¹ Robert Butler, *US Election History: Razor- Thin Finish In 2012 Would be Far From Nation's First*, THEPRESIDENCY.US (Nov. 7, 2012), <http://thepresidency.us/2012/11/us-election-history-razor-thin-finish-in-2012-would-be-far-from-nations-first/>; see also, Lucy Madison, *In Last Days of Campaign, A Final Push to Get Out The Vote*, CBS NEWS (Nov. 5, 2012, 6:00 AM), (CBS News called the election “nail-bitingly close”).

²² The predicted numbers and make-up of polling place no-shows was weighted against Obama, making the get-out-the-vote ground game particularly important for his campaign. The Suffolk University Political Research Center reported in advance of the election that “[t]wo-thirds of the unlikely voters say they voted four years ago, backing Obama by more than 2-1 over Republican John McCain. See Susan Page, *Why 90 Million Americans Won't Vote in November*, USA TODAY (Aug. 15, 2012, 6:15 AM), <http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/>.

²³ Susan Page, *Why 90 Million Americans Won't Vote in November*, USA TODAY (Aug. 15, 2012, 6:15 AM), <http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/>.

²⁴ The term “big money” is often used by opponents of the current campaign finance laws and climate. See e.g., *Money in Politics*, COMMON CAUSE (last visited Feb. 17, 2013), <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4764307> (“Big money has long dominated our elections, and the problem has worsened since the Supreme Court's *Citizens United* ruling in 2010, which allowed corporations to spend unlimited amounts of money on our elections. In campaign 2012, ‘independent’ groups spent about \$1 billion, much of it from anonymous individuals and corporations.”)

²⁵ See generally Pollock, Philip H. III. 1983. *The Participatory Consequences of Internal and External Political Efficacy: A Research Note*, 36 W. POL. Q., 400- 409. See also Philip B. Heymann, *Democracy and Corruption*, 20 FORDHAM INT'L L.J. 329, 328-329 (1996-1997)

Part I of this Article provides background on campaign finance law, highlighting the Court's recent case of *Citizens United*, affirmed in *American Tradition Partnership*, which provided fertile ground for new funding structures that made possible the accumulation of large pools of money to be spend on candidate and issue advertisements. This Part explains the Supreme Court's acceptance of citizen perceptions of corruption as a legitimate basis for regulating campaign communication, but notes that the Court has failed to elaborate or use this interest as a determining factor in its decisions. Part II of the Article explains how the Court's decision in *Citizens United* triggered a series of events, including a District Court case *SpeechNow.org v. Federal Election Commission* and the subsequent birth of the Super PAC, which increased the potential for bundling of contributions. This Part illustrates the effect of Super PACs and other financing structures by citing data on the amount of independent money spent during the most recent presidential election. Part III provides a picture of how developments in campaign financing have influenced the appearance of corruption, and includes extensive discussion of polling data evincing Americans' distrust of the political election process, and government generally. Part IV discusses the implications of the polling data revealing widespread perceptions of corruption in campaigns. This Part starts with the Supreme Court's own adoption of appearance of corruption as a compelling concern, illustrating ways in which the Court has considered the issue in opinions. This Part explains how perceptions of corruption affect voters' sense of political efficacy and how this, in turn, threatens democracy. Finally, Part V looks at citizen involvement in the 2012 political election, both as a function of donations and volunteerism, and in terms of turnout at the polls. An examination of the numbers reveals that while small donations and volunteering remained strong, voting numbers were down from 2008 *and* 2004. The discussion in this Part focuses on Obama's campaign strategy, arguing that the 2012 election cycle simultaneously illustrates the importance of political efficacy, and portends grave problems for future elections.

I. A HISTORY OF CAMPAIGN FINANCE JURISPRUDENCE AND THE “APPEARANCE OF CORRUPTION”

Public suspicion regarding the role of money in politics dates back to colonial times. Even the revered George Washington was accused of exploiting money for political gain.²⁶ Toward the close of the nineteenth century, direct contributions from corporate treasuries helped to give William McKinley’s Republican campaign a significant edge over Democrat William Jennings Bryan, \$16 million to \$600.²⁷ In the face of widespread public opposition to McKinley’s campaign financing, Theodore Roosevelt publicly opposed such practices. Roosevelt then suffered a major crisis of public confidence when it was revealed that railroad and oil companies provided seventy-five percent of his campaign funds during the

²⁶ In 1757, Washington was charged with a kind of campaign spending irregularity in his race for a seat in the Virginia House of Burgesses. Said to have purchased and distributed more than a quart of rum, beer, and hard cider per voter (391 voters in the district) during the campaign. Historian R. T. Barton set forth this account:

. . .the law passed by the House of Burgesses soon after the election of 1758, which provides that no one should be qualified to hold a seat in that house, who should, "before his election, either himself or by any other person or persons on his behalf and at his charge, directly or indirectly give, present or allow any person or persons having voice or vote in such election any money, meat, drink, entertainment or provision, or make any present, gift, reward, or entertainment, &c., &c., in order to be elected."

It is hardly to be supposed that this law was aimed at the worthy delegate from Frederick, but it fit his case so exactly that had it been in force prior to his election he would certainly have been ineligible to his seat. For seven years Washington continued to represent Frederick county, but there is no record of any incident of interest connected with his subsequent elections. As a law-abiding citizen it is to be presumed that thereafter meat and drink, except in the ordinary way of hospitality, were not among the means resorted to by Washington and his friends to secure popular favor.

See New River Notes, <http://www.newrivernotes.com/va/1electgw.htm> (last visited Feb. 10, 2013). *See also*, John Morgan & Felix Várdy, *On the Buyability of Voting Bodies*, 23 J. THEORETICAL POL. 260, 261 (2011). (discussing Washington’s distribution of alcohol in exchange for votes).

²⁷ *See* National Public Radio, *Whose Democracy Is It? A Public Radio Collaboration Examining Democracy in America* (November 2003), <http://www.npr.org/news/specials/democracy/index.html>

1904 presidential election.²⁸ Outrage was so significant that Roosevelt called for, and Congress passed the first major campaign-finance reform law. The Tillman Act of 1907²⁹ banned "all contributions by corporations to any political committee or for any political purpose." The sponsor of the bill, Senator Benjamin Tillman, remarked that it was a "sad thought that the Senate is discredited by the people of the United States as being a body more or less corruptible or corrupted."³⁰ Forty years after the passage of the Tillman Act, the Taft-Hartley Act extended the ban on corporate donations to labor unions. As early campaign finance legislation reveals, political actors have long worried about campaign donations and outside spending would appear to their constituents.

A. *Pre-Citizens United*

The modern era of campaign finance law dates to the 1973 case, *United States Civil Service Commission v. National Ass'n of Letter Carriers*. In this case, the Supreme Court, in holding that federal employees should be banned from taking formal positions in political parties or run for office on partisan political tickets, said, "it is not only important that the Government and its employees in fact, avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."³¹ This decision is notable in that the Court realized that an important aspect of democratic politics public perception of the fairness of the process.

²⁸ *Id.*

²⁹ *Id.* (Discussing the public recoil against the corruption of politics by business led McKinley's successor, Theodore Roosevelt, to act. In his 1905 message to Congress, Roosevelt condemned the perception that the dollar speaks louder than the vote. "No enemy of free government [is] more dangerous," he stated, "and none so insidious." Theodore Roosevelt, 1905 State of the Union Address.)

³⁰ Jack Beatty, *A Sisyphian History of Campaign Finance Reform*, THE ATLANTIC, (July 2007), <http://www.theatlantic.com/magazine/archive/2007/07/a-sisyphian-history-of-campaign-finance-reform/306066/>

³¹ *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973). This case arose when a group of federal employees and local party committees challenged § 9(a) of the Hatch Act, 5 U.S.C. § 7324(a)(2), against federal employees' taking "an active part in political management or in political campaigns." This was not the first Supreme Court case to challenge the Hatch Act. In the earlier case, *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947), a divided Court likewise upheld the Act.

One year after the decision in *National Ass'n of Letter Carriers*, Congress amended the Federal Election Campaign Act (FECA).³² The FECA Amendments limited certain political contributions and expenditures, imposed disclosure requirements on political committees who receive contributions and individuals and groups who make contributions, developed public financing programs for Presidential elections, and created the Federal Election Commission as the administering agency of these requirements.³³ Predictably, the amendments were challenged, and in 1976, the Court handed down its opinion in *Buckley v. Valeo*³⁴. In *Buckley*, appellants argued that limiting the use of money for political purposes constituted an impermissible restriction speech, because in their view “virtually all meaningful political communications in the modern setting involve the expenditure of money.”³⁵ The appellees argued that several important governmental interests were advanced by the regulations, including (1) preventing corruption or the appearance of corruption; (2) “equaliz[ing] the relative ability of all citizens to affect the outcome of elections,” and (3) tempering the dramatic increases in the costs of political campaigns so as to encourage the participation of political candidates lacking large sums of money.”³⁶ Ultimately, the *Buckley* Court sustained the Act’s individual contribution limits, disclosure provision, and public financing scheme, but found the expenditure limitations “constitutionally infirm.”³⁷ In upholding limitations on direct contributions, the Court determined that these limitations on direct contributions were justified by Congress’ interest in preventing not only actual corruption but also the appearance of corruption, explaining that “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”³⁸ The *Buckley* Court referred to the

³² See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in sections of 2, 18, and 47 U.S.C.).

³³ See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in sections of 2, 18, and 47 U.S.C.).

³⁴ See *Buckley v. Valeo*, 424 U.S. 1, 1 (1976).

³⁵ See *Buckley* 424 U.S. at 11.

³⁶ *Id.* at 25-26.

³⁷ *Id.* at 143.

³⁸ *Buckley v. Valeo*, 424 U.S. 1, 26-28 (1976). *Buckley*, 424 U.S. at 27 (quoting *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (ellipsis in original)).

Government interest in "combating the appearance or perception of corruption engendered by large campaign contributions" as of "almost equal" importance to combating corruption.³⁹

While the *Buckley* Court found a potential for direct contributions to pose a threat to the legitimacy of elections, it did not view independent expenditures as posing the same threat.⁴⁰ The Court worried about limiting political speech without having a sufficiently compelling reason to do so.⁴¹ In finding the expenditure limitations constitutionally infirm, the Court noted that limiting spending "necessarily reduces the quantity of expression... because virtually every means of communicating ideas in today's mass society requires the expenditure of money."⁴² Moreover, the Court asserted that "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."⁴³ Finally, the Court decided that there is nothing "insidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate."⁴⁴ In so holding, the Court was making the determination that unrestricted independent spending on political messaging does not create the

³⁹*Id. at 27.*

⁴⁰ The Court concluded that "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling." *Buckley*, 424 U.S. at 29. The Court also concluded that the \$5,000 limitation on contributions by political committees enhanced the opportunity of association "of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id.* at 35-36. And finally, the \$25,000 limitation on total contributions during any calendar year was constitutional even though it did impose a restriction on "the number of candidates and committees with which an individual may associate himself by means of financial support," since the restraint serves "to prevent evasion of the \$1,000 contribution limitation" and is thus no more than a corollary to the individual limitation. *Id.* at 38. FECA as amended in 1974 limits expenditures by individuals or groups "relative to a clearly identified candidate" to "\$1,000 per candidate per election, and by a candidate from his personal or family funds to various specified annual amounts depending upon the federal office sought, and restricts overall general election and primary campaign expenditures by candidates to various specified amounts, again depending upon the federal office sought." *Id.* at 626.

⁴¹ The Court characterized limitations on expenditures as "restrict[ing] the quantity of speech by individuals, groups, and candidates." *See Id.* at 39.

⁴²*Id.*

⁴³ *See Buckley* 424 U.S. at 48-49.

⁴⁴ *Id.*

appearance of corruption.⁴⁵ The *Buckley* Court established that the only constitutionally acceptable rationale for campaign finance regulation was to combat the corruption or the appearance of corruption—no leveling of the playing field or other rationale would suffice.⁴⁶

In October of 1989, the Court heard arguments for *Austin v. Michigan Chamber of Commerce*⁴⁷ Plaintiffs in *Austin* were challenging a Michigan law⁴⁸ that prohibited non-media corporations from using general treasury funds for independent expenditures in state election campaigns. The Court held that “application of 54(1) to the Chamber is constitutional because the provision is narrowly tailored to serve a compelling state interest.”⁴⁹ The compelling state interest, according to the Court, was addressing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁵⁰ The *Austin* Court’s unease with “corporate domination” of political elections relates to the goal of safeguarding First Amendment values by preserving some space in the political “marketplace.”⁵¹ The numerous advantages enjoyed by corporations “not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”¹³⁰

⁴⁵ As Dan Ortiz has explained, in the Court’s “*Buckley* view, [independent expenditures] do not give rise to even the appearance of corruption. Thus, regulating such expenditures would not serve to protect the integrity of the political process.” Daniel R. Ortiz, *Recovering the Individual in Politics*, 15 N.Y.U. J. Legis. & Pub. Pol’y 263, 272 (2012)

⁴⁶The Court explicitly rejected the goal of “equalizing the relative ability of individuals and groups to influence the outcome of elections.” See *Buckley*, 424 U.S. at 48-49. The Court explained, “there is no precedent which supports the position that “the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.” *Id.* at 49.

⁴⁷ *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990).

⁴⁸ Michigan Campaign Finance Act, § 54(1), Mich. Pub. Acts 388 (1976).

⁴⁹ *Austin*, 494 U. S. 652.

⁵⁰ *Id.* at 659-60 (citations omitted). Articulating the twin campaign finance concerns as “corruption of the appearance of corruption” was not new in *Austin*. The Court had earlier held in *FEC v. National Conservative Political Action Committee* that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances”. *Federal Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496 -497 (1985).

⁵¹ *Id.* at 659.

In *Shrink Missouri* the Court upheld Missouri’s \$1075 funding limit. Justice Souter’s opinion for the Court emphasized evidence that Missouri residents *perceived* a need for limits. He wrote “[A]lthough majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: [A]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.”⁵² The opinion cited newspaper stories and editorials arguing that wealthy interests were controlling Missouri politics.⁵³ Justice Souter’s examples of media accounts was notable less in that they demonstrated actual corruption, but rather in that they evinced a belief amongst Missouri residents that money was having a corrupting influence.

