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# COMMENTARY

## LET THE PEOPLE SPEAK: THE CASE FOR A CONSTITUTIONAL AMENDMENT TO REMOVE CORPORATE SPEECH FROM THE AMBIT OF THE FIRST AMENDMENT

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The Supreme Court's decision in *Citizens United v. Federal Election Commission*<sup>1</sup> rocked the American political landscape. The idea that for-profit corporations now have the same First Amendment protections as real, living human beings, and can spend unlimited amounts to influence elections, was, not surprisingly, greeted with widespread public disdain. In its aggressive handling of an important, but limited, challenge to elements of the Bipartisan Campaign Reform Act (BCRA),<sup>2</sup> *Citizens United* transformed an otherwise narrow case into a sweeping expansion of corporate rights under the First Amendment.<sup>3</sup> The ultimate decision overturned basic

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1. 130 S. Ct. 876 (2010).

2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at scattered parts of 2 U.S.C. (2006)).

3. *Citizens United* rose through the lower courts as a case involving application of § 203 of the BCRA. The BCRA prohibited "electioneering communication" by corporations or corporate-funded organizations within thirty days of a primary election or sixty days of a general election. 2 U.S.C. § 441b(b)(2) (2006). The Act defined "electioneering communications" as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A). The organization Citizens United, which receives corporate funds, sought to air an on-demand video, *Hillary: The Movie*. In the lower courts, the issue was whether Citizens United's movie was covered by these prohibitions. *Citizens United v. FEC*, 533 F. Supp. 2d 274, 277 (D.D.C. 2008).

Similarly, the case in its initial presentation at the Supreme Court was focused on the narrow question of whether a movie like *Hillary: The Movie* was covered by BCRA's prohibitions. As noted by the attorneys for Citizens United in their first merits brief, the question posed by the case was "[w]hether the prohibition on corporate electioneering communications in the Bipartisan Campaign Reform Act of 2002 (BCRA) can constitutionally be applied to a feature-length documentary film about a political candidate funded almost exclusively through noncorporate donations and made available to digital cable subscribers through Video on Demand." Brief for Appellant at 2, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_07\\_08\\_08\\_205\\_Appellant.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_205_Appellant.authcheckdam.pdf).

On June 29, 2008, however, the Court issued the following order for reargument that transformed the case:

The parties are directed to file supplemental briefs addressing the following question: For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election*

principles of campaign finance law in place for more than sixty years and directly overturned, in whole or in part, two of the Court's recent decisions. *Citizens United* was thus a bombshell, both in the sudden appearance of a broad challenge to settled principles and in its dramatic remaking of First Amendment jurisprudence and U.S. election law.

Objections to the Court's ruling have prompted a public debate about how to mitigate its impact, including the possibility of a constitutional amendment. While any amendment to the U.S. Constitution obviously faces huge hurdles, there is gathering support for the idea. More than three-quarters of a million people have signed petitions calling for an amendment;<sup>4</sup> dozens of Representatives and Senators have expressed their support;<sup>5</sup> and resolutions calling for an amendment are beginning to percolate in towns and states throughout the United States.<sup>6</sup>

This Commentary makes the case for why a constitutional amendment is, in fact, necessary. It begins, in Part II, with a review of the historical evolution of corporate speech rights. Except for cases involving freedom of the press, the Supreme Court did not grant speech rights to for-profit corporations until the 1970s. Moreover, even when it granted speech rights to corporations, the Court acknowledged the special problems posed by the corporate form. Part II thus demonstrates *Citizens United's* sharp departure from previous corporate speech jurisprudence. Part III follows with a critique of *Citizens United's* holding that there can be no differential First Amendment treatment of corporations and individuals, as well as its failure to analyze the unique problems posed by corporate spending in the electoral arena. Part IV analyzes and criticizes *Citizens United's* assertion that corporate independent expenditures—campaign spending not coordinated with candidates—cannot give rise to corruption or even the appearance of corruption. Part V assesses the empirical impact of *Citizens United* by examining the spending patterns in the 2010 election. Finally, Part VI addresses possible legislative and constitutional remedies to mitigate the damage caused by *Citizens United* and concludes that a constitutional amendment that removes

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*Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?

Order in Pending Case, *Citizens United v. FEC*, 129 S. Ct. 2893 (2009). This rare request for reargument transformed the case from an as-applied challenge to a particular element of the BCRA to a facial challenge implicating broad principles of constitutional law.

