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Confronting the Impact of *Citizens United*

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INTRODUCTION

Perceived corporate dominance has spurred a recent populist backlash, on both the political left and political right. In this atmosphere, the Supreme Court's 2010 decision in *Citizens United v. FEC*,¹ granting corporations the right to spend directly on express political advocacy, has become the target of a particularly heated critique.

This Essay confronts the impact of *Citizens United* in two respects. Part I first reviews *Citizens United*'s place in the campaign finance constellation. It argues that although the decision was a bold stroke in many ways, its impact on the scope of permissible campaign finance regulation is far less substantial than commonly assumed.

Even if *Citizens United*'s incremental impact is mild, it nevertheless has the feel of a final straw. The decision has provoked first furor, and then fear, with opponents invoking images of a dystopian political process overwhelmed by corporations. Yet rarely is the fear of corporate political spending articulated at a level of specificity conducive to assessing, or confronting, the perceived damage. Part II takes up that challenge, parsing the concerns at the root of opposition to corporate political spending.² It then offers responsive policy proposals, all well within the regulatory space undisturbed by *Citizens United*.

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1. 130 S. Ct. 876 (2010).
2. This Essay leaves aside the robust debate about corporate governance structures' capacity to ensure that corporate political spending is in the interest of the appropriate stakeholders. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, BRENNAN CENTER FOR JUSTICE (June 7, 2010), http://www.brennancenter.org/page//publications/shareholdersvoice2_5_10.pdf; Adam Winkler, "Other People's Money": *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004). Instead, it

I. THE SURPRISING LIMITS OF *CITIZENS UNITED*

Citizens United is written to be a big opinion, offering bold constitutional pronouncements with thin evidentiary support, and scoffing at both previous Courts and coordinate federal branches. Its aggressive posture and sweeping language have stirred scholars and practitioners alike, in fields far beyond its holding.³

Curiously, however, *Citizens United* may be as momentous a change in campaign finance law when compared to other decisions of the Roberts Court.⁴ This Part first considers those other cases, which inspired less frenzy but represented larger seismic shifts. It then considers *Citizens United* itself, and the comparatively incremental increase in political speech the decision actually permits.

A. Earlier Cases of the Roberts Court

As with all modern campaign finance stories, it is necessary to begin with 1976's *Buckley v. Valeo*.⁵ *Buckley* concerned a challenge to the Federal Election Campaign Act of 1971 (FECA)⁶: extensive campaign finance legislation capping both contributions to candidates (contributions) and spending on elections (expenditures). The government defended the law as necessary to prevent corruption—and the appearance of corruption—in the federal political process. *Buckley* upheld FECA's limits on contributions as suitably tailored to the government's important objectives but found its corollary limits on expenditures to be unjustified constraints on the ability to create and distribute core political speech.⁷ After *Buckley*, candidates, driven to outspend opponents and independent entities in order to promote their preferred narrative, were soon consumed in an "arms race" for campaign funds.

focuses on the feared repercussions of corporate political spending that exist even when internal governance procedures ensure that managers' incentives are perfectly aligned with those of the corporation's stakeholders.

3. En route to overturning precedent and nullifying a congressional statute, the decision raises or revives serious questions about, *inter alia*, Supreme Court practice, tax law, corporate governance, commercial speech, the role of empirical data in electoral jurisprudence, and the relative utility of facial and as-applied challenges. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. (forthcoming 2011) (manuscript at 24-25), available at <http://ssrn.com/abstract=1620576> (cataloguing concerns about the *Citizens United* decision).
4. The claim that *Citizens United* represents relatively limited doctrinal change is descriptive, not normative; there is much in the decision to critique, but such analysis is beyond the scope of this Essay.
5. 424 U.S. 1 (1976) (per curiam).
6. Pub. L. No. 92-225, 86 Stat. 3 (1972).
7. *Buckley*, 424 U.S. at 58-59.

Fast-forward to the Roberts Court. In *Randall v. Sorrell*, the Court was, for the first time, meaningfully presented with expenditure limits premised on a different government interest—one that actually arose out of the “arms race”: the need to prevent fundraising from draining time that legislators spend legislating and executives spend executing.⁸ A plurality of the Court curtly dismissed this interest—and implicitly, any others—on the grounds that *Buckley*’s invalidation of expenditure limits could not be undermined, even by a presumably legitimate novel interest supported by presumably legitimate evidence.⁹ Two years later, in *Davis v. FEC*, the Roberts Court confronted the supply side of the “arms race,” invalidating a provision relaxing contribution limits for candidates whose wealthy self-financed opponents spent beyond a given threshold.¹⁰ The opinion is most significant in concluding that a wealthy candidate’s ability to speak would be burdened, despite the absence of limits or restrictions on that speech, by rules fostering the speech of others.¹¹ That novel theory has inaugurated a wave of judicial attacks on public campaign financing programs.¹²

Randall and *Davis* are watershed decisions, distinctions of kind rather than degree. The first categorically refused to consider novel forms of harm to the political system; the latter wholeheartedly embraced a novel form of harm to political plaintiffs. Moreover, both cases rejected—and possibly doomed—efforts to change the fundamental nature of the fundraising “arms race”: *Randall* refused to consider any regulatory interest in shutting it down, and *Davis* attacked perhaps the most effective means of coaxing it to a close. In contrast, as this Essay next explains, *Citizens United* represents only an incremental change, turning up the volume of speech already in the political marketplace.

