

## The Marginality of Citizens United

Michael C. Dorf

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# THE MARGINALITY OF *CITIZENS UNITED*

Michael C. Dorf\*

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## INTRODUCTION

As this symposium and countless opinion pieces denouncing or (less frequently) praising *Citizens United v. FEC*<sup>1</sup> illustrate, that ruling is already regarded as extremely important. Yet, as I shall argue in this Response, it is likely to have no more than a marginal practical effect. Partly, that is for reasons identified by Professors Wert, Gaddie, and Bullock (hereinafter “WGB”) in their symposium contribution.<sup>2</sup> As they explain, corporate fears of alienating customers by becoming too closely associated with a political party or controversial political positions temper the corporate appetite for direct spending on politics—at least insofar as such spending is visible to the public.<sup>3</sup>

But there is also a more fundamental reason why *Citizens United* will not substantially change the shape of American politics: Even before *Citizens United*, corporations or, more precisely, persons and entities with substantial accumulated wealth, already had, and frequently took advantage of, the opportunity to exert enormous influence over American politics, both directly and indirectly.

Before coming to that point, however, it will be useful to situate *Citizens United*. Fortunately, the three principal papers in this symposium provide an excellent framework for considering how *Citizens United* changed and, more importantly, did not change, the ability of monied interests to influence politics.

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<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> See Justin J. Wert, Ronald Keith Gaddie & Charles S. Bullock, III, *Of Benedick and Beatrice: Citizens United and the Reign of the Laggard Court*, 20 CORNELL J.L. & PUB. POL'Y 469 (2011).

<sup>3</sup> See *id.* at 727 (“Political action beyond . . . highly technical policy concerns can actually serve to imperil the primary objective of any firm, which is keeping clients and customers.”).

The balance of this Response proceeds in five Parts. Part I examines Professor Gardner's intriguing suggestion that the extremity of the position the Court took in *Citizens United*—and has taken more generally with respect to campaign spending—bespeaks fear of a slippery slope.<sup>4</sup> In his view, that fear is unreasonable, and I agree, although I suggest that the logic Gardner perceives may not provide the best causal account of the Court's rigid campaign spending doctrine.

Part II turns to the argument of WGB. They contend that *Citizens United* is best understood as the effort of a "laggard Court" that trails the policy preferences of the general public.<sup>5</sup> I believe their thesis to be correct in its broad strokes but that, like much of the otherwise highly illuminating work on the Court by political scientists, it glosses over important matters of nuance because it fails to distinguish between general political ideology and distinctively judicial ideology.

Part III considers Professor Briffault's contribution.<sup>6</sup> He argues that *Citizens United* did not break substantially new ground in protecting *corporate* speech but that the decision is troubling in other respects.<sup>7</sup> Briffault thus fears that *Citizens United* could herald a substantial tightening of the Court's campaign finance jurisprudence; the result would be the demise of soft-money restrictions and perhaps even the reasonable limits on campaign contributions that have been held permissible since *Buckley v. Valeo*.<sup>8</sup>

In Briffault's view, to focus on corporations as such misses the real story, which is the effect that large concentrations of wealth can have on politics—whether in the hands of corporations, other artificial entities, or natural persons.<sup>9</sup> I agree entirely. But where Briffault largely faults the Court's doctrines for opening too many opportunities for money to affect politics, I would go further to note that no regime of campaign finance consistent with free speech can realistically hope to contain the impact of concentrated wealth on our political economy.

Accordingly, Part IV explains why *Citizens United* is ultimately small potatoes. The regime of campaign finance regulation pre-*Citizens United* was so full of loopholes that adding this additional one did not materially alter it. But *that* fact is, in turn, only partly due to the Supreme Court's strongly libertarian campaign finance doctrine, before or after *Citizens United*. The impact of concentrated wealth on politics can

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<sup>4</sup> See James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL'Y 469, 673 (2011).

<sup>5</sup> See Wert et al., *supra* note 2, at 719.

<sup>6</sup> See Richard A. Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 469, 643 (2011).

<sup>7</sup> See *id.*

<sup>8</sup> 424 U.S. 1 (1976) (per curiam).

<sup>9</sup> Briffault, *supra* note 6, at 670–71.

be seen in areas quite far afield from what we would ordinarily deem political speech—especially in ordinary commercial advertising.