4. Robert Weissman, *One Year Later, Movement Is Growing to Overturn Citizens United*, PUB. CITIZEN (Jan. 21, 2011), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3264>.

5. See, e.g., Arthur Delaney, *John Kerry: Amend the Constitution in Response to Citizens United Decision*, HUFFINGTON POST, (Feb. 2, 2010, 11:00 AM), [http://www.huffingtonpost.com/2010/02/02/john-kerry-amend-the-cons\\_n\\_445842.html](http://www.huffingtonpost.com/2010/02/02/john-kerry-amend-the-cons_n_445842.html). Senator Schumer, along with thirty-seven other senators, strongly criticized the Court's decision in *Citizens United* and proposed legislation—the DISCLOSE Act—which would limit the holding's effect. S. 3295, 111th Cong (2nd Sess. 2010).

6. See, e.g., S. Res. 116, 25th Leg., Reg. Sess. (Haw. 2010) (requesting Congress “take immediate action by enactment of Federal Code or constitutional amendment” to redefine person so as to exclude corporations); H.J.M. No. 12, 60th Leg., 2nd Reg. Sess. (Idaho 2010) (requesting congressional action be taken, including through amendment, to “negate the harmful effects” of the *Citizens United* decision); H.J.M. 36, 50th Leg., 1st Sess. (N.M. 2011) (calling for Congress to formulate and send an amendment for ratification to the states).

for-profit corporations from the speech protections of the First Amendment is both appropriate and necessary.

## II.

It is not obvious that any constitutional protections should apply to corporations. The landmark case standing for the proposition that the Bill of Rights and other constitutional protections should apply to for-profit corporations is the 1886 decision *Santa Clara County v. Southern Pacific Railroad Co.*<sup>7</sup> The decision itself does not state that corporations should be treated as persons for purposes of constitutional protections, but a header to the court's opinion makes this claim explicitly.<sup>8</sup> Although the Supreme Court has extended other constitutional protections to for-profit corporations since *Santa Clara*, it is only recently that the Court decided that for-profit, non-media corporations should be afforded protections under the First Amendment.

The language of the First Amendment makes no mention of corporations, but nor does it mention persons. It specifies only that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>9</sup> Justice Stevens argues at length in *Citizens United* that there is no evidence that the Framers intended this language to apply to corporate speech.<sup>10</sup> In his concurrence, Justice Scalia argues to the contrary, but he is effectively reduced to arguing that the absence of affirmative proof demonstrating the Framers intent to exclude corporations from First Amendment coverage shows that they intended the Amendment to apply to corporate speech.<sup>11</sup> As Justice Stevens convincingly establishes, the framers

took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.<sup>12</sup>

For most of U.S. history, corporations did not enjoy First Amendment speech protections (except for freedom of press protections). In the 1970s, the Court developed two lines of cases that changed this state of affairs.

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7. 118 U.S. 394 (1886).

8. *Santa Clara*, 118 U.S. at 396 ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."). See generally THOM HARTMANN, UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE"—AND HOW YOU CAN FIGHT BACK (2010).

9. U.S. CONST. amend. I.

10. *Citizens United v. FEC*, 130 S. Ct. 876, 948 (2010) (Stevens, J., dissenting) ("[T]here is not a scintilla of evidence to support the notion that anyone [among those who drafted and ratified the First Amendment] believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position. ").

11. *Id.* at 925–27 (Scalia, J., concurring).

12. *Id.* at 949–50 (Stevens, J., dissenting).

In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>13</sup> the Supreme Court established that the commercial speech of for-profit corporations should be afforded First Amendment protection. The logic of this decision was rooted in the idea that consumers have a right to information; accordingly, the Court struck down a state law that prohibited pharmacies from advertising the price of prescription drugs.<sup>14</sup> Later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>15</sup> the Court established the following four-part framework for evaluating the constitutionality of restrictions on commercial speech:

For commercial speech to [to gain First Amendment protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>16</sup>

Over the next quarter century, this test evolved to the point where it effectively established a heavy presumption against restrictions on commercial speech, so long as the speech is not misleading and the advertised product is legal.<sup>17</sup> Relying on this jurisprudence, the Court has struck down numerous public health and public interest rules and regulations. Corporations have referenced the jurisprudence to chill legislators and regulators from acting in countless other instances. Among the areas affected:

- rules limiting tobacco advertising likely to be seen by children;<sup>18</sup>
- regulations restricting alcohol advertising;<sup>19</sup>
- limitations on casino and gambling advertising;<sup>20</sup>

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13. 425 U.S. 748 (1976). While this case involved advertising by professionals (pharmacists), its holding concerned advertisers generally. *Id.* at 761. Neither it, nor any subsequent decision by the Court, have distinguished the application of commercial speech protections based on whether the speaker is an individual or corporation.