In spite of the holdings in *Austin* and *Shrink Missouri*, lawmakers heard a call for more comprehensive campaign finance reforms. In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA)⁵⁴—or McCain-Feingold Act. The BCRA was a Congressional attempt to close “loopholes” in FECA and other portions of the United States Code “to purge national politics of what is *conceived to be* the pernicious influence of ‘big money’ campaign contributions.”⁵⁵ The BCRA was challenged in the 2003 case, *McConnell v. Federal Election Comm’n*.⁵⁶ The *McConnell* Court

⁵² *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 394 (2000) (internal quotations omitted).

⁵³ *Id.* at 393 (Justice Souter also pointed out that Missouri had previously adopted campaign finance limits through a ballot proposition that had received 74% approval from the voters.)

⁵⁴ Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §§ 1-504 (2002).

⁵⁵ Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §§ 1-504 (2002) (emphasis added.) (Relevant statutes enacted by the Bipartisan Campaign Reform Act include: 2 U.S.C.A. § 441(i), 441(k), 441(a), 438 (a), and 510.)). The Bipartisan Campaign Reform Act (BCRA) formed the basis for *McConnell v. Federal Election Comm’n*. *McConnell*, 540 U.S. at 114. FECA regulated “donations made by any person for the purpose of influencing any election for Federal office,” but left unregulated donations made “solely for the purpose of influencing state or local elections.” *Id.* at 122. As a result, prior to the enactment of BCRA, corporations, unions, and even wealthy individuals “who had already made the maximum permissible contributions to federal candidates” could contribute “nonfederal money,” known as “soft money,” to political parties intended to influence state or local elections. *Id.* at 123. Such soft money contributions were often “designed to gain access to federal candidates” and were in many cases “solicited by the candidates themselves.” *Id.* at 125. “The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA’s limitations on the source and amount of contributions in connection with federal elections.” *Id.* at 126.

⁵⁶ *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 203–209 (2003).

found limits on electioneering communications permissible, citing, among other things, concern for the “eroding of public confidence in the electoral process through the appearance of corruption.”⁵⁷ The *McConnell* Court referred at one point to the “Government’s strong interests in preventing corruption, and *in particular the appearance of corruption.*” The Courts special emphasis on appearance suggests a growing concern about the potential for citizens to disengage with the political process as well as a focus on the legitimacy of democratic institutions.⁵⁸

B. *Citizens United*

When the *Citizen’s United*⁵⁹ opinion was handed down, it set off a storm of controversy and commentary from law makers, political pundits, scholars, and anyone else who had been watching and waiting for the Supreme Court decision. The decision involved a question of whether a not-for-profit advocacy group, *Citizens United*, could advertise and offer free-of-charge its documentary, *Hillary: The Movie* in the thirty-day period leading up to an election.⁶⁰ Both the advertisements for the movie and the movie itself were highly critical of Hillary Clinton, and made the case that she was unfit to serve as president of the United States.⁶¹ The group

⁵⁷ *Id.* (citing Federal Election Comm’n v. National Right to Work Comm., 459 U.S. 197, 208 (2010)). “Electioneering communication” is defined “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary or sixty days of a general election. *Citizens United*, 130 S. Ct. at 887 (citing 2 U.S.C. § 434(f)(3)(A)).

§ 434(f)(3)(A)).

§ 434(f)(3)(A)).

⁷ See Adam

⁵⁸ *Id.* at 47, emphasis added.

⁵⁹ *Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876 (2010).

⁶⁰ At the conclusion of a lengthy analysis of various arguments made by *Citizens United*, Kennedy concluded:

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. In-deed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*. *Citizens United*, 130 S.Ct. at 892 (internal citation omitted).

⁶¹ “To implement the proposal, *Citizens United* was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for

Citizens United receives corporate funding, as such, the broadcasting of this type of “electioneering communication” was forbidden under federal law.⁶² The District Court denied Citizens United’s request for declaratory and injunctive relief, and granted the Federal Election Commission judgment as a matter of law, based upon existing campaign finance laws.⁶³

By a vote of 5-4, the Court, per Justice Kennedy, overturned *Austin v. Michigan Chamber of Commerce*⁶⁴ and the portion of *McConnell v. Federal Election Commission*⁶⁵ that restricted independent corporate expenditures, as codified in section 203 of the Bipartisan Campaign Reform Act (BCRA).⁶⁶ In particular, the *Citizens United* decision invalidated laws forbidding corporations and unions from using general treasury funds for “electioneering communication,” political advocacy transmitted by broadcast, cable, or satellite communication in the period leading up to a federal election.⁶⁷ After the ruling, no state could limit the amount of money corporations or unions poured into advertising for or against issues or candidates in the run-up to an election.⁶⁸

Hillary. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie’s Website address.” *Id.* at 887.

⁶² 2 U.S.C. §441b(b)(2) (2006) (for a definition of “electioneering communication” see fn 57, *supra*).

⁶³ See *Citizen United v. Federal Election Comm’n.*, 530 F. Supp. 2d 274 (D.D.C.2008) (denying Citizens United’s request for a preliminary injunction). The court held that §441b was facially constitutional under *McConnell*, and that §441b as constitutional as applied to Hillary because it was “susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.” *Id.* at 279.

⁶⁴ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. Federal Election Comm’n.*, 130 S. Ct. 876 (2010).

⁶⁵ *McConnell v. Federal Election Comm’n.*, 540 U.S. 93 (2003), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010). In *McConnell v. Federal Election Comm’n.*, the Court upheld limits on electioneering communications in a facial challenge, relying on the holding in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), banning political speech when it originated from a corporate entity. *McConnell v. Federal Election Comm’n.*, 540 U. S. at 203–209.

⁶⁶ 2 U.S.C. § 434(f)(3)(A) (2006) (Section 203 of BCRA amended 2 U.S.C. § 441b(b)(2) to prohibit any “electioneering communication,” which is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary or sixty days of a general election. *Citizens United*, 130 S. Ct. at 887 (citing 2 U.S.C. § 434(f)(3)(A)).

⁶⁷ 2 U.S.C. §441b (2006).

⁶⁸ Much has been made of the fact that the group Citizens United, in its arguments, provided the Court with many avenues by which the Court could decide the question on narrow grounds.

In striking down the previous corporate spending limits, Kennedy asserted that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”⁶⁹ Justice Kennedy, writing for the Court in *Citizens United*, decisively rejected *Austin*’s distortion rationale, finding this interest “unconvincing and insufficient.”⁴⁹ Importantly, Kennedy asserted that “[t]he appearance of influence or access . . . [would] not cause the electorate to lose faith in our democracy.”⁷⁰ The only evidence for this supposition was Kennedy’s own conclusion that “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”⁷¹ Confident that his logic would guide voter behavior, Kennedy concluded that unlimited corporate spending would not adversely affect citizen participation in elections.⁷²

In response to the majority’s opinion, Justice Stevens penned a blistering dissent in which he questioned virtually all of Kennedy’s assumptions. Stevens wrote, “In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like §203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process.”¹¹³ Stevens went on to assert

A democracy cannot function effectively when its constituent members believe laws are being bought and sold . . .⁷³ At stake in the legislative efforts to address this threat is therefore not only

⁶⁹ *Citizens United*, 130 S. Ct. 876 (2010).

⁷⁰ *Id.*

⁷¹ *Citizens United*, 130 S. Ct. at 910.

⁷² See e.g. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 609 (2011) (“Note the majority’s unsupported empirical statement--apparently for all types of elections and any identity of speaker--that independent spending can never cause voters to ‘lose faith in our democracy.’” In spite of Kennedy’s assertion, a number of commentators argued that the opinion purports to make speech available for all, but actually serves to hinder participation. For example, Monica Youn proposes that the opinion establishes a “‘source-blind’ approach to the regulation of money in politics that forbids the state from differentiating among different sources of political spending . . . [u]nder [this] fully commodified conception of speech, speakers drop out of the picture. . .” Youn’s account highlights the Court’s focus on the “free” generation of copious amounts of speech, rather than the right of individuals to possess unfettered ability to express views. Monica Young, *First Amendment Fault Lines and the Citizens United Decision* 5 Harvard L. & Pol. Rev. 135, 138 (2011).

⁷³ *Id.* at 964.

the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents[but also] the confidence of its citizens in their capacity to govern themselves."⁷⁴

Steven's dissent was notable in part because it explicitly contemplated the potential for damage from the *appearance* of corruption. He found the implications and potential effects of the opinion deeply troubling.

He was not alone. The *Citizens United* opinion received immediate and wide-spread media coverage. There was plenty of discussion and commentary scholars,⁷⁵ and media coverage reached a large number of American citizens. Bill Moyers interviewed Monica Youn and Zephyr Teachout on PBS,⁷⁶ an initial New York Times article⁷⁷ received more than 2,000 posted comments and was followed by a series of follow-up articles and a spate of editorials.⁷⁸ Other widely read news outlets and blogs published stories and opinion pieces on the decision, including the Wall Street Journal, the Washington Post, Politico, Slate, USA Today, the Huffington Post, to name just a few,⁷⁹ and television outlets of all political

⁷⁴ *Id.* at 964. (citing Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U. S., 449, 507 (2007) (Souter, J., dissenting) and McConnell v. Federal Election Comm'n, 540 U. S., at 144 (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 390 (2000))).

⁷⁵ *Citizens United v. FEC (Amicus Brief)*, BRENNAN CENTER FOR JUSTICE (Jan. 21, 2010), http://www.brennancenter.org/content/resource/citizens_united_v_fec/; Erin Miller, *What Should Congress Do About Citizens United?*, SCOTUSBLOG.COM (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/?p=15469> (Laurence H. Tribe, Professor of Constitutional Law at Harvard Law School, discusses the decision in *Citizens United v. Federal Election Commission*)

⁷⁶ *Free Speech for Corporations*, PBS.ORG (Jan. 29, 2010), <http://www.pbs.org/moyers/journal/01292010/profile2.html>

⁷⁷ Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all>.

⁷⁸ See e.g., Editorial, *The Court's Blow to Democracy*, N.Y. TIMES (Jan. 1, 2010), <http://www.nytimes.com/2010/01/22/opinion/22fri1.html>; Editorial, *When Other Voices are Drowned Out*, N.Y. TIMES (March 25, 2012), <http://www.nytimes.com/2012/03/26/opinion/when-other-voices-are-drowned-out.html>; Editorial, *Citizens United*, N.Y. TIMES (June 25, 2012), <http://www.nytimes.com/2012/06/26/opinion/the-court-citizens-united.html>; Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES (July 17, 2012), <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all>.

⁷⁹ See Philip Rucker, *Citizens United used 'Hillary: The Movie' to Take on McCain-Feingold*, WASH. POST (Jan. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012103582.html>; John C. Coates and Taylor Lincoln, *Fulfilling the Promise of 'Citizens United,'* WASH. POST (Sept. 6, 2011), <http://www.washingtonpost.com/opinions/fulfilling-the-promise-of->

stripes weighed in.⁸⁰ CNN analyst and New Yorker contributor, Jeffrey Toobin wrote a detailed analysis of Chief Justice Robert's strategy regarding the opinion, which he also discussed it in his book, *The Oath: The Obama White House vs. The Supreme Court*.⁸¹ Other authors, including Monica Youn, Bill Moyers, and Lawrence Lessig, among others, authored books focused on the opinion and its implications.⁸²

citizensunited/2011/09/02/gIQAA4np7J_story.html; Dan Eggen, *Citizens United Challenges the Strident Side of Supreme Court Ruling*, WASH. POST (April 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033104028.html>; Ashby Jones, *What Will Citizens United Do to the 2010 Election Cycle?*, Law Blog, WALL ST. J. (Jan. 21, 2010, 2:59 PM), <http://blogs.wsj.com/law/2010/01/21/what-will-citizens-united-do-to-the-2010-election-cycle/>; Bradley Smith, *The Incumbent's Bane: Citizens United and the 2010 Election*, WALL ST. J. (Jan. 25, 2011), <http://online.wsj.com/article/SB10001424052748703555804576101622398145818.html>; Daniel Henninger, *The Rage Against Citizens United*, WALL ST. J. (Oct. 28, 2010), <http://online.wsj.com/article/SB10001424052702304173704575578461221742460.html>; Richard L. Hasen, *Money Grubbers*, SLATE (Jan. 21, 2010, 12:58 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.html; Richard L. Hasen, *The Numbers Don't Lie*, Slate, (March 9, 2012), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html; Joan Biskupic and Fredreka Schouten, *Supreme Court Rolls Back Campaign Spending Limits*, USA Today, (Jan 21, 2010, 5:50 PM), http://www.usatoday.com/news/washington/judicial/2010-01-21-campaign-spending-supreme-court_N.htm; Deborah Tedford, *Supreme Court Rips Up Campaign Finance Laws*, NPR, (Jan 21, 2010), <http://www.npr.org/templates/story/story.php?storyId=122805666>; Jason Linkins, *The Supreme Court's Citizen United Decision is Terrifying*, Huffington Post (March 23, 2010, 6:12 AM), http://www.huffingtonpost.com/2010/01/21/the-supreme-courts-citize_n_432127.html.

⁸⁰ See Ken Klukowski, *Founding Fathers Smiling After Supreme Court Campaign Finance Ruling*, FOXNEWS (Jan 22, 2010), <http://www.foxnews.com/opinion/2010/01/22/ken-klukowski-supreme-court-amendment-mccain-feingold/>; Ilya Shapiro on *Citizens United on MSNBC's Rachel Maddow Show*, CATO INSTITUTE (July 23, 2012), <http://www.cato.org/multimedia/video-highlights/ilya-shapiro-citizens-united-msnbc-rachel-maddow-show>

⁸¹ Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, THE NEW YORKER (May 21, 2012), http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin; JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* (2012).

⁸² MONICA YOUN, *MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED* (2011); JEFFREY D. CLEMENTS & BILL MOYERS, *CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT* (2012); THOM HARTMANN, *UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE" - AND HOW YOU CAN FIGHT BACK* (2010); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY*

In June 2012, the Court reaffirmed the *Citizens United* ruling in a brief, per curiam, 5-4 decision that summarily reversed a decision of the Montana Supreme Court, which had upheld the state's existing restrictions on corporate political spending.⁸³ The Montana court had ruled that the state's distinctive history and characteristics warranted a departure from the principles announced in *Citizens United*. In spite of numerous amicus briefs containing testimonials about the dangers of unchecked corporate spending on political advocacy,⁸⁴ the majority held firmly onto its earlier position, stating:

The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does...Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.⁸⁵

Again, media coverage of the topic was extensive, both leading up to and following the decision.⁸⁶

CORRUPTS CONGRESS--AND A PLAN TO STOP IT (2011). (These books are almost unwaveringly critical of the decision and pessimistic about the short and long-term effects.)