Part V concludes this apparently depressing picture of American political life with a caution against nihilism or apathy. If concentrated wealth prevents the realization of the perfect pre-conditions for citizen deliberation, that does not mean that all efforts to limit the damage from such wealth are in vain. Here, as elsewhere, the best should not become the enemy of the good.

### I. GARDNER'S SLIPPERY SLOPE

In his insightful contribution to this symposium, Professor Gardner observes and offers an explanation for an apparent puzzle. Why, Gardner asks, has the Supreme Court's campaign spending regulation jurisprudence settled on an extreme point in the spectrum of doctrinal possibilities? Whereas other constitutional doctrines announce balancing tests or difficult-but-not-impossible-to-satisfy levels of judicial scrutiny, when it comes to campaign spending, the Court has chosen an absolute prohibition. He says that "the Court and its strongest supporters . . . take the position that *no* regulation of campaign spending may be permitted . . . as a matter of constitutional law."<sup>10</sup>

What could explain such an extreme position?, Gardner asks. His answer is that the Justices in the majority in *Citizens United* and similar cases fear a slippery slope.<sup>11</sup> However, Gardner goes on to argue that the fear is unrealistic. Downhill from the Court's absolute stance, there are both doctrinal and practical plateaus on which legal principles and campaign spending regulations respectively could safely come to rest, thus halting the slide to direct suppression of dissent, loss of public information needed for democratic deliberation, or incumbent entrenchment—the three fears that might be motivating the Justices to adopt a categorical stance against campaign spending regulations.

If indeed the Court worries about the slippery slopes Gardner identifies, then his analysis strikes me as exactly right. For the reasons he identifies, the fears are unrealistic. However, Gardner is less persuasive in showing either that the relevant constitutional doctrine really *does* occupy an extreme point on the regulatory spectrum or that, to the extent it could be said to do so, fears of a slippery slope explain the doctrine.

Gardner's claim that "the Court's approach in campaign spending cases [occupies] the most extreme position available"<sup>12</sup> rests initially on the use of a quite narrow lens. After all, the Court's cases concerning

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<sup>10</sup> Gardner, *supra* note 4, at 685.

<sup>11</sup> *Id.* at 676.

<sup>12</sup> *Id.* at 675.

campaign finance regulation *as a whole* do not take the most extreme position possible.

As everyone who works in this field knows, since *Buckley*, the doctrine has distinguished between campaign spending restrictions and campaign contribution limits. The doctrine governing the latter is not so extreme. Even applying what the *Buckley* Court called its “rigorous standard of review,” the Justices upheld a contribution limit of \$1,000.00 in 1976 dollars.<sup>13</sup> To be sure, as the Court indicated in 2006, substantially lower maximum contribution limits do violate the First Amendment,<sup>14</sup> but that only shows that in eschewing the ostensibly extreme anti-regulatory position avowed in its spending cases, the Court’s contribution cases do not go all the way to the other extreme; they settle on a point that allows substantial, though not unlimited regulation.

Taken together, the Court’s contribution and expenditure cases present a mixed pattern. That is especially true when one adds disclosure requirements to the mix, as the Court has consistently upheld mandatory disclosure under a relatively lenient standard of scrutiny.<sup>15</sup> If the Court were really concerned about the slippery slopes to which Gardner points, then one would expect to see it staking out an extreme anti-regulatory position across the range of campaign finance regulations, rather than simply with respect to campaign spending.

Perhaps Gardner could reformulate his thesis as a hypothesis about the most conservative Justices rather than the Court as a whole. After all, those Justices have called for overruling the application of less-than-strict scrutiny to campaign contribution limits.<sup>16</sup> And, as Professor Briffault’s contribution notes, *Citizens United* may hasten the day when *Buckley* falls.<sup>17</sup>

But even then, it is worth noting that the Court’s conservatives do not expressly call for a no-regulation regime when it comes to expenditures. Further, they would still allow disclosure requirements, as *Citizens United* itself illustrates.<sup>18</sup> And for at least some of the conservatives, the strict scrutiny they would apply to contribution limits in the wake of *Buckley*’s demise might not be invariably fatal in fact.<sup>19</sup>

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<sup>13</sup> *Buckley*, 424 U.S. at 29.