14. *Id.* 757 (“More recently, in *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972), we acknowledged that this Court has referred to a First Amendment right to ‘receive information and ideas,’ and that freedom of speech ‘necessarily protects the right to receive.’” (emphasis added) (internal quotation mark omitted)).

15. 447 U.S. 557 (1980).

16. *Cent. Hudson Gas*, 447 U.S. at 566.

17. Although the Court has declined to replace the *Central Hudson* test with a strict scrutiny standard, as some justices have suggested, it has applied the third and fourth prongs of the test in such a way as to impose a high burden on regulations limiting commercial speech. The third prong requires a showing of empirical evidence that “the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 184 (1999)). The fourth prong mandates showing “a reasonable ‘fit between the legislature’s ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.’” *Id.* at 556 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)).

18. *See id.* at 565–66 (invalidating state law barring placement of tobacco advertisements at level lower than five feet in establishments located within 1,000 foot radius of school or playground).

19. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506–14, 516 (1996) (invalidating advertisements stating retail prices for alcoholic beverages).

- pharmaceutical marketing, including direct-to-consumer advertising and promotion of off-label uses of pharmaceuticals;<sup>21</sup> and
- rules designed to force disclosure of hidden ads (e.g., product placements) on television and radio.<sup>22</sup>

Meanwhile, the Court in 1978, in *First National Bank of Boston v. Bellotti*,<sup>23</sup> ruled that for-profit corporations are entitled to political speech protections beyond those afforded to the media. Finding a First Amendment right for corporations to contribute to state referenda campaigns, the Court argued,

[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.<sup>24</sup>

The courts have extended this rationale in very troubling directions over the subsequent three decades, including the creation of a “negative” speech right for corporations. This negative right works to prevent government agencies from requiring corporations to be associated with certain kinds of speech, on the grounds that it will compel them to respond. As a result, courts and corporations have invoked corporations’ purported First Amendment political speech rights to:

- overturn a rule mandating that regulated utilities include in their bills information on how to join a consumer group;<sup>25</sup>
- prohibit state laws mandating disclosure of whether dairy products include genetically engineered growth hormone;<sup>26</sup> and
- seek immunity for financial credit rating firms that issue grossly negligent ratings of bonds and other debt instruments.<sup>27</sup>

However, even while upholding corporate political speech rights, the post-*Bellotti* cases nevertheless recognized that corporations are different than individuals. This was primarily true in the area of campaign spending, where the Court recognized the disproportionate power of corporations, and their unique ability to dominate election

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20. See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 195–96 (1999) (holding that federal laws regulating lottery advertisements do not apply to radio and television advertisements for casinos in states where gambling is legal).

21. David C. Vladeck, *The Difficult Case of Direct-To-Consumer Drug Advertising*, 41 LOYOLA L.A. L. REV. 259, 268–69 (2007) (stating that test for constitutionality of restrictions on commercial speech invalidates virtually any regulations on advertisements that are not demonstrably false, misleading, or deceptive).

22. See Letter from Robert Weissman, Managing Director, Commercial Alert, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 21, 2008) (on file with author), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520187546> (countering industry arguments that regulations on hidden advertisements are unconstitutional).

23. 435 U.S. 765 (1978).

24. *Bellotti*, 435 U.S. at 777 (footnotes omitted).

25. *Pac. Gas & Elec. Co. v. Publ. Util. Comm’n*, 475 U.S. 1, 5–7 (1986).

26. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 69–74 (2nd Cir. 1996).

27. Nathan Koppel, *Credit Raters Plead the First; Will It Fly?*, WALL ST. J., April 21, 2009, at C1.

spending if left unregulated. In *Austin v. Michigan State Chamber of Commerce*,<sup>28</sup> for example, the Court held that the government can limit for-profit corporations to the use of political action committees (PACs) to fund express electoral advocacy.<sup>29</sup> And in *McConnell v. Federal Election Commission*,<sup>30</sup> the Court applied that principle to uphold the constitutionality of federal restrictions on “electioneering communications”—corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages.<sup>31</sup>

Thus, while *Citizens United* was a continuation of the recent line of cases upholding corporate speech rights, it was also a sharp break from the principle—unbroken since the creation of the First Amendment—that corporations are not entitled to political speech rights coextensive with human beings.