⁸³ American Tradition Partnership v. Bullock, 132 S. Ct. 2490 (2012).

⁸⁴ Lyle Denniston, *Opinion Recap: Citizens United Solidified*, SCOTUSBLOG.COM (June 25, 2012, 12:48 PM), <http://www.scotusblog.com/2012/06/opinion-recap-citizens-united-solidified/> ("The brevity of the unsigned ("Per Curiam") opinion for the majority overruling the Montana Supreme Court suggested that the five Justices who joined in *Citizens United* were totally unmoved by a stack of friend-of-court briefs urging the Court to reconsider that decision in the wake of the flood of money going into races this year, especially for the presidency and for seats in Congress.").

⁸⁵ American Tradition Partnership v. Bullock, 132 S.Ct. 2490, 2491 (2012). 567 U. S. ____ (2012) (slip opinion p. 1)

⁸⁶ *Campaign Finance (Super PACs)*, *Times Topics*, N.Y.TIMES (Nov. 12, 2012), http://topics.nytimes.com/top/reference/timestopics/subjects/c/campaign_finance/index.html; Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES (July 17, 2012), <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all>; Adam Liptak, *Court Declines to Revisit Its Citizens United Decision*, N.Y. TIMES (June 25, 2012), <http://www.nytimes.com/2012/06/26/us/supreme-court-declines-to-revisit-citizens-united.html>; Peter Overby, *Supreme Court Says Montana Cannot Ignore 'Citizens United' Ruling*, NPR (June 25, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/06/25/155707295/supreme-court-says-montana-cannot-ignore-citizens-united-ruling>; Amanda Terkel, *Montana Nonpartisan Judicial Elections System Struck Down by Appeals Court*, HUFFINGTON POST (Sept. 18, 2012, 9:33 PM), http://www.huffingtonpost.com/2012/09/18/montanas-ban-political-endorsements-judicial_n_1895318.html?utm_hp_ref=politics; Seth Cline, *Supreme Court Considering Case that Defies Citizens United Ruling*, U.S. NEWS & WORLD REPORT (June 15, 2012), <http://www.usnews.com/news/articles/2012/06/15/supreme-court-considering->

Following the decision, there was a flood of articles addressing a variety of topics, from the changing role of the Roberts Court to the implications for First Amendment jurisprudence, to the implications for corporate governance, theory, and tax law. Very little of the commentary even mentioned the perceptions of the American voter.⁸⁷ This omission is surprising, given the prominence of the “appearance of corruption” issue in the *Citizens United* and earlier campaign finance decisions. How corrupt the process appears is a concern that is prominently featured in every Supreme Court campaign finance opinion, dating back to pre-*Buckley* days. This “appearance” concern is routinely discussed in tandem with “actual” corruption.⁸⁸

*SpeechNow.org v. Federal Election Commission*⁸⁹ a D.C. Circuit case, was decided two months after *Citizens United*. The issue in this case was whether the federal government may require an unincorporated association that makes only independent expenditures to register and report as a political committee.⁹⁰ If such a committee were designated “political committee,” it would then be subject to various requirements and restrictions.⁹¹ After

case-that-defies-citizens-united-ruling; Seth Cline, *Supreme Court Re-Affirms Citizens United*, U.S. NEWS & WORLD REPORT (June 25, 2012), <http://www.usnews.com/news/articles/2012/06/25/supreme-court-re-affirms-citizens-united>; Rachel Weiner, *Supreme Court's Montana Decision Strengthens Citizens United*, *The Fix*, WASH. POST (June 25, 2012, 10:43 AM), http://www.washingtonpost.com/blogs/the-fix/post/supreme-courts-montana-decision-strengthens-citizens-united/2012/06/25/gJQA8Vln1V_blog.html; Michael Doyle, *Citizens United Stands; No Exceptions for States*, THE SEATTLE TIMES (June 26, 2012, 8:31 AM Updated 1:55 PM), http://seattletimes.com/html/politics/2018532177_scotuscampaign26.html; Josh Levs and Bill Mears, *Supreme Court*, CNN (June 25, 2012), http://articles.cnn.com/2012-06-25/politics/politics_scotus-campaign-finance_1_corporate-political-spending-campaign-spending-citizens-united-decision?_s=PM:POLITICS

⁸⁷ Exceptions include Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 *Harv. L. Rev.* 1563 (2012) and Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 *Harv. L. Rev. F.* 91 (2012).

⁸⁸ Which has come to be defined as “quid-pro-quo” corruption. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

⁸⁹ *SPEECHNOW.ORG v. Federal Election Comm'n.*, 599 F.3d 686 (D.C. Cir. 2010).

⁹⁰ According to the Federal Election Commission Act (FECA) of 1972, a political committee is “any committee, club, association, or other group of persons” that receives contributions of more than \$1000 in a year or makes expenditures of more than \$1000 in a year. 2 U.S.C. § 431(4) (2002).

⁹¹ Once a group is so designated, contributions to the committee are restricted by 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3). The first provision limits an individual’s contribution to a

noting that the committee in question proposed to engage exclusively in independent expenditures, the court in *Speechnow.org* said, “Because of the Supreme Court’s recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has *no* anti-corruption interest in limiting independent expenditures.”⁹² Previously, as the *SpeechNow.org* court pointed out, the “Court concluded that limiting the government’s anticorruption interest to preventing quid pro quo interest to preventing quid pro quo was a ‘crabbed view of corruption, and particularly of the appearance of corruption’ that ‘ignores precedent, common sense, and the realities of political fundraising.’”⁹³ The circuit court acknowledged that the *Citizens United* Court had “retracted this view of the government’s interest.” After concluding that the Supreme Court had rescinded its prior commitment to addressing broader corruption concerns, the *Speechnow.org* court had no choice but to lift restrictions on independent expenditure committees.⁹⁴ This holding would have important implications for the evolution of new forms of political action committees and similar non-profit political advocacy groups.⁹⁵

II. AFTER CITIZENS UNITED: THE RISE OF THE SUPER PAC

Although the direct impact on corporate spending patterns remains murky, without question the campaign finance landscape has undergone dramatic changes since the handing down of *Citizens United*. In 2008—the last presidential election—total spending was \$301.6 million.⁹⁶ In the 2012 presidential election cycle, estimated spending by independent groups rose

political committee to \$5000 per calendar year; the second limits an individual’s total contributions to all political committees to \$69,900 biennially. *Id.*

⁹² *SPEECHNOW.org*, 599 F.3d at 692-693.

⁹³ *McConnell*, 540 U.S. at 152.

⁹⁴ *SPEECHNOW.org*, 599 F.3d 686.

⁹⁵ See discussion, section II *infra*.

⁹⁶ Evan Mackinder, *Ten Weeks Out from Election Day, Outside Spending Exceeds 2008 Total*, *OpenSecrets.org*, CENTER FOR RESPONSIVE POLITICS (Sept. 6, 2012, 11:15 AM), <http://www.opensecrets.org/news/2012/09/ten-weeks-out-from-election-day-out.html>; see also *2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total*, FEDERAL ELECTION COMMISSION (June 8, 2009), <http://www.fec.gov/press/press2009/20090608PresStat.shtml> (reporting that “Individuals, parties and other groups spent \$168.8 million independently advocating the election or defeat of presidential candidates during the 2008 campaign.”).

to \$644.6 million.⁹⁷ Total independent spending for the 2012 election cycle was more than \$1.3 billion.⁹⁸ Although *Citizens United* has led, in a step-wise fashion, to an increase in independent spending, a relatively small amount is attributable to direct corporate spending.⁹⁹ Direct corporate expenditures have been tempered by the fear of negative publicity from flagrant political spending.¹⁰⁰ Instead of spawning a rash of direct independent spending by corporations, the decision has led to a series of subsequent Court decisions that have opened the door to new mechanisms for bundling funds.¹⁰¹ One particularly prominent new structure is the so-called super political action committee (Super PAC).¹⁰² Super PACs have been game-changers in the campaign finance realm.¹⁰³ Before *Citizens United*, individuals (but not corporations) could spend unlimited sums on independent advertising directly supporting or opposing candidates.¹⁰⁴

⁹⁷ 2012 Presidential Independent Expenditures, *OpenSecrets.org*, Center for Responsive Politics (last visited Feb. 12, 2013), <http://www.opensecrets.org/pres12/index.php>.

⁹⁸ Overview: 2011-2012 Outside Spending, *Follow the Unlimited Money*, SUNLIGHT FOUNDATION (last updated Feb. 13, 2013, 7:38 PM) <http://reporting.sunlightfoundation.com/outside-spending/overview/>.

⁹⁹ Testimony before the U.S. Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights (July 24, 2012) (statement of Ilya Shapiro, Senior Fellow in Constitutional Studies at the Cato Institute).

¹⁰⁰ *Id.* (“Exxon, Halliburton, and all these “evil” companies [or even so-called good ones, like Apple and Google] aren’t suddenly dominating the political conversation. They actually spend very little money on political advertising, partly because it’s more effective to spend money on lobbying but more importantly, why would they want to alienate half of their customers?”) In the spring of 2012, companies faced a record number of shareholder resolutions demanding that companies disclose whether corporate funds were spent on politics. As a result, a number of prominent companies cut ties with advocacy groups that have been affiliated with various controversial positions. Corporations under pressure on political spending, Fredreka Schouten and Martha T. Moore, *USA Today* April 13, 2012 (<http://www.usatoday.com/news/politics/story/2012-04-13/corporate-political-spending/54251644/1>)

¹⁰¹ How much of the money accumulated in PACs and Super PACs is corporate is unknown. There is no legal obligation that Super PACs report sources of donations.

¹⁰² “Super PAC” is a colloquialism for Super Political Action Committee.

¹⁰³ For a critical look at this assertion, see Justin Elliott, *Is Citizens United Just Misunderstood?*, SALON.COM (Jan. 18, 2012, 1:08 PM), http://www.salon.com/2012/01/18/is_citizens_united_just_misunderstood/singleton/

¹⁰⁴ Under section § 100.16 (a), an “Independent Expenditure” is defined as “an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.” A communication is “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents” if it is a

However, that money had to be spent by the individual directly, rather than being pooled with the money of others in a political action committee (PAC), which had a contribution cap of \$5,000. Before *Citizens United*, these PACs were also banned from accepting corporate or union funds. After *Citizens United*, lower courts had no choice but to conclude that the Court's previous reasoning that limiting the justification for restricting political speech (spending) to quid-pro-quo exchange for political favors had changed.

The D.C. Circuit Court decision in *Speechnow.org*¹⁰⁵ removed the limits on individual donations to independent expenditure groups, which led to the creation of the so-called Super PACs.¹⁰⁶ Previously, the only type of PAC existing was defined as any group receiving or spending \$1,000 or more to influence political elections. Whereas donations to these PACs were capped at \$5,000 per year, after *Speechnow.org*, there was no limit on how much people could donate to a Super PAC. Moreover, before *Citizens United* allowed for PACs to aggregate unlimited amounts of wealth from various sources, an individual who wanted to spend money to influence a federal election was required to own the ad by including a statement "paid for by _____." Prior to *Speechnow.org*, the alternative was contributing to a so-called 527 (named for a provision in the tax code), organizations that are not technically PACs. However, whether 527 could legally take unlimited amounts of money from individuals was up for debate. The lack of clarity about the status of 527s as appropriate vehicles for individual contributions made many would-be political financiers nervous. After *Citizens United* lifted restrictions on independent expenditures, an individual or entity could donate unlimited amounts of money to a

coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37 (2 U.S.C. 431(17)).

¹⁰⁵ *SPEECHNOW.org v. Federal Election Comm'n.*, 599 F.3d 686 (D.C. Cir. 2010). See discussion in Part B *supra*.

¹⁰⁶ The Federal Election Commission recognizes Super PACs and hybrid PACs as political action committees engaged in uncoordinated spending. A Super PAC (Independent Expenditure-Only Political Committee) or Hybrid PAC (committee that maintains a non-contribution account) must register by filing FEC Form 1 [PDF] (Instructions [PDF]), Statement of Organization within 10 days after raising or spending in excess of \$1,000 in connection with federal elections. Under "Type of Committee," the PAC would check box 5(f). Additionally, the committee must submit a letter to identify itself as a Super PAC or Hybrid PAC." (From the Federal Election Commission website, see http://www.fec.gov/ans/answers_pac.shtml#super_hybrid).

committee to communicate political messages without limit and without being identified in the communication.¹⁰⁷

A final way in which donations can be bundled and spent for political advocacy is through so-called 401(c)(4)s named for the tax code under which they fall. These Qualified Nonprofit Corporations (QNCs), may not donate to political campaigns or parties directly, but they also have no disclosure obligation with respect to donors.¹⁰⁸ An important distinction between Super PACs and QNCs is that the latter may not accept donations from corporate or labor union treasuries.¹⁰⁹ While QNCs are not directly impacted by *Citizens United* and the fall-out, they do provide a mechanism for wealthy private individuals to funnel profits made through corporate enterprise into politically motivated action groups without ever being identified. According to one report issued in August of 2012, two such nonprofits, Crossroads GPS and Americans for Prosperity, had spent almost \$60 million in television-based advertising geared toward the presidential race. This figure surpassed the spending of even the wealthiest Super PACs.¹¹⁰

Because of the variety of vehicles used to bundle funds—some of them newly evolved since *Citizens United* was decided—the spending

¹⁰⁷ The FEC requires Political Action Committees of all types to report on spending. According to the FEC webpage, “After registering with the FEC, PACs must file regular reports disclosing their receipts and disbursements. PACs have the option to file these reports quarterly or monthly, and may change their filing frequency as often as once a year. PACs that choose to file quarterly may be required to file certain pre- and post-election reports, depending on their activity.” (see http://www.fec.gov/ans/answers_pac.shtml#super_hybrid).

¹⁰⁸ According to the Federal Election Commission, “Qualified Nonprofit Corporations (QNCs) may make electioneering communications. To qualify, the entity must be a nonprofit corporation incorporated under 26 U.S.C. §501(c)(4) that is ideological in nature and qualifies for exemptions under 11 CFR 114.10. . . . If a QNC makes electioneering communications that aggregate in excess of \$10,000 in a calendar year, it must certify that it is eligible for the QNC exemption. The certification must include the name and address of the corporation and the signature and printed name of the individual making the qualifying statement. It must also certify that the corporation meets the standards of a QNC, either by satisfying all of the qualifications at 11 CFR 114.10(c)(1)-(5), or through a court ruling pursuant to 11 CFR 114.10(e)(1)(i)(B).”