<sup>14</sup> See *Randall v. Sorrell*, 548 U.S. 230, 250 (2006) (plurality opinion) (invalidating contribution limits that, when inflation is considered, allowed only slightly more than one-twentieth of the limits upheld in *Buckley*).

<sup>15</sup> See *id.*; *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000).

<sup>16</sup> See, e.g., *Nixon*, 528 U.S. at 410 (Thomas, J., joined by Scalia, J., dissenting) (calling for overruling *Buckley*’s approach to contribution limits).

<sup>17</sup> Briffault, *supra* note 6, at 652.

<sup>18</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

<sup>19</sup> See *Nixon*, 528 U.S. at 409–10 (Kennedy, J., dissenting) (calling for overruling *Buckley*, though leaving open the possibility of “some limits on both expenditures and contributions”); cf. Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving*

At the same time, Gardner's own devastating critique of the slippery-slope rationales for a no-regulation regime casts considerable doubt on the possibility that the slippery-slope fears really explain the extremity of the Court's approach to campaign spending limits. Thus, we ought to cast about for an alternative causal explanation for the shape of the doctrine. In my view, some combination of doctrinal inertia and ideological preferences best explains the case law.

By "doctrinal inertia," I mean that the *Buckley* Court put limits on campaign expenditures in the box of direct limits on speech that are thus subject to strict scrutiny, and that no majority has yet coalesced around an agreed-upon alternative. In deciding constitutional cases, the Supreme Court frequently and understandably adapts categories it has already developed, rather than creating wholly new ones. Thus, once the Court decided that limits on campaign expenditures infringed on freedom of speech, it was natural for the Court to use the doctrinal tools it had already developed for other sorts of infringements on speech.

Doctrinal inertia explains why we need no special causal account of the odd fact that the *Citizens United* Court treats corporate speech as almost *especially* valuable. Gardner criticizes the Justices for fearing a slippery slope given what he regards as the content-neutrality of campaign expenditure limits.<sup>20</sup> Yet he fails to note that the Court's standard doctrines treat *speaker-based* limits on speech as no better than content-based limits.<sup>21</sup> The Court makes the point at a crucial juncture in the *Citizens United* opinion, stating: "Quite apart from the purpose or effect of regulating content, . . . the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."<sup>22</sup> For the majority, the core flaw in the challenged provision at issue in *Citizens United* was that it "impose[d] restrictions on certain disfavored speakers,"<sup>23</sup> namely corporate speakers.<sup>24</sup>

But, it will be objected, surely the Court made a *choice* to treat limits on corporate independent expenditures as speaker-based in the same way as speaker-based limits outside the context of corporate speech and campaign speech. The objection is valid but misses the point. The majority Justices were no doubt *aware* of the possibility of stuffing cor-

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*Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (contending that strict scrutiny in his day "was 'strict' in theory, fatal in fact").

<sup>20</sup> See Gardner, *supra* note 4, at 695 ("Limitations on campaign spending . . . are by definition content-neutral . . .").

<sup>21</sup> See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Victims Crime Bd.*, 502 U.S. 105 (1991).

<sup>22</sup> *Citizens United*, 130 S. Ct. at 899.

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

<sup>24</sup> See *id.* at 902 ("[T]he Government cannot restrict political speech based on the speaker's corporate identity.") (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978)).

porate campaign expenditures into a different doctrinal pigeonhole, or of creating (or, more accurately, of *retaining*<sup>25</sup>) a separate pigeonhole for corporate campaign expenditures, but that only tells us that doctrinal inertia does not function in an ideological vacuum. For conservative Justices who are generally distrustful of regulation—and especially distrustful of regulations that have greater support among political liberals than among political conservatives—ideological preferences were sufficient to block any impulse they might otherwise have felt to attempt to overcome doctrinal inertia.

Thus, Gardner's (modified) hypothesis that the (conservative wing of the) Court is motivated by ultimately misguided fears of slippery slopes is unnecessary. Occam's razor points instead to a much more straightforward explanation: The doctrine since *Buckley* readily allowed the result the Court reached in *Citizens United*; given the ideological druthers of the dominant conservative wing of the Court, there was no reason for these Justices *not* to follow the doctrine where it led them.