B. Corporate Speech Before *Citizens United*

Citizens United did not introduce constitutional protection for the speech of incorporated entities.¹³ Before *Citizens United*, the Court had expressly

8. 548 U.S. 230 (2006) (per curiam).

9. *Id.* at 245-46 (plurality opinion).

10. 128 S. Ct. 2759 (2008).

11. *Id.* at 2769, 2771-72.

12. Most of these programs, though structured differently from the provision invalidated in *Davis*, allow one candidate’s spending to “trigger” additional disbursements to an opponent. See *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010); *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *stayed pending cert. decision* by 130 S. Ct. 3408 (U.S. June 8, 2010) (No. 09-A1163).

13. This Essay treats the speech of incorporated entities as distinct from the speech of corporate managers, employees, and shareholders acting through a separate segregated fund. The latter may share a corporate affiliation, but represent their own interests rather than the interests of the corporate entity.

granted for-profit corporations First Amendment rights to fund commercial speech,¹⁴ and had never questioned corporate rights to speak accurately on non-commercial subjects outside of the electoral arena.¹⁵

Within politics, federal regulations and many states' regulations had long prohibited corporations from spending their general treasury funds on election-related communications. Cases before *Citizens United*, however, cut these regulations to the bone. *First National Bank of Boston v. Bellotti* granted corporations the right to spend unlimited treasury funds to support or oppose ballot initiatives.¹⁶ *FEC v. Wisconsin Right to Life, Inc.* extended that right to political messages mentioning candidates, so long as they did not amount to express "vote for or vote against" advocacy or its "functional equivalent."¹⁷

These cases gave for-profit corporations ample lawful opportunity to support or critique candidates quite vigorously.¹⁸ Prior to the *Citizens United* decision, corporations had the constitutional right to spend unlimited funds telling voters that "Candidate Smith hates puppies." *Citizens United* only added protection for these corporations to convey an incremental "Vote Smith Out" exhortation, expressly encouraging citizens to act at the ballot box on their assessments of candidates. This is a relatively minimal final straw.¹⁹

C. Regulation After *Citizens United*

Better said, *Citizens United* invalidated the federal ban on corporations' ability to advocate expressly for or against political candidates, but it did not portend the complete collapse of other campaign finance regulation. For example, beyond the perceived audacity of the opinion, *Citizens United* gives no reason to question regulation of direct contributions to candidates. Limits on political expenditures are presumptively invalid because they have a direct impact on the expression of the spender's ability to produce and distribute its own speech, and, in the Court's eye, at best have a tangential relationship to prevent-

14. See *Centr. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

15. See, e.g., *Heffron v. Int'l. Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

16. 435 U.S. 765 (1978).

17. 551 U.S. 449, 457 (2007).

18. Certain corporate entities enjoyed more extensive rights to advocate for or against candidates directly. Some nonprofit corporations, organized in order to "disseminate political ideas," received this right in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263-64 (1986), and the Court consistently assumed that for-profit media corporations, organized in order to profit by their speech, had similar rights. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

19. Nate Persily, *Citizens United: A Preview to a Post-Mortem*, BALKINIZATION (Jan. 21, 2010, 8:04 AM), http://balkin.blogspot.com/2010/01/citizens-united-preview-to-post-mortem_21.html.

ing perceived corruption of officeholders.²⁰ Neither flaw infects limits on contributions—suitcases of cash delivered to candidates or their representatives have limited inherent speech content and a much greater perceived relationship to misconduct.²¹ And while candidates and parties might protest their loss of a competitive advantage in a system in which corporations and millionaires spend billions on some candidates, while other candidates may only raise money in bite-sized chunks,²² the Roberts Court seems to have no interest in evaluating contribution limits based on the degree to which they provide a level playing field.²³ *Davis* forecloses any argument that wealthy corporations' entry into the political marketplace creates a legal right for candidates or parties to amass the cash to keep up.²⁴

Regulations requiring disclosure of the financial backing of political communications appear to be even more secure. Eight Justices gave their approval to fairly extensive disclosure requirements in *Citizens United*,²⁵ absent evidence of “a reasonable probability of threats, harassment, or reprisals.”²⁶

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20. *Citizens United v. FEC*, 130 S. Ct. 876, 897-98, 908-11 (2010).
 21. *Id.* at 901-02, 908-09, 914-15; *Buckley v. Valeo*, 424 U.S. 1, 23 (1976); see also *In re Cao*, No. 10-30080, 2010 WL 3517263, at *9 (5th Cir. Sept. 10, 2010) (“[W]e do not read *Citizens United* as changing how this court should evaluate contribution limits on political parties and PACs.”). Even if the Court were to invalidate absolute prohibitions on corporate giving, those contributions would still be capped at \$2400. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 133 (2010); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435 (Feb. 17, 2009). On the current Court, only Justices Scalia and Thomas appear ready to scrap limits on contributions entirely. See *Randall v. Sorrell*, 548 U.S. 230, 265-67 (2006) (Thomas, J., concurring in the judgment); cf. *McConnell v. FEC*, 540 U.S. 93, 301-03 (2008) (Kennedy, J.) (finding a sufficient interest in limiting contributions to candidates, but not to parties).
 22. See *Republican Nat’l Comm. v. FEC*, No. 09-1287, 2010 WL 1653051, at *20-22 (U.S. Apr. 23, 2010) (jurisdictional statement).
 23. See *Citizens United*, 130 S. Ct. at 904 (emphatically rejecting any interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections”).
 24. See *Davis v. FEC*, 128 S. Ct. 2759, 2773-74 (2008). Of course, candidates and parties are the engines of most campaign finance regulation; given the newly enhanced comparative advantage of independent entities, incumbents may now be more interested in repealing existing restrictions. That would be a tactical choice, however, and not a doctrinal limitation.
 25. See *Citizens United*, 130 S. Ct. at 914-16; cf. *id.* at 980 (Thomas, J., concurring in part and dissenting in part).
 26. *Id.* at 916 (citing *McConnell*, 540 U.S. at 198); see also *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2820 (2010) (noting the same standard in the context of disclosures with respect to ballot proposition petition signatures).