¹⁰⁹ “QNCs can neither make contributions to federal political committees, nor accept any funds from corporations or labor organizations.” *Id.*

¹¹⁰ *Kim Barker*, Two Dark Money Groups Outspending All Super PACs Combined, PROPUBLICA (Aug. 13, 2012, 11:50 AM), <http://www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined>; Alicia Budich & Robert Hendin, *Non-Profits Outspending Super PACs*, CBSNEWS.COM (Aug. 19, 2012, 12:05 PM), http://www.cbsnews.com/8301-3460_162-57496037/non-profits-outspending-super-pacs/.

impact of *Citizens United* is difficult to directly measure. Moreover, researchers draw different conclusions from the same data. For example, measuring the post-*Citizens United* difference between spending in states that had an existing ban on corporate independent political spending and states without such bans is one way to discern the impact of *Citizens United*. If the increase was substantially more in states that had had bans, it suggests that the bans were successful in staunching the flow of political dollars, and in removing them, the Court has substantially altered the course of political campaigns. One study relying on this data asserted that “while spending did increase *more* in the states with a prohibition, the fact that a significant increase occurred across both set (sic) tells us that we should be looking for alternative and more complicated explanations.”¹¹¹ But another study that looked at the same data “found an increase in independent expenditures that was more than twice as large in the pool of states where bans had been in place” and concluded that *Citizens United* was the “final straw in a long line of cases that empower corporations to *potentially* overpower a system that is predicated on the value that each individual voter has an equal voice.”¹¹²

A. *The Impact of Super PACs: Money in the 2012 Political Election*

Even as the votes were being tallied, the total number of dollars spent was being calculated by nonprofit reporting groups like The Sunlight Foundation and the Center for Responsive Politics. The prevalence of the Super PAC and 401(c)(4) money in elections was substantial. According to the Center for Responsible Politics, in 2012, super PACs spent an estimated \$65 million on independent expenditures and were major players in more

¹¹¹Keith E. Hamm, Michael J. Malbin, Jaclyn J. Kettler & Brendan Glavin, *The Impact of Citizens United in the States: Independent Spending in State Elections, 2006-2010*, Paper Presented at the 2012 meeting of the American Political Science Association, (2012), found at http://www.cfinst.org/pdf/state/State-Indep-Spdg_2006-10_Working-Paper-as-Released-22October2012.pdf.

¹¹²Douglas Spencer & Abby Wood, *Citizens United, States Divided: Evidence of Elasticity in Independent Expenditures* (June 6, 2012) (available at: <http://ssrn.com/abstract=2046878> or <http://dx.doi.org/10.2139/ssrn.2046878>); see also, Justin Levitt, *Confronting the Impact of Citizens United*, 29 *Yale L. & Pol. Rev.* 217, 223 (2010) (“So why has Citizens United provoked so much sound and fury? The populist environment, hostile to generic corporate interests of many kinds, surely plays a part. So does the case’s aggressive procedural approach, and its sweeping rhetoric, both of which seem to poke a finger in the eye of those who disagree with the legal merits.”).

than a dozen congressional races.¹¹³ A New York Times review of corporate governance reports, tax returns of nonprofit organizations and regulatory filings by insurers and labor unions revealed that corporate donors included American Electric Power, Aetna, Prudential Financial, Dow Chemical and the drug maker Merck. In October of 2012, two weeks before the Presidential election, the spending figures were already record-breaking. The Center for Responsible Politics revealed that Super PACs had spent \$428,677,605 for or against candidates.¹¹⁴ Corporations, individuals, and other independent groups spent more than half that, for a figure totaling \$272,652,188.¹¹⁵ The conservative group connected with Karl Rove, American Crossroads, organized as a SuperPAC had spent \$63,129,654, while its affiliate Crossroads GPS, organized as a 501(c)(4)¹¹⁶ totaled \$42,528,185 in spending, including \$286,777 in electioneering communication.¹¹⁷ Restore Our Future, Americans for Prosperity, and the U.S. Chamber of Commerce, all conservative groups, had spent a total of \$164,699,683 in efforts to secure a win for conservative candidates. The left-leaning Priorities USA Action group, organized as a Super PAC, had spent \$52,826,836. The price tag for election 2012 had lived up to the expectations of the Center for Responsible Politics, which had reported the “the 2012 election will not only be the most expensive election in U.S. history, the cost will tower over the next most expensive election by more than \$700 million.”¹¹⁸

Two weeks later, by the close of polls, the totals were even more astounding. Restore Our Future -- the super PAC that backed Republican presidential nominee Mitt Romney -- was responsible for \$142,655,346 of the total \$631 million spent on independent expenditures by super PACs in

¹¹³ *2010 Outside Spending, by Super PACs*, *OpenSecrets.org*, Center for Responsive Politics (last updated Nov. 12, 2012), <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=S>.

¹¹⁴ *Outside Spending*, *OpenSecrets.Org*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 12, 2013), <http://www.opensecrets.org/outsidespending/index.php>

¹¹⁵ *Id.*

¹¹⁶ This is an organization without donor reporting requirements.

¹¹⁷ *Outside Spending*, *OpenSecrets.Org*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 12, 2013), <http://www.opensecrets.org/outsidespending/index.php>

¹¹⁸ <http://www.opensecrets.org/MT/mt-search.cgi?search=unreported+independent+spending&IncludeBlogs=8>

the 2012 election cycle.¹¹⁹ Conservative super PAC American Crossroads was second in spending, with a total of about \$105 million. The affiliated Crossroads GPS, the 501(c)(4) "social welfare" group, spent an additional \$70.8 million. Priorities USA Action, the group that supported President Barack Obama, spent \$66,182,180, rounding out the top three super PACs.¹²⁰ This spending was only a portion of the grand total. The Center for Political Responsiveness notes, "Millions more have been spent on issue ads running far enough before an election that they don't need to be reported anywhere."¹²¹

In mid-August, NBC Nightly News reported that half a billion dollars had been spent just on television and radio advertisements.¹²² When this total passed the 500 million mark, NBC anchor Brian Williams informed viewers of what else that much money could buy: "Five hundred million dollars could feed 9.2 million malnourished children for 50 days. It could immunize 29 million children for life. It could provide clean water for 500 million children for 40 days . . . instead, it's buying television commercials, and the general election hasn't even really started yet."¹²³ The satellite and cable television business news channel CNBC reported in late October of 2012 that "Barack Obama and Mitt Romney are spending a combined \$26.86 every second this election cycle."¹²⁴

¹¹⁹ Sunlight Foundation Reporting Group, *Super PACs, Follow the Unlimited Money*, (Feb. 11, 2013), <http://reporting.sunlightfoundation.com/outside-spending/super-pacs/>

¹²⁰ *Id.*

¹²¹ Robert Maguire & Viveca Novak, *Shadow Money's Top 10 Candidates*, *OpenSecrets.org*, CENTER FOR RESPONSIVE POLITICS (Oct. 25, 2012, 5:06 PM), <http://www.opensecrets.org/news/2012/10/shadow-moneys-top-10-candidates.html>

¹²² Domenico Montanaro, *Political Campaign Ad Spending Tops \$500 Million*, *First Read*, NBC NEWS (Aug. 16, 2012, 4:32 PM), <http://firstread.nbcnews.com/news/2012/08/16/13319834-political-campaign-ad-spending-tops-500-million?lite> (This article points out that in the third week of August alone, 37 million dollars was spent).

¹²³ Domenico Montanaro, *Political Campaign Ad Spending Tops \$500 Million*, *First Read*, NBC NEWS (Aug. 16, 2012, 4:32 PM), <http://firstread.nbcnews.com/news/2012/08/16/13319834-political-campaign-ad-spending-tops-500-million?lite>

¹²⁴ Eamon Javers, *Here's How Much Candidates Spend to Get Your Vote*, CNBC (Oct. 25, 2012, 10:16 AM), http://www.cnb.com/id/49550998/Here039s_How_Much_Candidates_Spend_to_Get_Your_Vote. (CNBC Also reported, "From January 2011 through September, the Obama campaign burned through over \$470 million, with the Democratic National Committee spending another \$255 million. And the top three Obama Super PACs dumped in another

All told, Campaign spending on messaging in the 2012 Presidential election shattered previous records, topping six billion dollars, according to the New York Times.¹²⁵ Six billion dollars is more than the gross domestic product (GDP)¹²⁶ of many small countries. For example, in 2011, the most recent year for which figures are available, Fiji's GDP was 3,818,121,194, Liberia's was 1,545,461,660, Sierra Leone's was 2,242,960,927, and Barbados' was 3,685,000,000. The number of Countries with GDP under 6 Billion was 40.¹²⁷ The amount of money spent during the 2012 presidential election cycle could have sustained a small nation for an entire year.¹²⁸

III. THE MAKING OF THE "APPEARANCE OF CORRUPTION"

In the Amicus Brief of the Democratic National Committee to the Court in the Citizens United case, Robert Bauer, campaign finance counsel to Obama, predicted that removing corporate campaign spending limits would usher in "another spell of disillusionment."¹²⁹ Bauer forecasted "a widespread sense that the rules were changed, and corporate political power

\$53.7 million. All that totals more than \$775 million dollars spent — before the crucial election month of October.”)

¹²⁵ Nicholas Confessore and Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/politics/little-to-show-for-cash-flood-by-big-donors.html?ref=politics&_r=1& (“The most expensive election in American history drew to a close this week with a price tag estimated at more than \$6 billion, propelled by legal and regulatory decisions that allowed wealthy donors to pour record amounts of cash into races around the country.”). In October, the Center for Responsible Politics predicted the total, “Earlier this year, the Center for Responsive Politics estimated that the 2012 election would cost \$5.8 billion -- an estimate that already made it the most expensive in history -- but with less than a week to go before the election, CRP is revising the estimate upwards. According to CRP’s new analysis of Federal Election Commission data, this election will likely cost \$6 billion. Communications, *2012 Election Spending Will Reach \$6 Billion, Center for Responsive Politics Predicts*, *OpenSecrets.org*, CENTER FOR RESPONSIVE POLITICS (Oct. 31, 2012), <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html>

¹²⁶ The World Bank Group explains that the *Gross Domestic Product* is calculated as the value of the total final output of all goods and services produced in a single year within a country's boundaries. See <http://www.worldbank.org/depweb/beyond/global/chapter2.html>

¹²⁷ See <http://search.worldbank.org/data?qterm=GDP&language=EN> (this total is based on World Bank info using 2011 numbers, so it does not include Liechtenstein, or several other countries for which data is not current).

¹²⁸ *Id.*

¹²⁹ *Citizens United v. Federal Election Commission*, 2009 WL 2365226 (U.S.), 16 (U.S.,2009)(“A sudden change in the law, to the advantage of corporate wealth amassed in commercial transactions, would cause a violent disruption in this (election) process.”)

restored to commanding levels, just as the era of the small individual donor had begun.”¹³⁰ This sentiment captures the notion that the majority on the Court was tipping the scales in favor of corporate interests and substantially diminishing the ability of individual Americans to determine election outcomes.¹³¹

A. *Concerns about Money in Political Elections*

Early in 2012, this aggregation of wealth and spending came under attack on several grounds. The objections were often explicitly triggered by rising consternation about the new vehicles for spending, but at their most fundamental, the arguments were as old as corruption itself. One prominent concern was that groups would inappropriately influence lawmakers by conspicuously spending money to get candidates elected who would, in turn, vote for legislation benefitting those groups. A second, and related, concern was that “average” (non-wealthy) citizens would have decreasing power to influence the outcome of elections. Much of the discussion focused on the potential for small donors’ contributions to be so overwhelmed by money from wealthy donors that small donations ceased to matter. To the extent that small donors and voters of little or average means perceived this to be true, these constituencies would become disenchanting and disengage from the political process.¹³² The uptick in influence of wealthy interests and the

¹³⁰ *Id.*

¹³¹ For a discussion and empirical analysis of citizens’ views of money in politics see Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 174 (2004). Persily and Lammie “find some support for several alternative hypotheses to the theory that improper influences on government generate Americans’ perceptions of corruption.” They also conclude by saying, “In the end, we must admit that large shares of the American population distrust their government and believe the campaign finance system is a source of undue influence.” *Id.*

¹³² Of course, this concern is not new. More than twenty years ago, Dan Lowenstein wrote:

A common way of describing this type of situation is to say that there is an “appearance of impropriety.” While not exactly wrong, discussion of the campaign finance question in terms of appearances is misleading. It suggests that there is an underlying reality that is either proper or not proper, and if we could only look behind the locked door or, perhaps, into the legislator’s head, we would know. Used as a rationale for reform measures, the argument is that the appearance of impropriety is a sufficient

dwindling impact of average citizens was echoed by a related fear, namely that money, rather than quality, would select winners. After the 2012 election, the Center for Responsible Politics reported that “candidates who had the most money on their side (from their campaign and from outside sources) won 92.7 percent of House and 63.6 percent of Senate races.”¹³³ Although money could be an indication of support generally, it could also represent the backing by disproportionately wealthy interests, such as the wealthiest companies, such as oil, technology interests, or pharmaceuticals. The objections came not only from outside observers. Lawmakers themselves were vocal about the negative consequences of unlimited interest group spending. When Charles Roemer, former Louisiana governor and congressman, testified before the Senate Judiciary Committee in a hearing entitled, “Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs,” he asserted that

Washington DC is not just broken. It is bought, rented, leased, owned by the money givers. Special interests, the bundlers, PACs, Super PACs, lobbyists, the Wall Street bankers, the pharmaceuticals, the corporate giants, the insurance companies, organized labor, the GSE’s like Fannie and Freddie, energy companies, on and on and on and on. And this is not about one party versus the other, or about one person or another. It is about systemic and institutional corruption where the size of your check rather than the strength of your need or idea determine your place in line.¹³⁴

During the same hearing, Professor Lawrence Lessig pointed out that in the 2012 election cycle, .000063%, or 196 citizens, had funded 80% of the

justification for reform, because it undermines popular confidence in government. Depending on who is speaking and who is listening, there may be an implied wink to the effect that impropriety is really very unlikely but that some sop must be thrown to the ignorantly suspicious public. Alternatively, the implied wink may suggest that of course there is impropriety, but it would be impolitic to say so directly.

Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 Hofstra L. Rev. 301, 326 (1989).

¹³³ Communications, *Blue Team Aided by Small Donors, Big Bundlers; Huge Outside Spending Still Comes Up Short*, *OpenSecrets.org*, CENTER FOR RESPONSIVE POLITICS (Nov. 7, 2012, 7:38 PM), <http://www.opensecrets.org/news/2012/11/post-election.html>.