## II. WGB'S LAGGARD COURT

If my critique of Gardner sounds too much in legal realism, let me assure the reader that it is meant to be only partly so. Ideological druthers alone rarely beget Supreme Court decisions. One also needs doctrinal space. Thus, to my mind, WGB err in analyzing the campaign finance decisions of the Rehnquist and Roberts Courts in almost exclusively partisan political terms. Where, as in the area of campaign finance, we see the Court acting contrary to the contemporary political will, WGB explain the phenomenon in terms of the party politics that gave rise to the current Court—namely, “three decades of Republican Party efforts to remake the Supreme Court in its own image.”<sup>26</sup>

WGB rightly seek insights from the political science literature on the Court, which accounts for most of the variance among the voting patterns of different Justices by using ideological categories from the political domain. WGB endorse the “attitudinal” model in its most extreme form: “When the Court advances purportedly legal, as opposed to overtly political reasoning,” they say, “this is simply window dressing designed to ensure the legitimacy of the judicial function as it conforms its decisions to the dominant political coalition.”<sup>27</sup> Yet whether housed in law schools under the heading of “critical legal studies” or in political sci-

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<sup>25</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

<sup>26</sup> Wert et al., *supra* note 2, at 732.

<sup>27</sup> *Id.* at 729.

ence departments under the heading of the “attitudinal model,”<sup>28</sup> this view is too crude—as one of the chief examples chosen by WGB itself demonstrates.

WGB invoke the Rehnquist and Roberts Court jurisprudence under—and in adjudicating challenges to—the Voting Rights Act, as supposed evidence of the Court’s political leanings.<sup>29</sup> They are correct that the Justices predictably divide in these cases along a conservative/liberal axis. But the division is a distinctively *jurisprudential* split, not simply politics by other means.

Consider the majority-minority districts that a conservative majority in *Shaw v. Reno*<sup>30</sup> and its progeny frequently invalidated. On net, these districts probably benefited the Republican Party. “There is a reasonably good case to be made that the post-1990 creation of majority-minority districts has helped the Republican party by concentrating black voters in a relatively small number of districts rather than systematically diluting them as was done in the past.”<sup>31</sup> Yet despite the advantage that packing African Americans into majority-minority districts conferred on Republicans in the surrounding correspondingly whiter, and thus more Republican, districts, the Court’s most conservative members were most hostile to these districts. These Justices were undoubtedly influenced by their conservative judicial ideology—especially their commitment to color-blindness—but they were not voting the party line.

Other cases cited by WGB are to the same effect. For example, they refer in passing to the decision in *City of Boerne v. Flores*,<sup>32</sup> in which the Court’s most conservative Justices voted to invalidate the Religious Freedom Restoration Act (RFRA) as applied to the states. Yet with broad bipartisan support among the public, RFRA had passed the House by voice vote and passed the Senate nearly unanimously.<sup>33</sup> If the Court’s conservatives were representing Republicans—or any other political constituency for that matter—they would not have invalidated RFRA. More broadly, the preference of the conservative Justices of the

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<sup>28</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED passim* (2002) (classifying Supreme Court decisions and Justices on the basis of categories that largely correspond with contemporary American left-right political divisions).

<sup>29</sup> See Wert et al., *supra* note 2, at 732–36.

<sup>30</sup> 509 U.S. 630 (1993).

<sup>31</sup> David A. Bositis, *The Future of Majority-Minority Districts and Black and Hispanic Legislative Representation*, in *REDISTRICTING AND MINORITY REPRESENTATION: LEARNING FROM THE PAST, PREPARING FOR THE FUTURE* 9, 9 (David A. Bositis ed., 1998).

<sup>32</sup> 521 U.S. 507 (1997), cited by Wert et al., *supra* note 2, at \_\_ [draft at 20].

<sup>33</sup> See Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 538 (1993–1994). Only three Senators, including only one Republican (North Carolina Senator Jesse Helms), voted against RFRA. See U.S. Senate Roll Call Vote No. 331, 103rd Cong, 1st Sess. (Oct. 27, 1993).