This is not to suggest that *Citizens United* creates no campaign finance ripples. For example, the Court repeatedly insists that the First Amendment does not distinguish speech based on the speaker.²⁷ As Professor Rick Hasen discusses, there is no principled way to take this precept seriously and still maintain a prohibition on expenditures by unions,²⁸ or more controversially, foreign entities.²⁹ Expect *Non-Citizens United* in the near future.

The decision also creates questions about other corporate electoral funding, short of gifts to candidates.³⁰ The principal expenditure at issue in *Citizens United* was a movie about a candidate; the Court allowed corporations to produce such communications because of the core speech the communications comprise. Federal law, however, prohibits corporate payments to influence elections beyond such paradigmatic speech.³¹ For example, corporations may not fund partisan voter registration drives.³² And it is not clear whether corporations may funnel money to other entities that wish to advocate for or against candidates.³³ The extent to which *Citizens United* speaks to these payments—whether these are, in terms of the relative speech interests of the corporate enterprise or the marketplace of ideas, more like expenditures beyond regulatory

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27. 130 S. Ct. at 899, 902-03, 905-11; *id.* at 919, 921-22 (Roberts, C.J., concurring); *id.* at 928-29 (Scalia, J., concurring).
28. In the days after *Citizens United*, the FEC announced that it would not enforce the federal ban on expenditures by unions. Press Release, Fed. Election Comm'n, FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC* (Feb. 5, 2010), available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>.
29. Hasen, *supra* note 3 (manuscript at 4, 25-32); see also *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (noting that First Amendment protections extend to resident non-citizens). If a critical interest in corporate political speech is informing the electorate, *Citizens United*, 130 S. Ct. at 907, there are surely American voters who would want to consider foreign citizens' views on American candidates' approaches to matters like foreign relations, international trade, or international security.
30. See *supra* text accompanying note 21. When electoral activity is coordinated with candidates, it is treated not as independent expression, but as a gift to the candidate, like any contribution. See 11 C.F.R. § 109.20 *et seq.* (2010). With corporate money freed for independent spending but not spending that is coordinated with candidates, there will likely be an increase in scrutiny on the "independence" or "coordination" of corporate political spending.
31. 2 U.S.C. § 431(9)(A) (2006).
32. 2 U.S.C. §§ 431(9)(B)(ii), 441b(b)(2)(B); 11 C.F.R. § 114.4(d)(3) (2010).
33. The Federal Election Commission recently permitted such payments with respect to federal candidates, FEC Advisory Op. 2010-11, FEDERAL ELECTION COMMISSION (July 22, 2010), <http://saos.nictusa.com/saos/aonum.jsp?AONUM=2010-11>, but whether such payments must be allowed as a constitutional matter is hotly disputed. See *Thalheimer v. San Diego*, 706 F. Supp. 2d 1065 (S.D. Cal. 2010) (pending appeal).

power or more like contributions susceptible to regulation—is uncertain. Still, in all, these are relatively minor uncertainties, atop a relatively minor increase in corporate speech rights.

II. PARSING THE FEAR OF CORPORATE EXPENDITURES

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,³⁴ and its sweeping rhetoric, both of which seem to poke a finger in the eye of those who disagree with the legal merits.

Perhaps most important in the decision's outsized aura, however, is the fact that in eliminating the ban on corporate express advocacy, *Citizens United* eliminated the final extant prohibition on independent corporate political speech. The case has thereby taken on the perceived sins of the whole line of decisions expanding corporate rights in the political marketplace. More specifically, *Citizens United* has provoked such a strong reaction because it stands for a series of opinions that, together, allow the potential for corporate speech to overwhelm a democratic system built to serve individual voters.

Careful parsing of this reaction reveals that it has several components, seldom articulated. For example, limited forays into campaign advocacy—a billboard or two, say—by small incorporated nonprofit organizations or local for-profit businesses do not provoke the same degree of concern that the demos is endangered. These concerns, therefore, do not seem to be predicated on the corporate form as such. Rather, most of the fear provoked by *Citizens United* seems to be driven by the anticipated actions of entities with exceptionally concentrated wealth.³⁵ Attention is focused on corporations, because the corporate form allows for-profit corporations to amass such wealth at an unsurpassed scale.