¹³⁴ *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 112th Cong.* (pg.-pg.) (2012) (statement of Charles Roemer, former Governor of Louisiana).

super-PAC spending. Lessig went on to tell lawmakers that “the elected are dependent upon the tiniest slice of America, yet that tiny slice is in no way representative of the rest of America. This . . . is corruption.”¹³⁵

B. Availability of Information and the Creation of Appearance

The American public would seem to agree with Lessig. As one commentator has noted, “If limits on contributions are permissible only in times and places where wide segments of the public believe that special interests exert too much influence over politics, then they are permissible in all times and places. The public always believes this, and it always will.”¹³⁶ Much of the public’s information about money in elections comes from various television, print, and web-based media. Because money in politics is controversial, and controversy sells, news outlets regularly report on political election spending. Television and print media tout segments like “Keeping them Honest,”¹³⁷ “Fact Check,”¹³⁸ and “Political Hotsheet,”¹³⁹ which are designed to uncover information that the public might otherwise not have. Websites like FactCheck.org¹⁴⁰ and OpenSecrets.org¹⁴¹ are dedicated to divulging the facts behind controversial topics, American citizens are provided with fact-based information they likely would not have otherwise had. As a result, dollars spent do influence how the public views the political campaign process. For example, in response to the defeating of the DISCLOSE Act¹⁴², in July of 2012, CNN reported “Nearly 700

¹³⁵ *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 112th Cong.* (pg.-pg.) (2012) (statement of Lawrence Lessig, Professor, Harvard Law School).

¹³⁶ Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH U. J.L. & POL’Y 171 (2001). (Levin is opposed to consideration of appearances in crafting campaign finance regulation.)

¹³⁷ This is a CNN segment hosted by Anderson Cooper 360.

¹³⁸ This is a New York Times sidebar companion to coverage of campaign debates in which candidates’ claims are vetted.

¹³⁹ A CBS news production: http://www.cbsnews.com/8300-503544_162-503544.html?tag=hdr

¹⁴⁰ This site was created by the Annenberg Public Policy Center at the University of Pennsylvania (no connection to NYT “Fact Check”).

¹⁴¹ This site is dedicated to compiling statistics and reporting on lobbying and political donation activities.

¹⁴² The DISCLOSE Act of 2012 would require groups spending more than \$10,000 during an election cycle to identify donors of more than \$10,000 H.R.5175 - DISCLOSE Act

independent political groups have poured more than \$187 million into 2012 campaigns nationwide so far, according to FEC records compiled by the Center for Responsive Politics.”¹⁴³ ProPublica¹⁴⁴ keeps a running tally of PAC and Super PAC contributions, including how much money is garnered and in support or opposition of which political candidate.¹⁴⁵ The Center for Responsive Politics allows visitors to look up donations by individual or company name, and keeps a current list of interest group contributions.¹⁴⁶

In addition to media reports of campaign spending, Americans witnessed a dramatic uptick in the number of political advertisements. The vast majority of this spending went to political messaging, much of it in the form of television advertisements. In 2008, the last time Americans were deciding on a president, approximately 730,000 advertisements aired in the four months prior to the election.¹⁴⁷ During the same time period in the 2012 election, the number was 1,015,615—representing a 39 percent increase. This jump was surprising, even to the co-director of the research group that provided the analysis, Erika Fowler. Fowler commented, “Everyone expected ads to be more abundant this election than in 2008, especially with super PAC involvement and both candidates opting out of public funding, but passing the one million mark is a real milestone.”¹⁴⁸

(6/24/2010--Passed House amended. Democracy is Strengthened by Casting Light on Spending in Elections Act or DISCLOSE Act - Title I: Regulation of Certain Political Spending)(In July 2012, Senate Republicans blocked the DISCLOSE Act, as the 53-45 vote fell seven votes short of the required 60 needed to overcome the GOP filibuster.)

¹⁴³ Halimah Abdullah & Matt Smith, *Outside Political Donors Still Shrouded in Smoke*, CNN (July 18, 2012, 6:39 PM), <http://www.cnn.com/2012/07/18/politics/campaign-finance>

¹⁴⁴ Al Shaw & Kim Barker, *PAC Track: What and Where are the Super PACs Spending?*, PRO PUBLICA (Dec. 7, 2012), <http://projects.propublica.org/pactrack/#committee=all>

¹⁴⁵ *See Id.* (The site states, “Two federal court rulings in 2010 paved the way for the ascent of “super PACs,” political action committees that can raise and spend unlimited amounts of money on political races, as long as they don’t coordinate with a specific candidate. And so far, they’re spending heavily on the Republican race. This app, part of our long-term investigation into “dark money,” keeps track of where super PACs are spending and raising their cash to influence the presidential race.”)

¹⁴⁶ *OpenSecrets.org*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 13, 2013), <http://www.opensecrets.org/>

¹⁴⁷ This is according to the Wesleyan Media Group, relying upon according to the study, which is based on tracking estimates from Kantar Media/CMAG. <http://www.washingtonpost.com/blogs/election-2012/wp/2012/11/02/romney-campaign-ads-outnumber-obama-ads-in-final-stretch/>

¹⁴⁸ Dan Eggen, *Obama Campaign Has Spent More on Ads than Romney's*, *Post Politics Blog*, THE WASHINGTON POST (Nov. 2, 2012, 1:12 PM),

C. Empirical Polling Data on Citizen Perceptions

As campaign spending becomes more conspicuous to the American public, the potential for the perception of corruption increases. In spite of the fact that most Americans are not well informed about Supreme Court opinions,¹⁴⁹ the public has evinced a groundswell of opposition to such spending, suggesting that citizens are taking notice.¹⁵⁰

1. Polling before *Citizens United*

Polls conducted before the *Citizens United* opinion reveals that Americans have been concerned about corruption in government for some time. For example, during the 2008 primary election, Gallup conducted a poll asking about the "importance of candidates' positions on each issue in influencing Americans' vote for President." Corruption was rated extremely/very important by 79% of those polled.¹⁵¹ Interestingly, concerns over corruption in government outranked concerns about terrorism, social security, Medicare and taxes. Gallup conducted another poll in February of 2010 asking "What are the one or two weaknesses of the United States that make you most pessimistic about the future of the country over the next

<http://www.washingtonpost.com/blogs/election-2012/wp/2012/11/02/romney-campaign-ads-outnumber-obama-ads-in-final-stretch/>.

¹⁴⁹ Recent polling data suggests that many Americans lack a good grasp of *Citizens United* and do not understand the implications of the decision. This is hardly surprising, particular in light of the fact that experts in the field debate the strength of the cause-and-effect relationship between the decision and subsequent campaign funding developments. See David Primo, *Public Opinion and Campaign Finance: Reformers versus Reality*, 7 INDEP. REV. 207 (2002) ; but see Chris Cillizza & Aaron Blake, *Poll: Voters Want Super PACs to be Illegal*, *The Fix Blog*, THE WASHINGTON POST (March 13, 2012, 7:00 AM), http://www.washingtonpost.com/blogs/the-fix/post/poll-voters-want-super-pacs-to-be-illegal/2012/03/12/gIQA6skT8R_blog.html and *National Survey: Super PACs, Corruption, and Democracy*, Brennan Center for Justice (April 24, 2012), http://www.brennancenter.org/content/resource/national_survey_super_pacs_corruption_and_democracy.

¹⁵⁰ See this Part, *infra*.

¹⁵¹ Lydia Saad, *Iraq and the Economy are Top Issues to Voters*, GALLUP POLITICS (Feb. 13, 2008), <http://www.gallup.com/poll/104320/Iraq-Economy-Top-Issues-Voters.aspx>

20 years." Those polled rated "Poor Governance (politics, Congress, corruption, etc...)" to be the biggest weakness of the United States.¹⁵²

These concerns appeared to have been connected to attitudes about campaign finance as well. An empirical article that examined polling data from immediately prior to *Citizens United* found "strong support" among almost half (49%) of respondents for the assertion that "*Candidates who run for federal offices should only be allowed to spend money funded through a public financing system. No individual or political action committee contributions would be allowed.*"¹⁵³ Almost seventy percent (69%) were strongly in support of the statement, "*Free and equal airtime on television should be available for candidates.*"¹⁵⁴ Political corruption was tied for second as the most important issue facing America along with a balanced budget and education (and after unemployment). However, respondents in this study also ranked campaign spending as low on the list of priorities, second-to-last. The fact that respondents were simultaneously worried about corruption in government and unconcerned about campaign spending would suggest that there was little perceived connection between the two.

2. Polling after *Citizens United*

Since *Citizens United* was decided, there seems to have been a shift in views of the public. A poll conducted in April of 2012, revealed that Americans are inferring a connection between campaign spending and corruption.¹⁵⁵ This poll suggested that Americans fear that elected officials are influenced by Super PACs and corporate interests, and further, that this

¹⁵² Lydia Saad, *One in Three Cite "American People" as Key U.S. Asset*, GALLUP POLITICS (Feb. 17, 2010), <http://www.gallup.com/poll/126032/One-Three-Cite-American-People-Key-Asset.aspx>

¹⁵³ Blass, Abby K, Shaw, Daron and Roberts, Brian, 'Pay to Play' or Money for Nothing? Americans' Assessments of Money and the Efficacy of the Political System (2010). (APSA 2010 Annual Meeting Paper.) (Available at SSRN: <http://ssrn.com/abstract=1644346>).

¹⁵⁴ *Id.* (Other questions that were part of the survey but are not mentioned here focused on individual spending, rather than corporate spending.)

¹⁵⁵ *National Survey: Super PACs, Corruption, and Democracy*, Brennan Center for Justice (April 24, 2012), http://www.brennancenter.org/content/resource/national_survey_super_pacs_corruption_and_democracy. (The survey took place between April 12 and April 15, 2012, and was conducted by the independent Opinion Research Corporation. The telephone survey captured the attitudes of 1,015 adults living in the continental United States, and was based upon 764 landline and 251 cell phone interviews.)

beliefs may influence voting behavior.¹⁵⁶ According to the survey, conducted by the Brennan Center for Justice at NYU School of Law, Americans believe that money spent – even if it is not directly given to a candidate’s campaign fund or political party organization—impacts how a candidate votes. More than two-thirds of all respondents (68%) agreed that a company that spent \$100,000 to help elect a member of Congress could successfully pressure him or her to change a vote on proposed legislation.¹⁵⁷ Republicans and Democrats were equally supportive of this notion (both at 71%), and only one in five respondents disagreed.¹⁵⁸ More than three-quarters of all respondents (77%) thought that a member of Congress would put the interests of a group that spent millions to advertise for him or her before the interests of the public.¹⁵⁹ Republicans and Democrats agreed with this view in similar numbers (81% and 79% respectively).

Other recent polls tell a similar story. A CBS/New York Times poll from January of 2012 asked "Which one of the following two positions on campaign financing do you favor more: limiting the amount of money individuals can contribute to political campaigns, or allowing individuals to contribute as much money to political campaigns as they'd like?" Almost two-thirds of respondents favored limiting money spent for political advertising.¹⁶⁰ Similarly, more than two-thirds favored limiting the amount of money that groups can spend independently to get political candidates elected.¹⁶¹ A Washington Post-ABC News Poll conducted by telephone from March 7 to 10, 2012, found that nearly seven in 10 registered voters would like super PACs to be illegal, including more than half who feel that way strongly. Sixty-nine percent of Americans expressed the view that super PACs should be banned. Only 25 percent said they should remain legal.¹⁶²

¹⁵⁶ *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CENTER FOR JUSTICE (April 24, 2012), http://www.brennancenter.org/content/resource/national_survey_super_pacs_corruption_and_democracy

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Politics*, POLLINGREPORT.COM (last visited Feb. 13, 2013), <http://www.pollingreport.com/politics.htm>

¹⁶¹ *Id.*

¹⁶² Chris Cillizza & Aaron Blake, *Poll: Voters Want Super PACs to be Illegal*, *The Fix Blog*, THE WASHINGTON POST (March 13, 2012, 7:00 AM), http://www.washingtonpost.com/blogs/the-fix/post/poll-voters-want-super-pacs-to-be-illegal/2012/03/12/gIQA6skT8R_blog.html

A third survey, conducted in June of 2012 by Clarus Research Group for Common Good, a nonpartisan government reform coalition, found that 57 percent of American voters think the current system of financing political campaigns doesn't work.¹⁶³ The poll numbers, published in the Atlantic, also reveal that 80 percent of those polled indicated that they believe that members of Congress are more interested in being re-elected than they are in improving the campaign finance system. Almost nine out of ten think that all political campaign contributions and expenditures should be publicly disclosed, and three quarters of those responding would support an amendment to the U.S. Constitution that would give Congress the power to limit the amount of money that can be spent on political campaigns for president and Congress.¹⁶⁴

The most recent poll, commissioned by the Corporate Reform Coalition, also explored Americans' attitudes toward corporate political spending.¹⁶⁵ The results, reported in the October 2012 issue of *Demos*, found that almost nine of ten (98%) Americans polled agreed with the statement, "There is way too much corporate money in politics," and 51 percent strongly agreed.¹⁶⁶ Seventy percent of those polled expressed the view that a ban on corporate funded political ads would improve politics in America, and more than half advocated a Constitutional amendment to ban all corporate political spending.¹⁶⁷ Greater than eight out of ten (84%) people surveyed agreed that corporate political spending "drowns out the voices of average Americans," and similar numbers (83%) believe that corporations and corporate CEOs have too much political power.¹⁶⁸ Similarly, more than eighty percent of Americans agree that corporate political spending has made federal politics more negative (83%) and

¹⁶³ Ron Faucheux, *U.S. Voters: Congress Is Selfish About Campaign Finance*, THE ATLANTIC (July 16, 2012, 12:14 PM), <http://www.theatlantic.com/politics/archive/2012/07/us-voters-congress-is-selfish-about-campaign-finance/259812/>

¹⁶⁴ *Id.*

¹⁶⁵ Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending And Support for Achievable Reforms*, DEMOS (October 2012) http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Congress more corrupt (84%).¹⁶⁹ Reported concerns about state-level elections were similar, with eight of ten Americans agreeing that corporate political spending makes state politics more negative and 78% believing that this influence is corrupting in this forum.¹⁷⁰ Finally, the Corporate Reform Coalition poll shows that Americans are prepared to take action consistent with their professed concerns. Seventy-nine percent of those polled would refuse to buy a company's product or services to protest a company's political spending.¹⁷¹ Two out of three people (65%) would sell stock in the company, and more than half (53%) would take other steps to avoid investing in the company.¹⁷² Fifty-two percent of those polled would go to a meeting of the company's shareholders to ask for disclosure, and seventy-five percent would sign a petition to the SEC for corporate disclosure.¹⁷³

These findings are powerful evidence that the current campaign finance laws are failing to address the appearance of corruption. Particularly concerning is data revealing a growing cynicism on the part of Americans, and evidence that these attitudes influence behavior. Citizen distrust in the democratic process threatens the health of a democracy.