Rehnquist and the Roberts Court for restraining federal power is principally a matter of distinctly *judicial* ideology rather than partisan or otherwise political ideology.<sup>34</sup>

Even with respect to the core issue addressed in this symposium—regulation of campaign finance—the WGB approach lacks sufficient nuance to capture the subtle differences between political and legal issues. Today, political conservatives are more likely to oppose restrictions on campaign finance, but it was not always so. *Buckley* itself garnered the votes of iconic liberal Justices Brennan and Marshall,<sup>35</sup> and even today the issue does not divide neatly along a left/right political axis. The American Civil Liberties Union—perhaps the most prominent liberal NGO in the country—opposes much campaign finance regulation, and filed a brief urging the Court to invalidate Section 203 of the Bipartisan Campaign Reform Act (BCRA),<sup>36</sup> the key provision at issue in *Citizens United*.<sup>37</sup> So did the nation’s largest and leading labor organization.<sup>38</sup> And although the most recent Democratic appointee to the Court did her duty as Solicitor General by pressing arguments for sustaining the law challenged in *Citizens United*, as an academic she vigorously defended judicial skepticism of equality as a rationale for campaign finance regulation.<sup>39</sup>

Conversely, BCRA itself is popularly known by the name of its two chief sponsors (McCain–Feingold), one of whom, Senator John McCain, was the Republican nominee in the last Presidential election. Against the backdrop of this quite jumbled political landscape, it surely oversimplifies matters to see in *Citizens United* or in the Court’s campaign finance

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<sup>34</sup> See Michael C. Dorf, *Whose Ox is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN’S J. LEGAL COMMENT. 497 (2007) (arguing that judicial attitudes about federalism contain a distinctly legal, as opposed to political, element).

<sup>35</sup> Within the Court, Justices Brennan and Marshall, along with Justice White, were more receptive than some of their colleagues to the notion that campaign finance restrictions could serve First Amendment values. See Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 243 (2003). However, they did ultimately fully join (and in Brennan’s case substantially contribute to) the *per curiam* opinion in *Buckley*.

<sup>36</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (2002) (codified with some difference in language at 2 U.S.C. § 441b); see *Citizens United v. FEC*, 130 S. Ct. 876, 887–88 (2010) (explaining the changes wrought by BCRA § 203).

<sup>37</sup> See Amicus Curiae Brief of American Civil Liberties Union in Support of Appellant on Supplemental Question, *Citizens United v. FEC*, 130 S. Ct. 876 (2009) (No. 08-205), 2009 WL 2365203.

<sup>38</sup> See Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Appellant, *Citizens United v. FEC*, 130 S. Ct. 876 (2009) (No. 08-205), 2009 WL 2365216.

<sup>39</sup> See Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 471 (1996) (“[T]he goal of equalization often and well conceals what does conflict with the First Amendment: the passage of laws tainted with ideological, and especially with self-interested, motivations.”).

jurisprudence more broadly a battle between Republican opponents and Democratic proponents of campaign finance regulation.

In short, WGB are not wrong to see the play of ideology in the Court's campaign finance cases, but that should be the beginning point of analysis, not the end point. For anyone interested in understanding the why and how of the law in this area—as in just about all other areas—the important questions concern how judicial ideology differs from political ideology (which is itself polyphonic), and how those differences cash out in terms of doctrinal rules.

### III. BRIFFAULT'S PORTENTS

Professor Briffault takes up just the right doctrinal questions in his contribution. He offers two key insights. First, Briffault observes that Justice Kennedy's majority opinion in *Citizens United* adopts a very narrow definition of the sort of "corruption" that campaign finance regulation may legitimately target.<sup>40</sup> Indeed, *Citizens United* employs the very definition of corruption Justice Kennedy had previously championed in dissent in *McConnell v. FEC*.<sup>41</sup> Thus, Briffault worries that *Citizens United* could lead to the wholesale substitution of Justice Kennedy's views about soft money for those of the *McConnell* majority.

Second, Briffault worries about the *Citizens United* Court's signals regarding complexity. The majority indicates that the complexity of a campaign-regulatory regime counts against that regime's constitutionality because of the chill exerted on speech by complex rules and standards.<sup>42</sup> However, as Briffault explains, given the risks of evasion, all campaign finance restrictions are necessarily complex, perhaps becoming increasingly complex over time.<sup>43</sup> If the complexity of a campaign finance regulatory scheme itself raises First Amendment questions, Briffault notes, then *all* campaign finance regulation could be unconstitutional.