Understanding that the furor over *Citizens United* concerns the political leverage of extreme wealth, rather than the corporate form as such, usefully narrows the field of responsive policy to address that concern. Parsing further, to understand the reasons *why* citizens may be worried about the deployment of extreme wealth in the political marketplace,³⁶ yields a still narrower field of policy responses. This Essay turns now to the particular fears that may be at the

34. See *Citizens United*, 130 S. Ct. at 931-36 (Stevens, J., dissenting).

35. E.g., Donna F. Edwards, *Response to Democracy After Citizens United*, *BOSTON REV.*, Sept.-Oct. 2010, at 23-24 ("The *Citizens United* ruling will go down in history as one of the Supreme Court's worst decisions—the *Dred Scott* of our time.").

36. Some concerns about corporate speech are nonconsequentialist, finding fault in the mere fact that corporations are speaking, or the fact that entities have different capacities for disseminating speech, apart from any impact that that speech may have on the campaign marketplace or political process. This Essay focuses, instead, on the tangible impact of the speech authorized by *Citizens United*.

heart of the reaction to *Citizens United*—and once articulated, finds several tailored responses to these fears well within the regulatory space undisturbed by the decision itself.

A. *Corporations will completely dominate political communication in a particular race, squeezing out alternatives.*

Call it the “all in” scenario: ExxonMobil decides to spend its \$45 billion of annual net income³⁷ on a few pivotal races, not only blanketing but smothering the available fora.

It is important to remember that even Exxon-esque wealth cannot truly preclude alternative speech. In the extremely unlikely event that a single entity or consortium managed to purchase all of the available advertising space in the relevant television, radio, newspaper, and billboard markets, it would still be virtually impossible for that entity or consortium to dominate all news and editorial content, and impossible for a single interest to dominate distributed media like the Internet, direct mail, or person-to-person communication.

Nevertheless, the (unlikely) prospect that one corporate entity or consortium might purchase effective control of any single medium might justify regulatory intervention calibrated to prevent monopolization of a channel of the marketplace of ideas, just as government may prevent monopolization of a channel of the commercial marketplace. As just one example, such regulation might prevent a single entity, or entities acting in concert, from consuming more than *x* percent of the available space within a given medium in a given period.

Such an approach is not at odds with *Citizens United*. The decision addressed, and rejected, regulation premised on the assertion that incremental corporate speech is inherently harmful, no matter how much or how little of the available bandwidth that speech consumes. The Court has displayed a markedly different approach in circumstances when speech is recognized as zero-sum, and the government is interested not in prohibiting speech categorically, but in regulating individual speakers’ use of a medium to preserve the diversity of the marketplace of ideas. Specifically, the Court has given the government broad latitude to ensure the health of a limited-capacity medium at risk from too many simultaneous speakers.³⁸ For the same reasons, it should show the same solicitude for regulation preventing one speaker from monopolizing any given channel.³⁹

37. EXXONMOBIL, 2008 SUMMARY ANNUAL REPORT 6 (2008), available at http://www.exxonmobil.com/Corporate/Files/news_pub_sar_2008.pdf.

38. See, e.g., Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 680-82 (1998); Cox v. New Hampshire, 312 U.S. 569, 574, 576 (1941).

39. See, e.g., Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387-90 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945).

This approach also steers well clear of the interest, thoroughly denigrated in *Buckley*, *Davis*, and *Citizens United*, in equalizing speech or leveling electoral opportunities. Individuals and entities would remain differently able to distribute speech based on their differential wealth. Rather than aiming toward equality, the anti-monopolization concern polices the boundaries of the extreme in a manner designed to preserve diversity. Moreover, unlike campaign finance regulation applied only to political speech, the anti-monopolization proposal above, triggered by a particular entity's consumption no matter what the nature of the speech, would also be content-neutral.

B. Corporations will spend enough on speech to cause voters to elect the candidate preferred by the corporations.

This is one articulation of the “distortion” that corporate speech is said to create: Disproportionate corporate spending will cause citizens to follow the money, making the “wrong” choice. When unpacked, this argument entails a descriptive claim that a sufficiently large quantum of speech is not only one factor among many in influencing voter choice, but that it is decisive—and a normative claim that such a decisive impact is troublesome.

This Essay leaves aside the descriptive claim; a substantial body of work attempts to isolate the drivers of voter choice and their relative impact, and the degree to which campaign speech “matters” in that calculus is contested.⁴⁰ Rather, assuming that corporate campaign speech may be decisive, this Essay probes the comparatively neglected normative concern. Corporate spending might cause voters to change their minds. So what?

Presumably, there is no normative objection to speech that is decisive because it persuades based on an accurate idea assessed by the voter on the merits, no matter how large the quantity of that speech. Such a decision process fits a platonic ideal of the marketplace of ideas—and is likely vanishingly rare.

Instead, there are at least three potentially controversial ways in which a substantial quantity of candidate-focused speech might cause a voter to change his or her mind.

First, voters may use heuristics that fail them. The breadth of support for a given proposition, if a proxy for majoritarian merit, may legitimately factor into voters' election choices.⁴¹ But if voters employ a heuristic equating quantity of speech with breadth of support, great volumes of corporate speech might cause

40. See, e.g., Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 Mo. L. Rev. 143, 152-64 (2010).

41. The electorate may use breadth of support for a communication (“support Smith because he will cut taxes”) to gauge the truth or fiction of an assertion (people agree that “Smith will cut taxes”), its normative value (people agree that “it is good that Smith will cut taxes”), or the salience of a topic overall (people agree that a “candidate’s approach to taxes is a good issue for evaluating candidates”). Any of the three may cause a decisional “error” if there is not broad support for that communication.

voters rationally seeking a bandwagon to follow a bandwagon that does not exist.⁴²

Second, even more basic cognitive processes might lead to error. When voters do not consciously evaluate the relative merit of arguments at first hearing, repetition alone may provide the arguments with unwarranted force or affective resonance remarkably difficult to dispel.⁴³ Millions of dollars of corporate speech might therefore cause voters to put more faith in the arguments than those arguments “deserve,” simply by virtue of the repetition.