IV. WHY APPEARANCE MATTERS: THE CONSEQUENCES OF PERCEPTIONS OF CORRUPTION

Although most of the Court's discussion of corruption has centered on actual corruption, the Court has acknowledged that the appearance of corruption is an evil unto itself. As previously noted, "appearance" has received very little independent attention. Nevertheless, the Court has evinced a willingness to consider the perceptions of the public in a variety of

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (indicating that they would ask their employer to remove it from their retirement portfolio).

¹⁷³ *Id.* See also, Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP POLITICS (July 30, 2012), <http://www.gallup.com/poll/156347/Americans-Next-President-Prioritize-Jobs-Corruption.aspx> (When Gallup conducted a poll in July 2012, asking "how important a prior should each of the following issues be for the next president," those polled said "reducing corruption in federal government" was the second most important issue. Forty-five percent polled considered it to be an extremely important issue and 87% considered it to be an extremely/very important issue. The only issue outranking reducing corruption was creating jobs.).

campaign finance opinions. There are two ways in which the Court has manifested a belief that appearances matter. The first is directly, by explicitly referencing the concern in dicta. The second is indirectly, through the type of evidence it considered relevant in making determinations.

A. *The Court's View of Appearance of Corruption*

The Court has characterized avoiding the appearance of corruption as a “compelling” interest in all of the major campaign finance cases, including *Buckley*, *McConnell*, *Austin*, and *Citizens United*.¹⁷⁴ Even in the most recent *Speechnow.org* district court case, the court noted that “the [Supreme] Court expanded the definition [of corruption] to include ‘the appearance of undue influence’ created by large donations given for the purpose of ‘buying access.’”¹⁷⁵ The *Speechnow* opinion cited the Court’s earlier reticence about adopting a pure quid-pro-quo definition of corruption, based on the concern that this was a “crabbed view of corruption, *and particularly of the appearance of corruption*” that “ignores precedent, common sense, and the realities of political fundraising.”¹⁷⁶ In spite of the Court’s adoption of the narrow quid-pro-quo definition of “corruption,” the Court has never retracted its view of the dangers posed by the *appearance* of corruption. The *Buckley v. Valeo*, opinion maintained that when it citizens believe that the government is corrupt then they lose faith in the government's ability not only to function, but more importantly to be responsive to the needs of the people.¹⁷⁷ Avoiding this outcome was a vital governmental interest in 1976, and it remains one today.

Of course, the important governmental interest on one side of the equation must be balanced against the freedom of speech interest on the other. The question is not whether political speech is valuable. As one commentator noted,

¹⁷⁴ *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). For a discussion of the cases, see section ____ infra.

¹⁷⁵ 599 F.3d 686 (D.C. Cir. 2010) (citing 540 U.S. at 144, 148, 152. See also *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000)).

¹⁷⁶ 599 F.3d 686 (D.C. Cir. 2010) (citing 540 U.S. at 144, 148, 152. See also *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000)). The SPEECHNOW court went on to note, “The Citizens United Court retracted this view of the government’s interest . . .” *Id.* (emphasis added).

¹⁷⁷ *Buckley*, 424 U.S. at 27.

The issue is not the value of speech that is acknowledged by all. The issue is whether independent expenditures by corporations give rise to an appearance of corruption, for avoiding that appearance is acknowledged to be a governmental interest compelling enough to justify restricting the speech that causes the appearance.¹⁷⁸

In evaluating this balance, members of the judiciary, including those on the Supreme Court have accepted empirical evidence of citizen perception in past cases. For example, in *Daggett v. Comm'n on Governmental Ethics*,¹⁷⁹ the court noted that 70% of survey respondents “believed that large campaign contributions were a major source of political corruption” and that new limits on contributions would bolster faith in the democratic process. In *Montana Right to Life Ass'n*¹⁸⁰, the court accepted polls showing that 78% of Montana voters thought money was “synonymous with power” and that 69% of Montanans believed “elected officials gave special treatment” to large contributors. In *Homans v. City of Albuquerque*,¹⁸¹ the district court, while striking down spending limits as unconstitutional under *Buckley*, accepted a public opinion poll of city voters who believed that federal elections, which had no spending limits, were more susceptible to special interest influence than local elections, which were governed by spending limits.¹⁸²

The courts pay attention to data about citizen perceptions because, they are aware that a lack of faith in political institutions have negative consequences for democracy generally. One team of researchers noted that “[a]ttitudes toward the processes of government, as apart from the policies,

¹⁷⁸ Alexander Polikpff, *So How Did We Get into This Mess? Observations on the Legitimacy of Citizens United* 105 NW. U. L. REV. 203, 218 (2011).

¹⁷⁹ *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000).

¹⁸⁰ *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003).

¹⁸¹ *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004).

That courts may accept evidence derived from empirical polls and other social science sources is established. For example, in the Federal Election Commission’s Reply Memorandum in Support of Its Proposed Findings of Fact in the case of *Libertarian National Committee, Inc. v. Federal Election Commission*, the FEC noted, “Legislative facts are frequently based on a variety of materials such as academic studies, research papers, news articles, polling data, and political and social science analyses . . . this Court may adopt and rely upon the Commission’s proposed legislative facts from *McConnell* and *Colorado II*, as well as similar facts supported by news articles and Internet sources.” http://www.fec.gov/law/litigation/lnc_fec_support_reply_facts.pdf

¹⁸² *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004).

constitute an important, free-standing variable that has serious implications for the health of democracy"¹⁸³ Harvard law professor Phillip Heyman has written:

[C]orruption undermines the culture of democracy. When people lose confidence that public decisions are taken for reasons that are publicly available and justifiable, they become cynical about public speech and deliberation. People come to expect duplicity in public speech, and the expectation tarnishes all public officials, whether or not they are corrupt. And when people are mistrustful of government, they are also cynical about their own capacities to act on public goods and purposes and will prefer to attend to narrow domains of self-interest they can control. Corruption in this way diminishes the horizons of collective actions and in so doing shrinks the domain of democracy. Finally, corruption undermines democratic capacities of association within civil society by generalizing suspicion and eroding trust and reciprocity.¹⁸⁴

Ultimately, the cost to democracy is the refusal of citizens to participate. As Stevens pointed out, “[t]ake away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’”¹⁸⁵

Political scientist Mark Warren argues that democracies, because they involve political conflict and because political actors do not encapsulate all of the best interests of all of the constituents necessarily involve distrust.¹⁸⁶ Because of this inevitable byproduct of adversarial political system, in order for democracies to function, citizens must trust the process. Otherwise, the people will feel disenfranchised and will stop participating. Warren notes that

[in *Buckley*], the Court argued that there was no connection between spending and corruption, because the possibilities for improper influence were regulated at the source. What the Court failed to see is that, in aggregate, candidates engaged in spending

¹⁸³ John R. Hibbing & Elizabeth Theiss-Morse, *Process Preferences and American Politics: What the People Want Government to Be*, 95 Am. Pol. Sci. Rev., 145 (2001).

¹⁸⁴ Philip B. Heymann, *Democracy and Corruption*, 20 FORDHAM INT’L L.J. 323, 328-329 (1996-1997) (Philip B. Heymann is a former Deputy Attorney General in the Clinton administration and currently a law professor at Harvard Law School.).

¹⁸⁵ *Citizens United* at (citing *WRTL*, 551 U. S., at 507 (Souter, J., dissenting) and *McConnell*, 540 U. S., at 144 (quoting *Shrink Missouri*, 528 U. S., at 390).

¹⁸⁶ Mark E. Warren, *Democracy and Deceit: Regulating Appearances of Corruption*, 50 Am. J. Pol. Sci. (Jan. 2006)

racers need to rely on a relatively wealthy class of people and interest groups who, in aggregate, have interests that differ from the less wealthy. Under these circumstances, the public is justified in inferring improper influences from high levels of privately financed spending in itself.¹⁸⁷

The belief that wealthy interests—rather than the citizens who populate the country—dictate which candidates win elections erodes confidence in the democratic process. Lack of trust in the election outcomes undermines the sense that Americans have that they play a meaningful role in selecting the men and women who create the laws that govern society. Ultimately, the people lose faith in their own ability to be politically efficacious.

B. *Political Efficacy Research*

The link between the perception of corruption and the breakdown of participatory democracy is best viewed through the lens of “political efficacy.” “Political efficacy” defined as understanding political issues and engagement in activities supporting a political candidate, and responsiveness on the part of the government to participation by the citizenry in politics.¹⁸⁸ Contemporary work in political efficacy has been informed by two lines of work from social psychology on self-efficacy more generally. The first line of work conceives of self-efficacy as primarily motivational, or characterized by an effort to influence events and outcomes.¹⁸⁹ The second relates to a cognitive view of efficacy, which focuses on the degree to which an individual anticipates and perceives control over her environment.¹⁹⁰ Albert Bandura has written, “Unless people believe they can product desired

¹⁸⁷ *Id.* at 172. (“For democratic inclusion to be effective, individuals not only need to be enfranchised to participate in collective decisions. Individuals must also have the conditions and capacities to make autonomous judgments—that is, decisions free from coercions, threats, or blackmail, and based on a good understanding of the interests and values of oneself and others.”).

¹⁸⁸ Richard G. Niemi et al., *Measuring Internal Political Efficacy in the 1988 National Election Study*, 85 *Am. Pol. Sci. Rev.* 1407, 1408 (1991).

¹⁸⁹ Robert W. White, *Motivation Reconsidered: The Concept of Competence*, 66 *Psych. Rev.* 297 (1959).

¹⁹⁰ *See generally*, Richard deCharms *Personal Causation and Perceived Control* In CHOICE AND PERCEIVED CONTROL (Lawrence C. Perlmutter & Richard A. Monty, eds, 1979).

effects by their actions, they have little incentive to act. Efficacy belief is, therefore, the foundation of action.”¹⁹¹

Political efficacy is the manifestation of a particular form of personal and collective influence. This form of efficacy is generally realized early in life, long before meaningful political input is possible. Researchers have found that as early as third grade, children have already formed a basic sense of political efficacy.¹⁹² Although children grasp political efficacy early on, it can change over the course of a lifetime. When an individual invests time or money in political campaigns, these actions lead to increases in internal political efficacy.¹⁹³ Internal efficacy can be understood as reflecting the individual’s assessment of how much power or influence he or she can have on the course of political events and outcomes. External efficacy—characterized by government responsiveness—represents a general evaluation of the receptiveness of political institutions to input from all individuals in society collectively. One study found that high investment activities are more likely to lead to an increase in efficacy than low-investment activities, but that both high and low-investment activities contributed to voter feelings that they could have an effect on government.¹⁹⁴ In a cross-country study looking at the connection between corruption and democracy, the authors found that in democracies with higher levels of corruption citizens reported a lower level of satisfaction with the performance of their political systems and lower levels of trust in public servants.¹⁹⁵

Political efficacy is important because the more internal efficacy a citizen experiences, the more likely he or she is to vote and to engage in

¹⁹¹ Albert Bandura, Personal and Collective Efficacy in Human Adaptation and Change, in J.G. Adair, D. Belanger, & K. L. Dion eds 1998, 51, 52.

¹⁹² David Easton & Jack Dennis, *The Child's Acquisition of Regime Norms: Political Efficacy*, 61 *Am. Pol. Sci. Rev.* 25 (1967),

¹⁹³ Priscilla L. Southwell, *The End of Alienation? the Rise of Political Trust and Efficacy in the United States* (2009). (APSA 2009 Toronto Meeting Paper.) (Available at SSRN: <http://ssrn.com/abstract=1451380>).

¹⁹⁴ Timothy Vercellotti, Prepared for presentation at the 2011 annual meeting of the American Political Science Association, Sept. 1-4, Seattle, WA.

¹⁹⁵ Christopher J. Anderson and Yuliya V. Tverdova, *Corruption, Political Allegiances, and Attitudes toward Government in Contemporary Democracies*, 47 *AM. J. POL. SCI.* 91, 104 (2003).

other forms of political participation.¹⁹⁶ Empirical findings support this conclusion. An early study of the impact of income level on political efficacy reported that an individual's feeling of political efficacy was related to other measures of power in society. The authors found "[l]arge differences in . . . political participation . . . among persons in different income and race strata."¹⁹⁷ The study asked respondents to report on the number of elections in which they had voted since they were eligible to vote. The authors reported that "the distribution of their responses followed exactly the income-race hierarchy: almost nine-tenths of the rich¹⁹⁸ indicated they had always voted, followed by the middle-income whites, middle-income blacks, poor whites, and poor blacks in that order. Moreover, the relationship between political efficacy and participation is self-perpetuating. Feelings of efficacy increase likelihood of voting or volunteering time of money,¹⁹⁹ and one's level of participation in turn, influences the degree to which a citizen feels efficacious.²⁰⁰ Research has demonstrated the correlation between involvement in campaigns and the perception of efficacy.²⁰¹ Individuals who believe that they can effect change through participation in politics tend to be actively involved in politics, while those who perceive that political institutions and processes are unresponsive to them, become politically apathetic.²⁰² As discussed above, *Buckley v. Valeo* mandated regulating the "appearance of corruption" because corruption creates a lack of trust in government, thus discouraging people from participating.²⁰³

¹⁹⁶ Priscilla L. Southwell, *The End of Alienation? the Rise of Political Trust and Efficacy in the United States* (2009). (APSA 2009 Toronto Meeting Paper.) (Available at SSRN: <http://ssrn.com/abstract=1451380>).

¹⁹⁷ William H. Form & Joan Huber, *Income, Race, and the Ideology of Political Efficacy*, 33 J. POL. 659, 668. (1971).

¹⁹⁸ *Id.* at 659. ("Rich" was defined as the top 1% as defined by recent census data.)

¹⁹⁹ Priscilla L. Southwell, *The End of Alienation? the Rise of Political Trust and Efficacy in the United States* (2009). (APSA 2009 Toronto Meeting Paper.) (Available at SSRN: <http://ssrn.com/abstract=1451380>).