These are serious worries, and if they come to pass that would mark an important turning point in American campaign finance regulation. Certainly the ability of wealthy individuals, corporations, and other entities to give unlimited funds *directly* to candidates could dramatically change the nature of campaigning and even governance. However, one must bear in mind that these are implications and inferences that Profes-

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<sup>40</sup> See *id.* at 446–47; see also *Citizens United*, 130 S. Ct. at 908–11 (limiting the anti-corruption rationale of campaign finance regulation to targeting *quid pro quo* arrangements).

<sup>41</sup> 540 U.S. 93, 292 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part) (describing the *Buckley* anti-corruption rationale as targeting *quid pro quo* corruption).

<sup>42</sup> See Briffault, *supra* note 6, at 663–65; see also *Citizens United*, 130 S. Ct. at 895–96.

<sup>43</sup> See *id.* at 665–66.

sor Briffault draws from the logic of *Citizens United*, rather than doctrinal changes wrought by the case itself.

If anything, Briffault's analysis confirms that *Citizens United*—viewed as a doctrinal signpost rather than as a harbinger—is not especially consequential. Long before *Citizens United*, corporations were understood to have some rights under the Constitution.<sup>44</sup> Whatever one thinks about that proposition as a general matter, the First Amendment's protection for "freedom of speech" rather than for freedom of any particular speaker, combined with the fact that media companies are often embedded in larger corporate conglomerates, would make any categorical effort to deny constitutional protection to corporate speakers problematic. Where *Citizens United* broke new ground with respect to corporate speech was in overruling *Austin v. Michigan Chamber of Commerce*,<sup>45</sup> insofar as that case allowed the distorting impact of independent expenditures by corporations to stand as a compelling interest in campaign finance cases.<sup>46</sup> But *Austin* itself was always best seen as something of an outlier, in light of the Court's declaration in *Buckley* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>47</sup> As with the rest of the *Citizens United* opinion, the delivery of the final coup de grâce to *Austin* is more worrisome for what it may portend than for what it does.

#### IV. CONCENTRATED WEALTH'S UBIQUITOUS EFFECTS

Put differently, even before *Citizens United*, large corporations, as well as other wealthy natural and artificial persons, enjoyed enormous opportunities to spend funds to influence politics. These opportunities included and still include direct influence on public debate and, less noticed but probably of greater importance, indirect influence.

First, consider what BCRA allowed even before *Citizens United*. In *FEC v. Wisconsin Right to Life, Inc. (WRTL)*,<sup>48</sup> the Court held that BCRA's ban on independent corporate expenditures for "electioneering communications" was unconstitutional insofar as it applied beyond the narrow category of speech that is the "functional equivalent" of "express advocacy" for or against a particular candidate.<sup>49</sup> Thus, without violating BCRA, a corporation could spend millions of dollars on issue adver-

<sup>44</sup> See *Cnty of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

<sup>45</sup> 494 U.S. 652 (1990).

<sup>46</sup> See *id.* at 660 (finding a compelling interest in limiting the unfairness of corporations using their state-conferred benefits to underwrite campaign speech).

<sup>47</sup> *Buckley v. Valeo*, 424 U.S. 1, 48–49 (2010) (per curiam); see also *Austin*, 494 U.S. at 685 (Scalia, J., dissenting) (quoting this language from *Buckley*).

<sup>48</sup> 551 U.S. 449 (2007).

<sup>49</sup> See *id.* at 452.

tising right up through election day, even taking clear sides on issues closely associated with particular candidates. Indeed, that result would have been evident even before *WRTL*. That case gave a narrow definition to campaign speech, but issue advertising by corporations, other artificial entities, and natural persons would have been protected speech under *any* view advanced by any Justice ever to sit on the Court in the modern era of campaign finance regulation. Ordinary issue advocacy—whether or not it occurs during an election campaign—simply *is* protected speech.

WGB note that over the last two decades, corporations have not used political action committees (PACs) to fund independent expenditures, thus suggesting the lack of a corporate appetite for such expenditures.<sup>50</sup> That may be, but not because corporations have no appetite for influencing public debate. On the contrary, the most plausible explanation for corporate indifference to the opportunities PACs provide for independent expenditures may well be that they are substantially less effective than the other means at their disposal.