Third, theoretically, a substantial mass of speech might simply amount to an unstoppable electoral force. That is, the first two concerns above suggest that sheer quantity has an impact only in the lacunae of cognitive evaluation. In contrast, some commentary concerning the impact of corporate spending sug-

gests a fear that money is its own destiny, no matter how much thought voters are prepared to give to their vote.⁴⁴

Because the first two propositions, at least, are premised on cognitive errors, additional information might mitigate the concern. In campaign finance regulation, the case for such information often involves requirements to disclose the financial support for speech.

Current disclosure regimes, however, are generally poorly tailored to the task. Even when focused on particular communications, disclosure usually involves detailed reporting of individual contributions to a centralized source.⁴⁵ Such compilations are far too complex for most voters to assess the breadth of support for any given message.⁴⁶ Moreover, by the time that voters seek out the relevant information, it is far too late to dislodge the conclusions reached by the basic mental shortcuts in question.

42. Cf. Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, at 63 (articulating the concern that “[c]orporate advertising will mislead the public . . . because its volume will suggest more public support than there actually is for the opinions the ads express”).

43. See Sheff, *supra* note 40, at 153-54, 160-63.

44. See, e.g., Issacharoff, *supra* note 21, at 4.

45. See, e.g., *Democracy is Strengthened by Casting Light on Spending in Elections* (DISCLOSE) Act, H.R. 5175, S. 3628, 111th Cong. § 211 (2010).

46. Moreover, such models may have substantial countervailing privacy concerns. See Lloyd Hitoshi Mayer, *Disclosures on Disclosure*, 45 IND. L. REV. (forthcoming 2010) (manuscript at 28-30), available at <http://ssrn.com/abstract=1622760> (recommending disclosure of “only certain, non-identifying information for smaller contributors” to reduce the risk of harmful retaliation); see also Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273 (forthcoming 2010) (manuscript at 276, 300-01) (on file with author) (recommending limited disclosure for donors of small amounts, to maintain privacy and reduce the need for observers to sift through information with little meaningful incremental value).

A new—and far more basic—model of disclosure focused on particular communications may be far more promising. Consider a few simple elements designed to appear, in standardized form, within a communication itself: a sort of “Nutrition Facts” label for democracy. Such a label would signal the importance of the information it contains, as well as provide the information itself. This, in turn, would improve the chance that voters pay attention, increasing the cognitive processing they devote to the message and weakening the hold of fallible heuristics.⁴⁷

For example, “Democracy Facts” disclaimer emphasizing simple proxies for the quantity and fervor of local support for a particular communication might help flag the existence of a false bandwagon. This Essay suggests two rough metrics of local support, though others may be at least as suitable. For any given electoral communication, the number of financial supporters within the jurisdiction is one relevant measure of quantity.⁴⁸ The portion of financial support generated by the top *x* contributors is one relevant measure of relative

Democracy Facts	
Paid by	People for Good Things
Supporters*	12,345
\$ from Top 5	63%
Top 5 Contributors	
George Washington	
John Adams	
Thomas Jefferson	
John Q. Adams	
America, Inc.	
Candidate Authorized	No
* the number of financial supporters for this communication within the jurisdiction of the candidate mentioned	

47. See Sheff, *supra* note 40, at 163-64 (suggesting that “greater attention to the semantic content of a message” and “more in-depth cognitive processing” may mitigate the pure effect of repetition).
48. The number of supporters might include those funding the particular communication, or if such earmarked contributions do not cover the communication’s costs, those otherwise funding the sponsoring entity and presumably agreeing with its speech.

Identifying the number of supporters requires a further refinement. Imagine that two hundred people give to PeopleForGoodThings, which joins twelve corporations giving to PeopleForGreatThings, which joins one organization giving to PeopleForExcellentThings, which distributes an electoral communication. How many entities have financially supported the final piece of speech in a way that reflects the strength of the bandwagon?

One technique would trace financial backing to “ultimate source donors”—that is, entities like individuals or corporations that are not themselves funded primarily by ideological donations. A tangential benefit of this technique is that it aligns the incentives of speaking entities with the difficulty of collecting information for disclosure. Any entity that wishes to magnify the impact of its speech, by speaking on behalf of a broader base of individuals, will have an incentive to trace the ultimate donor base more vigorously. Each organization will be able to weigh for itself the costs and benefits of increased information processing against the costs and benefits of the perception that it is speaking for a limited number of locals.

fervor.⁴⁹ These are both, of course, measures of financial support for a communication, and therefore only second-best measures of popular support for the propositions that a communication asserts. Still, they are at least useful flags. While millions of people may support a proposition funded by a handful, a large quantity of speech sponsored by just a few entities should alert voters to question the validity of their quantity-based heuristic, and seek more information to test the proposition's breadth of support.