²⁰⁰ Joshua K. Harder, *Why Do People Vote? The Case for Political Efficacy*, THEPRESIDENCY.ORG (last visited Feb. 13, 2013), <http://www.thepresidency.org/storage/documents/Fellows2008/Harder.pdf>

²⁰¹ Timothy Vercellotti, Prepared for presentation at the 2011 annual meeting of the American Political Science Association, Sept. 1-4, Seattle, WA.

²⁰² Albert Bandura, *Exercise of Human Agency through Collective Efficacy*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 75, 78 (2000).

²⁰³ *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). See also Virginia A. Chanley, Thomas J. Rudolph & Wendy M. Rahn, *The Origins and Consequences of Public Trust in*

Voting is the most basic and most prevalent way Americans participate in political life. History teaches us that Americans' perception of corruption affects their voting behaviors. After a political scandal, for example, citizens are less likely to vote. In the 1976 election, with memories of Watergate still fresh, four million fewer people voted than had in the 1972 election.²⁰⁴ The growing perception that increased independent spending by PACs and corporations leads to corruption seems also to influence plans to participate in elections. A report by the Brennan Center for Justice²⁰⁵ states, "An alarming number of Americans report that their concerns about the influence of donors to outside political groups make them less likely to engage in democracy."²⁰⁶ According to the poll results, two in three Americans (65%) express a lack of faith in government because "big donors to Super PACs have more influence than regular voters."²⁰⁷ The crisis of confidence was exhibited by Republicans (67%) and Democrats (69%) alike. Most concerning, a quarter of Americans (26%) say that they are less likely to cast a ballot because of the unequal influence big donors have over elected officials through contributions to Super PACs.²⁰⁸ Another study completed by Common Cause Minnesota looked at the impact of campaign contributions on people's perception of corruption and desire to participate in politics. The study confirmed that there was a substantial number of people, 33% polled, who would be less likely to participate because they believed that contributions allowed those who donated to influence the political process.²⁰⁹ When citizens feel that they cannot influence politics they do not participate.²¹⁰

Government: A Tim Series Analysis, 64 PUB. OPINION Q. (200)) (discussing what causes declining trust in Government and consequences of that declining trust).

²⁰⁴ John Wolley and Gerhard Peters, *Voter Turnout in Presidential Elections: 1828-2008*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/turnout.php>

²⁰⁵ The Brennan Center for Justice is a New York University.

²⁰⁶ *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CENTER FOR JUSTICE (April 24, 2012), <http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Todd Paulson and David Schultz, *Bucking Buckley: Voter Attitudes, Tobacco Money, and Campaign Contribution Corruption in Minnesota Politics*, 19 HAMLIN J. PUB. L. & POL'Y. 449, 469 (1997-1998)

²¹⁰ See generally Pollock, Philip H. III. 1983. *The Participatory Consequences of Internal and External Political Efficacy: A Research Note*, 36 W. POL. Q., 400- 409. See also Philip B. Heymann, *Democracy and Corruption*, 20 FORDHAM INT'L L.J. 329, 328-329 (1996-

Perceptions of corruption also influence attitudes about lawmakers and political parties. Americans who generally believe that government is corrupt tend to attribute that corruption to the party in control, regardless of whether a Democrat or Republican occupies the White House.²¹¹ Hence, perceptions can systematically undercut faith in the executive. Moreover, individual candidates who run for election during a period when Americans perceive corruption in government are more vulnerable on election day.²¹² This is true even for candidates who are innocent of suspicious activity. In other words, an air of corruption that hangs around government casts a pall over all law-makers, and influences global judgments about government. Perhaps for this reason, the problem of fundraising and campaign spending has become a familiar theme on Capital Hill, and in the American political discourse. As Lessig testified, politicians who are “forced into a cycle of perpetual fund-raising, . . . become—or at least most Americans believe [they] become—responsive to the will of the funders. . . .”²¹³

V. ELECTION 2012 AND THE OBAMA CAMPAIGN

With escalating costs of political elections and growing dissatisfaction in government, the 2012 election cycle could have marked the beginning of a significant downturn in citizen engagement. However, some characteristics of the election, and specifically of Barack Obama’s campaign, may have muted some of the influence of burgeoning campaign spending. Specifically, Obama’s campaign strategies to personally engage

1997)

²¹¹ Tim Fackler and Tse-min Lin, *Political Corruption and Presidential Elections*, 57 J. POL., 971, 988-989 (1995)

²¹² See generally James A. McCann and David P Redlawsk, *As Voters Head to the Polls, Will They Perceive a "Culture of Corruption?"*, 37 POL. SC. & POL. (2006); Susan A. Banducci and Jeffrey A. Karp, *Electoral Consequences of Scandal and Reapportionment in the 1992 House Election*, 22 AM. POL. Q. (1994); Michael Dimock and Gary Jacobson, *Checks and Choices: The House Banking Scandal's Impact on Voters in 1992*, 57 J. POL. (1995); Tim Fackler and Tse-min Lin, *Political Corruption and Presidential Elections*, 57 J. POL., 988-989 (1995); John G. Peters and Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory, or If Political Corruption is in the Mainstream of American Politics Why is it Not in the Mainstream of American Politics Research?*, 72 AM. POL. SCI. REV. (1980).

²¹³ *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm on the Judiciary, 112th Cong.* (pg.-pg.) (2012) (statement of Lawrence Lessig, Professor, Harvard Law School).

voters arguably demonstrate the importance of political efficacy and suggest caution for future elections.

A. *Evidence of an Efficacy-Action Connection*

The 2008 presidential election of Barack Obama is a case study of the relationship between feelings of political efficacy in voters and political engagement, as measured by various forms of participation. Obama's campaign tactics revolutionized the way candidates reach voters. His campaign reached voters directly through social media, his messages were personalized, emotional, and designed to instill in the recipient a sense of power. One study of 2008 voters reported that "both internal and external efficacy are positively related to a vote for Barack Obama in the 2008 election, suggesting that he was able to appeal to those who were more optimistic about their political influence."²¹⁴ Research shows a connection between emotional appeals and political involvement.²¹⁵ The authors of one study found that "candidates who appeal to voters through the use of emotions are rewarded with increased support across a range of different types of participation."²¹⁶ Hence is it not surprising that direct emotional appeals increased participation; voter turnout in the 2008 election reached a level (62%) not seen since 1968.²¹⁷ Interestingly, Obama's election also drew the greatest number of individual contributions by average (middle-income) voters in modern times.²¹⁸ A full third of Obama's campaign

²¹⁴ Priscilla L. Southwell, *The End of Alienation? the Rise of Political Trust and Efficacy in the United States* (2009). (APSA 2009 Toronto Meeting Paper.) (Available at SSRN: <http://ssrn.com/abstract=1451380>).

²¹⁵ Philip Jones, Lindsay H. Hoffman, & Dannagal G. Young, *Online Emotional Appeals and Political Participation: The Effect of Candidate Affect on Mass Behavior* 14 *New Media & Soc.* (2012).

²¹⁶ *Id.*

²¹⁷ See also, Michael P. McDonald, *The Return of the Voter: Voter turnout in the 2008 Presidential Election*, 6 *THE FORUM*, 1 (2008); Gans, C., & Hussy, J. (2008). *African-Americans, Anger, Fear and Youth Propel Turnout to Highest Level Since 1960*. Retrieved March 22, 2009 <http://www.american.edu/media/electionexperts/>.

²¹⁸ The bipartisan website OpenSecrets.com reported that "Obama's victory in the general election was aided by his tremendous fund-raising success. Since the start of 2007, his campaign relied on bigger donors and smaller donors nearly equally, pulling in successive donations mostly over the Internet." *Presidential Candidate Barack Obama (D)*, *OpenSecrets.org*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 13, 2013), <http://www.opensecrets.org/pres08/summary.php?id=n00009638>.

contributions came from small donors.²¹⁹ Because Obama was the first (and only, in the 2008 election) candidate not to accept public funding for the general campaign, the only comparisons existing are for the primary election. He outpaced all presidential candidates in the primary season with respect to small donor donations, receiving 30% of donations from donors giving less than \$200.²²⁰ In the general election, the percentage of donations from small donors rose to 34%.²²¹ While a correlation between a historically high number of small donors and reports of feelings of high political efficacy is not conclusive, it does suggest that when average individuals perceive that their contributions are making a difference in a political campaign, they have a greater sense of ownership and involvement in the election. Moreover, political efficacy research lends support to the notion that Obama voters reported greater internal political efficacy than both McCain voters and nonvoters.²²²

B. *What Happened in 2012*

After the run-up to the 2012 presidential and congressional elections, two things seem clear. First, the amount of money spent in political elections is growing, and growing quickly. Second, to the extent that American citizens are paying attention, they are unhappy about the trend, and perceive a variety of negative consequences. Social science research and theory suggests that the rapid growth of campaign spending and public

²¹⁹ According to a study by the Campaign Finance Institute (CFI), about one-third (34 percent) of the \$337 million the Obama campaign raised from individuals for the general election came from donors who gave the general election campaign a total of \$200 or less. Press Release, Campaign Finance Institute, ALL CFI FUNDING STATISTICS REVISED AND UPDATED FOR THE 2008 PRESIDENTIAL PRIMARY AND GENERAL ELECTION CANDIDATES: New Figures Show That Obama Raised About One-Third of His General Election Funds from Donors Who Gave \$200 Or Less, Obama's General Election Money from Small Donors Alone Exceeded McCain's Public Funding Grant (January 8, 2010). Found at http://www.cfinst.org/press/releases_tags/10-01-08/Revised_and_Updated_2008_Presidential_Statistics.aspx

²²⁰ *Id.*

²²¹ *Id.*

²²² While arguably the source of the feelings of efficacy could stem from the Obama voters experiencing victory of their chosen candidate, the authors of the study also concluded that “[d]ifferential increases in internal political efficacy between Obama and McCain . . . in other words . . . between voters who voted for the winning and losing candidates . . . were not obtained.” Justin D. Hackett & Allen M. Omoto *Efficacy and Estrangement: Effects of Voting* 9 Anal. of Soc. Issues & Pub. Poli. 297, 309 (2009).

anxiety about this spending may usher in a new era of disillusionment and disengagement from the political process. The question then becomes whether the 2012 election cycle reveals evidence of a troubled democracy. All in all, the results for 2012 were mixed. On the one hand, individuals who were committed to a particular candidate or political party donated and volunteered in greater numbers. On the other hand, voter turn-out was lower than it had been in the past two presidential elections. A closer look suggests that even the depressed 2012 voting numbers may not be sustainable in future elections. In particular, the extraordinary success of the Obama campaign's get-out-the vote efforts may well have prevented what could have been a far more substantial downturn in citizen participation.

1. Small donations and volunteering was up.

With respect to financial participation, donations were up among small donors. One way to measure the activity of small donors is to look at web-based and other targeted Democratic fundraising efforts, because this is where activity was pivotal in the 2008 election cycle. In the months leading up to the 2012 election, the Democrats' congressional fundraising arms had record success with small donors, surpassing their 2008 numbers. By the fall of 2011, contributions to the Democratic Congressional Campaign Committee (DCCC) of \$200 or less had totaled \$21.5 million.²²³ Its Republican counterpart, the National Republican Congressional Committee, saw an increase from \$10.7 million through the first 11 months of 2009 to \$12.6 million during the same period in 2011.²²⁴ This figure represents an eighteen percent increase in funds from small contributors.²²⁵ However, ultimately, as was true in 2008, the Democrats had the most success in the realm of small-donor fundraising.²²⁶ As one observer put it “In raising money from those giving less than \$200, Obama is a major league slugger while Romney is still waiting to be called up from the minor leagues. And

²²³ *Id.*

²²⁴ Bob Biersack & Viveca, *Big Growth in Democrats' Small Donors*, *OpenSecrets.org*, CENTER FOR RESPONSIVE POLITICS (Jan. 5, 2012, 1:20 PM), <https://www.opensecrets.org/news/2012/01/the-bigger-role-of-small-donors.html#>

²²⁵ <https://www.opensecrets.org/news/2012/01/the-bigger-role-of-small-donors.html#>

²²⁶ Paul Blumenthal, *Barack Obama Must Thank Small Donors For Fundraising Lead*, HUFFINGTON POST (Sept. 27, 2013, Updated 1:39 PM), http://www.huffingtonpost.com/2012/09/27/barack-obama-small-donors_n_1917521.html

that has made an enormous difference to the campaigns' bottom lines."²²⁷ Volunteer numbers were also strong in 2012. Days before the election, Obama's campaign manager, Jim Messina, announced the existence of 5,100 "Get Out The Vote" (GOTV) stations in battleground states. The Obama campaign also had commitments from 700,000 volunteers to help with the GOTV effort. In July of 2012, a Huffington Post article noted, "Call them passionate, idealistic, earnest, even a tad naive: The volunteers helping to power the Obama and Romney campaigns are outliers at a time when polls show record low public satisfaction with government and a growing belief that Washington isn't on their side."²²⁸

The Obama campaign was, in many experts' estimation, an aberration. For example, Obama's 2008 campaign set an unprecedented standard for grass-roots involvement when it created the on-line platform, MyBarackObama.com which attracted record numbers of volunteers with the phrase: "This election is not about me, it's about you."²²⁹ The President was able to up the ante in 2012. In a substantially closer race, turn-out was a vital part of the strategy.²³⁰ On election day, in November 2012, the Democrats' turnout efforts were impressive, and some would say historic.²³¹ The month before the election, the Obama campaign released a memo in which it reported 1,792,261 voters in key battleground states, "nearly double

²²⁷ *Id.*

²²⁸ Beth Fouhy, *2012 Campaign: Obama, Romney Volunteers Hope to Make the Difference* in November, HUFFINGTON POST (Feb. 13, 2013), http://www.huffingtonpost.com/2012/07/03/2012-campaign-obama-romney_n_1647029.html

²²⁹ *Id.*

²³⁰ Robert Butler, *US Election History: Razor- Thin Finish In 2012 Would be Far From Nation's First*, THEPRESIDENCY.US (Nov. 7, 2012), <http://thepresidency.us/2012/11/us-election-history-razor-thin-finish-in-2012-would-be-far-from-nations-first/>; *see also*, Lucy Madison, *In Last Days of Campaign, A Final Push to Get Out The Vote*, CBS NEWS (Nov. 5, 2012, 6:00 AM), (CBS News called the election "nail-bitingly close").