Consider issue advertising accomplished through 527 organizations funded by labor unions, wealthy individuals, and corporations or trade groups.<sup>51</sup> With a recent peak of contributions and expenditures totaling about \$400 million in 2004,<sup>52</sup> such organizations provide pools of concentrated wealth the opportunity to influence public opinion before and during an election period. By way of comparison, consider that in the 2008 Presidential election, general election public funding for each major party candidates was \$84.1 million.<sup>53</sup> Because that figure was so low compared to how much money could be raised through private donations—even given the limits on individual contributions—candidate Obama reneged on an earlier pledge to accept public funding to free himself of the spending limit that comes as a condition on public funding.<sup>54</sup>

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<sup>50</sup> See Wert et al., *supra* note 2, at 724 (Figure 1).

<sup>51</sup> In each of the last four federal election cycles (including 2010), by far the largest contributor to 527 organizations was the Service Employees International Union (SEIU), with other union groups also well represented near the top of the list. See *Top Contributors to Federally Focused 527 Organizations*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/527s/527contribs.php> (last visited Jan. 14, 2011). In 2004, for example, SEIU contributed over \$50 million to federally-focused 527 organizations. See *id.* Persons and entities falling within each of the other categories are also well represented on the lists. See *id.*

<sup>52</sup> See *527s: Advocacy Group Spending in the 2010 Elections*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/527s/index.php#cmtes> (last visited Jan. 14, 2011).

<sup>53</sup> See *Presidential Spending Limits for 2008*, FEDERAL ELECTION COMMISSION, [http://www.fec.gov/pages/brochures/pubfund\\_limits\\_2008.shtml](http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml) (last visited Jan. 14, 2011).

<sup>54</sup> See Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Money in First for Major Candidate*, N.Y. TIMES, June 20, 2008, <http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html>.

As President, Obama has been an awkward messenger for the view that money improperly influences politics. Obama fueled a brief controversy when he called out the Supreme Court for its *Citizens United* decision in his 2010 State of the Union Address (and when Justice Alito, seated in the audience, appeared to disagree with Obama's characterization of the case).<sup>55</sup> But perhaps more important than Obama's condemnation of *Citizens United* has been his willingness to work within the existing system. The starkest example was a corrupt bargain the President struck with the Pharmaceutical Research and Manufacturers of America (PhRMA) regarding health care reform.

In August 2009, the White House struck a deal to enlist the pharmaceutical industry in support of its health care reform efforts.<sup>56</sup> PhRMA agreed that it would give \$80 billion worth of discounts to patients over ten years.<sup>57</sup> It further agreed to spend \$150 million for advertising in support of the President's plan.<sup>58</sup> In exchange, the White House agreed that savings from drug discounts would be capped at the \$80 billion; the government would not use its purchasing power to negotiate deeper price cuts.<sup>59</sup> That deal did not merely create the appearance of a quid pro quo. It was an admitted quid pro quo—and apparently perfectly legal, perhaps even constitutionally protected speech on the part of PhRMA, which, in light of the promised cap, was motivated to spend \$150 million to persuade voters that the reform effort was not only good for PhARMA but good for American health.<sup>60</sup>

More generally, lobbying was and remains another gigantic outlet for money in politics. Although the tax code restricts the deductibility of donations made to organizations that engage in lobbying,<sup>61</sup> federal law does not limit the amount of money that persons, corporations, or other entities may spend on lobbying. Thus, after a decade of yearly increases, in 2009, all persons and entities combined spent \$3.5 billion on lobbying Congress and federal agencies.<sup>62</sup> These activities were legal before and after BCRA and, as with issue advertising, any serious effort to restrict lobbying on the expenditure side (as opposed to ethical rules barring government officials from accepting gifts) would run afoul of the First

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<sup>55</sup> Barack Obama, *2010 State of The Union Address*, STATE OF THE UNION ADDRESS LIBRARY, <http://stateoftheunionaddress.org/2010-barack-obama> (last visited Jan. 14, 2011).

<sup>56</sup> See David D. Kirkpatrick, *White House Affirms Deal on Drug Cost*, N.Y. TIMES, Aug. 6, 2009, at A1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See 26 U.S.C. § 501(c)(4) (2006).