A "Democracy Facts" disclaimer may also help mitigate the second concern above—that communications receive unwarranted weight based on repetition alone. Here, the focus is on information revealing potential conflicts of interest, which may prompt voters to test their assumption of accuracy. Knowing the identity of those supporting a communication might help voters better calibrate the initial weight they believe the communication is worth, before repetition has the opportunity to solidify its presumed reliability. Some will credit the communication based on the sponsor's identity, while others will discredit it; either reaction is legitimate—and richer than an assessment based on quantity alone.

As above, the value of this disclaimer does not depend on identifying all supporters. Instead, the real value inheres in the identity of the "but-for sponsors," the primary sources of funding for the speech in question, without whom the speech likely would not exist, or would take on a different character.⁵⁰ Identifying the top *x* contributors should be sufficient.⁵¹

The "Democracy Facts" disclaimer may mitigate the effect of the two cognitive errors described above.⁵² *Citizens United's* express support for more exten-

49. More precisely, the value inheres in identifying the amount of financial support from the top *x* direct contributors, as a percentage of the total financial support from supporters within the jurisdiction.

50. This information also provides a tangential benefit. Outside of the election context, unattributed speech may be rebutted over time. In an election campaign of finite duration, however, any rebuttal may arrive only after the campaign is over. Effective disclosure of the real, continuing entities primarily responsible for a communication—"stand by your ad" provisions—may chill flatly false speech by ensuring some continuing locus of reputational responsibility for the communication after the campaign.

51. Cf. *Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act*, H.R. 5175, S. 3628, 111th Cong. § 214(b)(2) (2010) (requiring disclosure of, inter alia, the "Top Five Funders" of a communication); Mayer, *supra* note 46 (manuscript at 16-17, 31) (suggesting disclaimers identifying the most significant contributors). In order to preserve the ability of dissenting supporters to dissociate themselves from a given communication, it may suffice to exclude from the "top *x*" list those general organizational supporters who specify that their support is not to be used for a particular communication.

52. Critically, the claim here is not that disclosure, as a heuristic cue of its own, would substantially increase the degree to which voters make informed final choices on candidates. Cf. Briffault, *supra* note 46 (manuscript at 288) (expressing skepticism

sive disclosure certainly suggests that they would be legally upheld.⁵³ Yet if the third concern above—the sheer overwhelming force of quantity—is instead accurate, there is little reason to believe that this, or any, disclaimer would make any difference.

Fortunately, anecdotal evidence suggests that money is not entirely destiny: When equipped with accurate disclosure, voters do not slavishly follow even dominantly loud voices in the marketplace of ideas.⁵⁴ For example, 2004 California State Assembly candidate Tricia Hunter was favored 45 to 1 by independent expenditures, but lost her election.⁵⁵ Similar results have been seen in direct democracy initiative campaigns: In 2010, for example, Pacific Gas & Electric was the primary source of \$46.4 million supporting a California ballot proposition, against \$133,000 in spending from opponents—and the measure went down to defeat.⁵⁶ Money may buy awareness, but even dominant corporate spending cannot alone ensure electoral victory.

about such claims); Mayer, *supra* note 46 (manuscript at 11-13) (same). Rather, the claim is far more modest: Disclosure might help to mitigate informational mis- cues provoked by particular frequently repeated communications.

53. See *Citizens United v. FEC*, 130 S. Ct. 876, 914-16 (2010); *supra* notes 25-26 and accompanying text. Indeed, disclosure premised on the heuristics rationales discussed above presents a straightforward way to reconcile the Court's recent paeans to disclosure with its vigorous protection of anonymous political speech of the sort in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). In *McIntyre*, the Court confronted a private citizen distributing handbills door-to-door. In such a case, there is little danger that the recipient of the speech would misperceive a bandwagon behind the message, or grant it increased credibility based on sheer repetitive distribution.
54. Money is strongly correlated with political success. For example, candidates with more contributions have won more than 80% of state races in the last few election cycles (no single source seems to aggregate independent expenditures). See PETER QUIST, NAT'L INST. ON MONEY IN STATE POL., *THE ROLE OF MONEY & INCUMBENCY IN 2007-2008 STATE ELECTIONS* 7 (2010), available at <http://www.followthemoney.org/press/PrintReportView.phtml?r=423>. It is exceedingly difficult, however, to disaggregate the extent to which fundraising success generates, rather than is generated by, greater public support for the candidate than her rival. BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* 48-51 (2001).
55. See, e.g., CAL. FAIR POLITICAL PRACTICES COMM'N, *INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE* 30 (2008), available at <http://www.fppc.ca.gov/ie/IEReport2.pdf>.
56. CAL. SEC'Y OF STATE, *STATEMENT OF VOTE: JUNE 8, 2010, STATEWIDE DIRECT PRIMARY ELECTION 19* (2010), available at <http://www.sos.ca.gov/elections/sov/2010-primary/pdf/2010-complete-sov.pdf>; Campaign Contributions for Proposition 16, CAL. SEC'Y OF STATE, CALACCESS, <http://calaccess.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1321695> (for contributions toward supporting Prop. 16, follow hyperlink for all "Support" Committee Positions; then view information for "Contributions Received"; for contributions opposing Prop. 16, follow hyper-

- C. Corporations will spend enough on speech favorable to the winning candidate that the candidate will support the corporation's interest at the expense of the interests of the electorate, in order to incur similar future support.