²³¹ The predicted numbers and make-up of polling place no-shows was weighted against Obama, making the get-out-the-vote ground game particularly important for his campaign. The Suffolk University Political Research Center reported in advance of the election that "[t]wo-thirds of the unlikely voters say they voted four years ago, backing Obama by more than 2-1 over Republican John McCain. Susan Page, Jerry Mosemak, & Cooper Allen, *Why 90 million Americans won't vote in November*, USA TODAY (Aug. 15, 2012) <http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/1>

the number of voters the Obama campaign registered in 2008.”²³² CNN reported that “[t]he 125 million voter contacts the Obama team claimed were more than twice the Republican total, [and t]he hundreds of Democratic field offices outnumbered GOP outposts by greater than 2-1 or 3-1 in key swing states.”²³³ In early November, a memorandum from the Obama camp claimed that the campaign had made 125,646,479 personal phone calls or visits.²³⁴ The Huffington Post reported that “[i]f that number is accurate, then the campaign has contacted roughly one out of every 2.5 people in the entire country since the last election.”²³⁵ This number dwarfed the 50 million voter contacts the Romney campaign has claimed, particularly given that the Romney total included mailers left at doors.²³⁶ Susan Page of USA Today observed that the “Obama’s campaign is spending millions of dollars on the most elaborate field operation in U.S. political history, aimed at delivering both core supporters and reluctant ones to the polls.”²³⁷

Obama’s well-publicized strategy may have led Republican candidate Mitt Romney to redouble efforts as well. In early November, the Romney campaign appears to have stepped up efforts in order to avoid the fate of McCain in 2008, when early polling left the Republican presidential candidate behind, even in states where his numbers looked promising.²³⁸ In early November 2012, CBS reported that the RNC was hyping “an aggressive early voting program that . . . [similar to] that of the famously

²³² Sam Stein, *Obama Campaign: We’ve Contacted One Out of Every 2.5 People In The Country*, HUFFINGTON POST (Nov. 3, 2012, 6:23 PM), http://www.huffingtonpost.com/2012/11/03/obama-voter-contact_n_2069289.html

²³³ Rebecca Sinderbrand, *Analysis: Obama Won with a Better Ground Game*, CNN.com (Nov. 7, 2012, 7:00 AM), <http://www.cnn.com/2012/11/07/politics/analysis-why-obama-won>

²³⁴ This number did not include robocalls, e-mails, and leaving literature on doors.

²³⁵ Sam Stein, *Obama Campaign: We’ve Contacted One Out of Every 2.5 People In The Country*, HUFFINGTON POST (Nov. 3, 2012, 6:23 PM), http://www.huffingtonpost.com/2012/11/03/obama-voter-contact_n_2069289.html

²³⁶ *Id.*

²³⁷ Susan Page, *Why 90 Million Americans Won’t Vote in November*, USA TODAY (Aug. 15, 2012, 6:15 AM), <http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/1>

²³⁸ Lucy Madison, *In Last Days of Campaign, a Final Push to Get Out the Vote*, CBS News (November 5, 2012), http://www.cbsnews.com/8301-250_162-57544906/in-last-days-of-campaign-a-final-push-to-get-out-the-vote/

well-organized Obama campaign.”²³⁹ Kirsten Kukowski, a spokesperson for the RNC estimated two million contacts on election day.²⁴⁰ In response to Obama’s opening 106 field offices in Florida—a battleground state—the Romney campaign said it, too, had increased inroads in Florida, outpacing the 2008 efforts of then-candidate John McCain.²⁴¹

2. Voter turn-out was down

In spite of the candidates’ efforts, a report estimating the percentage of eligible voters who cast ballots in the 2012 election showed that voter turnout was lower than in the past two presidential contests.²⁴² The report, from the Center for the Study of the American Electorate, put 2012 voter turnout at 57.5% of all eligible voters, compared to 62.3% who voted in 2008 and 60.4% who cast ballots in 2004.²⁴³ An estimated 126 million people voted in the election, meaning that 93 million eligible citizens did not cast ballots.²⁴⁴ Curtis Gans, director of American University’s Center for the Study of the American Electorate, noted that in a majority of states, the numbers of people showing up at the polls was even lower than eight years

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Alex Sanz, *Obama, Romney Campaigns Step Up Florida Ground Operations*, News Channel 5 (October 24, 2012), <http://www.wptv.com/dpp/news/political/obama-romney-campaigns-step-up-florida-ground-operations>

²⁴² *Turnout Lower Than 2008 and 2004 Report Says*, ABC15.COM (Nov. 8, 2012), <http://www.abc15.com/dpp/news/national/election-results-2012-voter-turnout-lower-than-2008-and-2004-report-says#ixzz2KRzUf4c3>.

²⁴³ *See 2012 Voter Turnout*, BIPARTISAN POLICY CENTER (Nov. 8, 2012), <http://bipartisanpolicy.org/library/report/2012-voter-turnout>; *see also*, CNN Wire, *Election Results 2012: Voter Turnout Lower Than 2008 and 2004 Report Says*, ABC15.COM (Nov. 8, 2012), <http://www.abc15.com/dpp/news/national/election-results-2012-voter-turnout-lower-than-2008-and-2004-report-says#ixzz2KRzUf4c3>. Some groups turned out in greater numbers. For example, record numbers of Latinos turned out to vote, choosing President Obama by a wide margin. The New York Times reported, “Over all, according to exit polls not yet finalized by Edison Research, Mr. Obama won 71 percent of the Hispanic vote while Mitt Romney won 27 percent.” Julia Preston & Fernanda Santos, *A Record Latino Turnout, Solidly Backing Obama*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/politics/with-record-turnout-latinos-solidly-back-obama-and-wield-influence.html?_r=0

²⁴⁴ CNN Wire, *Election Results 2012: Voter Turnout Lower Than 2008 and 2004 Report Says*, ABC15.COM (Nov. 8, 2012), <http://www.abc15.com/dpp/news/national/election-results-2012-voter-turnout-lower-than-2008-and-2004-report-says#ixzz2KRzUf4c3>

prior.²⁴⁵ The 2012 turnout percentage of eligible voters who cast a ballot was down from 2008 in every state and the District of Columbia, except two – Iowa and Louisiana.²⁴⁶ "Beyond the people with passion, we have a disengaged electorate," Gans said.²⁴⁷ Responses from non-voters tend to support this conclusion. In a poll conducted by Suffolk University and USA Today, 54% stated their reason for not voting of non-voters call politics "corrupt." "The long-term trend tends to be awful," Gans says. "There's a lot of lack of trust in our leaders, a lack of positive feelings about political institutions . . ." ²⁴⁸

The uncommon success of the Obama campaign in getting voters to the polls likely disguised what would have been an even more significant downturn in voting among American citizens.²⁴⁹ Future elections, will tell. Although the Obama campaign has moved the art of campaigning into the 21st century, it remains to be seen whether the success of the Obama campaign can be duplicated. Part of President Obama's strength as a campaigner was his ability to connect to voters by evoking in them a sense of personal efficacy; this factor helped to propel him to victory in 2008 and 2012. A combination of the unique ability of the Obama campaign to engage voters and the historic significance of the Obama presidency²⁵⁰ make it likely that there will be even more depressed voter turnout than what occurred from 2008 to 2012 because these campaigns will likely not be

²⁴⁵ Josh Lederman, *Voter Turnout Shaping Up to Be Lower Than 2008*, HUFFINGTON POST (Nov. 7, 2012, 5:22 PM), http://www.huffingtonpost.com/2012/11/07/voter-turnout_n_2088810.html

²⁴⁶ *2012 Voter Turnout*, BIPARTISAN POLICY CENTER (Nov. 8, 2012), <http://bipartisanpolicy.org/library/report/2012-voter-turnout>

²⁴⁷ Josh Lederman, *Voter Turnout Shaping Up to Be Lower Than 2008*, HUFFINGTON POST (Nov. 7, 2012, 5:22 PM), http://www.huffingtonpost.com/2012/11/07/voter-turnout_n_2088810.html

²⁴⁸ Josh Lederman, *Voter Turnout Shaping Up to Be Lower Than 2008*, HUFFINGTON POST (Nov. 7, 2012, 5:22 PM), http://www.huffingtonpost.com/2012/11/07/voter-turnout_n_2088810.html

²⁴⁹ See *e.g.*, <http://www.chicagobusiness.com/article/20121107/BLOGS02/121109789/obama-won-with-lots-of-republican-help-now-can-they-work-together> ("Mr. Obama won because, tactically, he ran a brilliant campaign.") <http://www.thedaily.com/article/2012/11/04/110512-news-obama-campaign-organization/> ("The distinction shakes out to this: In 2008, it was about the man and the message; in 2012, it was about the operation.")

²⁵⁰ As the first African American president, Barack Obama

duplicable. While 131 million²⁵¹ people voted in the 2008 presidential election, about 126 million citizens voted in the 2012 election.²⁵² This difference of 5 million voters from 2008 to 2012 may have been substantially larger if several of the unique features of the 2012 election had been absent.

CONCLUSION

The 2012 Supreme Court case, *Citizens United*, which lifted the ban on unlimited independent corporate campaign spending, left an indelible footprint on American politics. The case was notable less for its immediate impact than for its symbolic significance and for the door it left open for new super-committees capable of amassing large sums to spend on political communication. A great deal of debate has focused on the legitimacy of the opinion and the desirability of its effects.²⁵³ However, relatively little attention has been given to its potential to shape Americans' attitudes about the political election process. Whether the trigger was the publicity *Citizens United* received, or the controversy around Super PACs, or whether it is simply a growing distaste for the proliferation of campaign ads, Americans are expressing record levels of dissatisfaction with the state of campaign financing.²⁵⁴

²⁵¹ Sean Sullivan, *President Election Turnout Ticked Down from 2008*, *The Fix*, THE WASHINGTON POST (Nov. 8, 2012, 2:00 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/08/presidential-election-turnout-ticked-down-from-2008-estimate-shows/>

²⁵² CNN Wire, *Election Results 2012: Voter Turnout Lower Than 2008 and 2004 Report Says*, ABC15.COM (Nov. 8, 2012), <http://www.abc15.com/dpp/news/national/election-results-2012-voter-turnout-lower-than-2008-and-2004-report-says#ixzz2KRzUf4c3>

²⁵³ Although Justice Kennedy claims that the holding in *Citizens United* is consistent with the bulk of the Court's campaign finance jurisprudence, scholars have argued that the opinion has the potential to muddle the law more than it clarifies it. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 609 (2011); see also, Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, 35 N.Y.U. Rev. L. & Soc. Change 681, 704 (2011)(referring to "a long history of cases that recognize that undue influence could constitute corruption and create the appearance of corruption.")

²⁵⁴ See Part III C *infra*.

One measure that has been proposed by opponents of *Citizen United* is liberal disclosure rules. The DISCLOSE Act²⁵⁵ passed in the House of Representatives, and filibustered in Congress, may return in some form—particularly if the American public exhibits sustained and robust dissatisfaction with the post-*Citizens United* situation. Of course, the notion that disclosure is a complete panacea seems naïve to many,²⁵⁶ in spite of Kennedy assertion in *Citizens United* that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²⁵⁷ Even assuming that disclosure of sources of funding *is* the perfect solution to combat actual corruption, the appearance problem looms. Although some citizens may feel reassured by having access to donor lists, having this information may have counterproductive effects. Measures to combat actual corruption, such as liberal disclosure of money spent, may make the *appearance* of corruption problem worse. The more the American people know about the extent to which financial might behind political campaigns is consolidated with various extremely wealthy individuals and groups with easily identifiable agendas, the more likely they may be to deem the entire system corrupt. As this article has illustrated, a wide-spread loss of confidence in the political system has the potential for serious, negative repercussions. With perfect disclosure and maximum benefit from disclosure, namely complete accountability, we might eliminate actual corruption²⁵⁸ but might still have robust perception of corruption.²⁵⁹ Election law expert, Rick Hasen points out that

²⁵⁵ H.R.5175 - DISCLOSE Act (6/24/2010--Passed House amended. Democracy is Strengthened by Casting Light on Spending in Elections Act or DISCLOSE Act - Title I: Regulation of Certain Political Spending)

²⁵⁶ See e.g., Dan Ortiz’s tongue-in-cheek remark, “No need to worry about limiting money, the Court seems to think: disclosure will take care of everything.” Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & Pol. 663, 664 (2012).

²⁵⁷ *Citizens United*, 130 S. Ct. at 916 (internal citations omitted).

²⁵⁸ The definition of which is up for debate.

²⁵⁹ As Robert Bauer has written, “If the appearance of corruption undermines, to a ‘disastrous extent,’ citizen confidence in government, then it does so regardless of whether it can be linked persuasively to actual corruption.” (Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 Harv. L. Rev. F. 91, 93 (2012) responding to Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 Harv. L. Rev. 1563 (2012)).

[F]oreign spending on U.S. elections could undermine the integrity of the electoral process. If such spending is significant and it is disclosed, voters could believe that foreign nationals are improperly influencing either the outcome of U.S. elections (through pursuit of an electoral strategy) or the legislative decisions made by elected officials (through pursuit of a legislative strategy).²⁶⁰

There is no easy escape from this conundrum, absent restoring campaign finance laws to their pre-*Citizens United* state.

In *Citizens United*, the Court put an exclamation point on its previous rejection of a “level playing field” rationale for campaign funding regulations.²⁶¹ Whether or not Americans have read the case, or even heard the reasoning, they have noticed the effects. Most Americans have concluded that the political election process is corrupt,²⁶² they believe that they are losing their voice, and wealthy interests are hijacking the political election process.²⁶³ As one commentator put it, “[i]t is no wonder . . . that an egalitarian vision of democratic politics is lacking in the United States. The U.S. Supreme Court has made it impossible to articulate such a vision.”²⁶⁴ In *Shrink Missouri*, Justice Breyer articulated a vision of reforms that would “seek to build public confidence in the [election] process and broaden the base of a candidate’s meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.”²⁶⁵ If Super PAC spending continues to dominate the political campaign scene, Breyer’s vision will not be realized, and increasing numbers of Americans may stay home on election day.

²⁶⁰ Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 609 (2011)

²⁶¹ See *Buckley v. Valeo* 424 U.S. 1, 27 (1976).

²⁶² See Part III C *infra*.

²⁶³ See Part III C *infra*.

²⁶⁴ Daniel P. Tokaji, The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison, 5 J. Parliamentary & Pol. L. 381, 382

²⁶⁵ 131 See *Shrink*, 528 U.S. at 400-01 (Breyer, J. concurring) (citation omitted).