<sup>62</sup> See *Lobbying Database*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/index.php> (last visited Jan. 14, 2011).

Amendment, even as understood by the Supreme Court's most campaign-finance-regulation-friendly Justices.

Finally, consider commercial advertising. Even in the grip of a deep recession that caused advertisers to shift their efforts overseas, in 2008 the one hundred firms that spent the most money on advertising globally spent \$44.4 billion on commercial advertising in the United States<sup>63</sup>—a sum that simply dwarfs political advertising. That speech was basically one-sided. With respect to some political issues, we may be able to count on corporate spending and union spending to more or less balance out, but the same cannot typically be said with respect to commercial advertising. Tepid efforts to advance public health through, for example, requirements that restaurateurs list calorie counts<sup>64</sup> have difficulty competing with the fast-food industry's spending of over \$4 billion on television advertising in 2009.<sup>65</sup>

The ability of commercial advertisers to influence consumer preferences directly provides a layer of insurance against legal action. A nation conditioned by commercial advertisers to regard driving as freedom itself<sup>66</sup> will predictably oppose increasing the gasoline tax as a means of discouraging driving—and thus even politicians who do not receive substantial material support from the automobile and oil industries will not likely propose such a tax increase. Commercial advertising not only occurs on a much larger scale than expressly political advertising; it may be all the more effective for seeming apolitical, operating to construct the culture in which politics and everything else occurs.<sup>67</sup>

In a country already awash in billions of dollars worth of commercial advertising and a smaller, but still enormous amount of money for lobbying and political advertising, the changes wrought by *Citizens United* are very small potatoes.

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<sup>63</sup> See Laurel Wentz & Bradley Johnson, *Top 100 Global Advertisers Heap Their Spending Abroad; Focused 62% of Budgets Outside the U.S. Last Year, with Much Going to China*, ADVERTISING AGE, Nov. 30, 2009, at 1.

<sup>64</sup> See Devon E. Winkles, *Comment: Weighing the Value of Information: Why the Federal Government Should Require Nutrition Labeling for Food Served in Restaurants*, 59 EMORY L.J. 549, 554–55 (2009) (describing state and local laws).

<sup>65</sup> See Noreen O'Leary, *They're Lovin' It*, ADWEEK, May 3, 2010, at 20.

<sup>66</sup> Once again, the numbers are telling. Even after substantial declines due to the recession, in 2008, automakers and auto dealers spent \$10 billion on television advertising. See Steve McLellan, *Chrysler Fallout Sign of Things to Come? Auto Giant's Bankruptcy May Signal Fewer Upfront Dollars*, ADWEEK, May 4, 2009, at 6.

<sup>67</sup> For a now-classic account of the role of commercial advertising in constituting consumerism, see STEWART EWEN, *CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE* (Basic Books 25th Anniv. ed. 2001) (1976).

## CONCLUSION

To those people who worry about the health of American politics, the bottom line I urge here may seem utterly bleak: Do not worry about *Citizens United* ruining American politics with barrels of cash; American politics was mostly ruined already. Yet I would resist a counsel of despair. Even if only at the margin, campaign finance regulation can create better and worse regimes.

More broadly, we can sensibly distinguish between flawed democracies and fundamentally non-democratic states like North Korea or the former Soviet Union. For all of its flaws, the United States retains a basically democratic system of government. And as Professor Gardner shows, there is no realistic likelihood that BCRA-style campaign finance regulation will place the United States on an inevitable road to serfdom. What should make the decision in *Citizens United* so galling, therefore, is not that it handed government over to corporate money. Quite the contrary. The decision offends precisely because it was so unnecessary for securing the place of moneyed interests in American politics.

In an important regard, WGB may have things exactly backwards. Of course they are right that the Roberts Court is a “laggard” in the sense that its conservative bloc was appointed by past Republican Presidents. But in asserting the rights of capital in their most extreme form, the conservative bloc of the Court aims to capture the spirit of a very current political movement that regards just about any regulation of the economy as “socialist.” If that movement succeeds, the Roberts Court could come to be seen not as a laggard from the Reagan era but in the vanguard of the Tea Party era. Thus, whether the Court lags or leads politics may well depend on whether one looks back or forward.