The concerns above address potential failures of the marketplace of ideas of an election; this concern adds a failure of post-campaign governance.⁵⁷ It depends on a particular incarnation of the familiar public choice problem⁵⁸: A corporation trades substantial expenditures for favorable legislation, which is unremarkable when the legislation also benefits the voting constituency, and pernicious when the broader constituency is harmed, particularly if the harm is not sufficiently severe to provoke a collective response from the broader constituency. The exchange resembles quid pro quo corruption, except that it occurs over several time periods and without an express agreement.⁵⁹ It may also be worrisome if officials and campaign benefactors are suspected to be engaged in such a scheme, the mere appearance of which would degrade faith in the governance process, even if there is no such understanding.

The *Citizens United* majority flatly, and without empirical evidence, discounted such exchanges as factual impossibilities.⁶⁰ Commentators have noted that the Court's assessment contradicts its evaluation of very similar problems in *Caperton v. A.T. Massey Coal Co.*,⁶¹ which acknowledged the possibility in judicial elections that even truly independent expenditures might, if sufficiently sizable, spur judges to issue unwarranted decisions favoring the spending entity, or at least create the appearance of such improprieties.⁶² While these analysts

link for all "Oppose" Committee Positions; then view information for "Contributions Received") (last visited Nov. 24, 2010).

57. See Issacharoff, *supra* note 21, at 8-9.
58. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 8-11 (1996). See generally, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991).
59. Though an agreement increases the certainty of mutual benefit, explicit coordination is not necessary for sophisticated repeat players to understand—albeit perhaps imperfectly—that their actions may be mutually beneficial.
60. *Citizens United v. FEC*, 130 S. Ct. 876, 908-09 (2010).
61. 129 S. Ct. 2252 (2009).
62. See, e.g., Hasen, *supra* note 3 (manuscript at 33-35). Indeed, one scholar has branded such expenditures "Caperton contributions," recognizing the *Caperton* Court's elision of "expenditures" and "contributions," as well as the potential of such expenditures to corrupt. See James J. Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality* 6, 43 (Hofstra Univ. Legal Studs. Research Paper, Paper No. 10-29, 2010), available at <http://ssrn.com/abstract=1662630>.

have correctly praised the value of *Caperton's* logic, they have thus far missed the value of its remedy.

As a remedy for the potential bias created by particularly sizable expenditures, Mr. Caperton sought not disgorgement of the expenditures, but recusal: a limit on the judge-beneficiary's ability to provide a perceived return on the expenditure sponsor's investment. It might be productive to consider such a solution in the legislative arena as well. Indeed, Professor John Nagle has suggested that legislators be required to recuse themselves from significant action on issues directly affecting campaign contributors.⁶³ Just as *Caperton* viewed substantial expenditures as equivalent to contributions, Professor Nagle's proposal may warrant extension to substantial expenditures as well.

For example, in the event of an expenditure sufficiently outsized to generate unusual gratitude by a favored candidate, the winning candidate might be presumptively ineligible to take legislative action unusually benefiting the sponsor of the expenditure in question.⁶⁴ This safeguard would be judicially unenforceable, since no voter has a cognizable right to force a legislator to vote or abstain from voting on any given proposition. For precisely the same reason, however, courts could not prevent legislatures from themselves enforcing such a recusal obligation against their own members as an internal ethics matter.⁶⁵

Some may protest that such a "legislative recusal" obligation, extended to outsized expenditures, would unduly interfere with a legislator's ability to act in the interest of her constituents. After all, if recusal is tied to contributions, a candidate can control the obligation by rejecting any given contribution—but candidates have no such control over third-party expenditures. And a corporation vigorously supporting a candidate might thereby eliminate the candidate's ability to benefit the corporation in ways that also benefit the remainder of the constituency.

63. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69 (2000).

64. This example adds an element to Professor Nagle's proposal beyond its extension to expenditures. In Nagle's proposal, a substantial contribution creates a recusal obligation for any matter affecting the contributor. *See id.* at 81. This creates the opportunity for strategic contributions: An entity contributes to a candidate likely to vote against that entity's interest, in order to force recusal. The same opportunity would apply to expenditures: Corporations might favor unopposed candidates or those likely to win by vast margins, in an attempt to force recusal of those inclined to act against the corporations' interests. Limiting the recusal obligation to legislative actions deemed to substantially benefit the outsized campaign benefactor avoids this potential.

65. *Cf. id.* at 86-87 (suggesting internal congressional enforcement of the recusal obligation). As with all proposals above, this suggestion leaves unresolved questions, including the percentage of a campaign's expenditures amounting to an "outsized" quantum, the size of a benefit that amounts to "substantial," and the body that might be charged with deciding both, *ex ante* or *ex post*. For this Essay, it suffices to introduce the concept.

Credible *ex ante* commitment to “legislative recusal” should align incentives to limit this concern. If legislation sought by private interests also benefits the constituency as a whole, there is no reason for the private interests to spend at levels designed to attract a candidate’s special gratitude; because of the benefit to the constituency, the private interest can count on natural support for the legislation in question (with, say, an extra bit of lobbying oomph). Therefore, the private interest will tailor its spending to avoid anomalous support triggering the “legislative recusal” obligation, ensuring the legislator’s continuing ability to act on the favored measure. Only legislation that does not inure to the broader public benefit would be worth campaign spending sufficient to capture the legislator’s attention; and only such spending would trigger the recusal obligation.

Credible pre-commitment to “legislative recusal” may also mitigate a different manifestation of this public choice problem that is more difficult to detect. For-profit corporations may spend large campaign sums to curry legislative favor. But they can also extort favored policy outcomes by merely threatening to support the opposition.⁶⁶ A recusal commitment might modestly increase legislative backbone to withstand such a threat. If a corporation sought favorable legislation by threatening to deliver overwhelming support to a campaign opponent, recusal would also disable the opponent from yielding the desired benefit if he or she should win a corporate-fueled campaign. The recusal rule would decrease the corporation’s incentives to spend in outsized quantities, reducing the size of the threat.

There are limits to recusal’s ability to address rent-seeking behavior through the reality or threat of substantial expenditures; none of the proposals in this Essay is a panacea. For example, the analysis above presumes corporate interest in passing favorable legislation; the recusal rule would have little impact if the corporation wished instead to block legislation, because replacing a disfavored decisive “yes”-vote with a competitor precluded from voting is often just as effective as securing a “no”-vote. Moreover, a legislator might influence passage of a measure at numerous stages, even without the ability to take formal legislative action—for example, by persuading a colleague or colleagues to act. Still, if the corrupting potential of expenditures on the legislative process is not judicially cognizable after *Citizens United*, legislators’ ability to tie themselves to the mast, however limited, may be the best means to address a serious public choice concern.

D. Corporate spending will unduly divert incumbents’ time from their governmental duties to raising funds.

This concern reflects another impact of political spending on governance. It assumes that candidates will want to control the political narrative and will not

66. See, e.g., *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 335 (4th Cir. 2008) (Michael, J., dissenting); MONICA YOUN, *CITIZENS UNITED: THE AFTERMATH* (2010), available at <http://www.acslaw.org/node/16287>.

be content to leave campaign speech to third-party proxies: The greater the volume of competing expenditures, the more pressure candidates will feel to spend time fundraising in order to deliver their own messages. And the more time that incumbent candidates spend fundraising, the less they will have available to perform their existing legislative obligations well.⁶⁷ This concern is the reason why *Randall* and *Davis* are so important; *Randall* refuses to acknowledge this rationale for regulating the amount of money that incumbents could spend time fundraising,⁶⁸ and *Davis* calls into question the ability of public financing schemes to adequately support incumbents who do not spend their time fundraising.⁶⁹ Meanwhile, eliminating contribution limits might relieve some of the time constraints above, but unlimited contribution opportunities raise the serious countervailing concern of quid pro quo corruption.

There is no question that direct corporate political spending will raise the scale of the arms race that candidates perceive themselves to be in, and will raise candidates' anxiety about the need to close any fundraising gap. In the short term, particularly if public funding does not meet a perceived gap, it is likely that incumbents, feeling pressure from corporate spending, will increase the time they spend fundraising and decrease the time they spend legislating. Perversely, however, if that gap becomes sufficiently large, there is an—admittedly Pollyannaish—possibility that it will channel candidates' political engagement in a productive direction.

If corporations pursue political speech with sufficient gusto, there may come a point at which candidates simply cannot raise enough money to purchase a volume of speech that “competes” with the volume of non-candidate speech, no matter how much time they spend attempting to raise funds. In order to promote the delivery of their message, then, candidates may have to turn to methods that rely more on volunteer effort than purchased advertisement.⁷⁰ These more personal contacts—door-to-door canvassing, phone, mail or email,

67. See, e.g., George Packer, *The Empty Chamber*, *NEW YORKER*, Aug. 9, 2010, at 38. At some level, deficient performance will threaten incumbents' reelection more than a fundraising gap. This is not an assertion that incumbents will completely abandon their governmental duties, but rather that incremental fundraising time has an opportunity cost for the quality of government.

68. *Randall v. Sorrell*, 548 U.S. 230, 245-46 (2006).

69. See *Davis v. FEC*, 128 S. Ct. 2759 (2008); *supra* note 12. *Davis* does not jeopardize public financing schemes like the Fair Elections Now Act, S. 752, 111th Cong. (2009), which rely exclusively on matching private contributions, and do not trigger consequences based on third-party expenditures. The efficacy of such schemes in an environment of unlimited corporate independent expenditures, however, is still unclear.

70. See John Salyer, *TV Ads CANNOT Make the Difference*, *CHICO TEA PARTY PATRIOTS* (Sept. 28, 2010, 11:34 PM), <http://chicoteaparty.ning.com/profiles/blogs/tv-ads-cannot-make-the> (claiming that TV advertising time for certain races is no longer available, and soliciting funds for grassroots activity).

generated by volunteers—are also more interactive than more expensive methods of message delivery, creating the conditions for a more robust political dialogue than television ads produce. Unlikely as it may seem, if *Citizens United* ultimately leads corporations to price candidates out of mass media, the decision's lingering unintended consequence might be the enrichment of the political marketplace.

CONCLUSION

Outsized political spending by wealthy corporations may create legitimate concerns for the democratic process. But just as the outsized rhetoric of *Citizens United* glosses over thorny issues within the case,⁷¹ opponents' outsized rhetorical response⁷² obscures both the real tangible concerns raised by corporate political spending and their potential responses. Confronting the true impact of *Citizens United* requires a more focused lens. The analysis and proposals above—part policy prescription and part thought experiment—are offered as contributions to that scholarly project.

71. See, e.g., *supra* text accompanying notes 27-29.

72. E.g., Edwards, *supra* note 35.