### III.

The principal holding of *Citizens United* is that corporations are entitled to the same First Amendment protections, including in the core area of election-related speech, as real, living human beings.<sup>32</sup> In reaching this conclusion, the Court emphasized the cases in which corporations have been granted First Amendment political speech protections over the last several decades,<sup>33</sup> while asserting that cases upholding limits on corporate speech, particularly in the area of election spending, were outliers and inconsistent with the otherwise consistent doctrine of the Court.<sup>34</sup>

*Citizens United*'s review of First Amendment cases involving corporate speech rights suffered from several failures. First, it neglected to acknowledge that corporate political-speech rights are a recent invention of the Court.<sup>35</sup> Thus, the implication of longstanding and settled rules favoring such rights is misleading. Second, and more pointedly, the Court's dismissal, as aberrations,<sup>36</sup> cases limiting corporate speech failed to seriously address the well-reasoned rationale for those limitations which the Court had previously accepted.<sup>37</sup> Until *Citizens United*, the Court had recognized the special

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28. 494 U.S. 652 (1990).

29. *Austin*, 494 U.S. at 654–55.

30. 540 U.S. 93 (2003).

31. *McConnell*, 540 U.S. at 189–224.

32. *Citizens United v. FEC*, 130 S. Ct. 876, 896–99 (2010).

33. *Id.* at 899–900 (2010).

34. *See, e.g., id.* at 903 (“No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity.”).

35. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777–78 (1978) (protecting corporate-political speech for a non-media entity for first time in Court's history) The *Bellotti* Court stated, without citation, that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” *Id.* at 777.

36. *See Citizens United*, 130 S. Ct. at 907 (noting that key rationale underlying *Austin* was “an aberration”).

37. Even where the Court previously invalidated restrictions on corporate campaign spending, it did not question the compelling government interest in limiting corporate influence on the political process. *See, e.g., FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1985) (invalidating law at issue but recognizing that “compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form”).

problems posed by corporate spending in the election arena, where by dint of size, resources, and single-minded purpose, corporations could distort and corrupt the political process.<sup>38</sup> And, until *Citizens United*, the Court agreed upon the need for—and constitutionality of—limits on corporate speech rights.<sup>39</sup>

The *Citizens United* majority did offer a conceptual rationale for why corporations should be afforded speech protections as extensive as those afforded human beings. The Court argued that it is constitutionally impermissible to differentiate speech protections based on the category of the speaker.<sup>40</sup> This rationale, however, is utterly unconvincing as a matter of law and common sense. First, the law is replete with differential standards of speech protections for different categories of speakers. Justice Stevens noted numerous examples<sup>41</sup> and Professor David Kairys has catalogued a long list as well.<sup>42</sup> Second, as a matter of basic common sense, the Court's concern with having different levels of speech protection for human beings and corporations "elides" the simple fact that corporations are not people, a point made clear in Justice Stevens's stinging dissent.<sup>43</sup> While corporations are staffed, managed, and owned by real people, they are legal entities separate and apart from the people who run them.

The majority's failure to distinguish corporations from real human beings led to strange twists of logic in its opinion. While the majority waxed eloquently on the importance of the First Amendment in protecting the expressive rights of disfavored persons,<sup>44</sup> the disfavored persons they described are not persons at all, but corporations. The Court also emphasized the importance of giving discriminated-against minorities the right to express their feelings, views, and aspirations, as well as speech protections that afford every person in a democracy the right to speak and affect policy.<sup>45</sup> It is hardly plausible, however, to consider the corporate sector a discriminated-against

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38. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 205 (2003) ("We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against "circumvention of [valid] contribution limits." (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) and *FEC v. Beaumont*, 539 U.S. 146, 155 (2003)); *Nat'l Right to Work Comm.*, 459 U.S. at 210 (noting that "'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" (quoting *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1982)).

39. *Citizens United*, 130 S. Ct. at 952–77 (Stevens, J., dissenting).

40. *Id.* at 898–99 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)).

41. *Id.* at 946–48 (Stevens, J., dissenting).

42. David Kairys, *The Contradictory Messages of Speech Law: Eloquence and Annoyance* 3–5 (Temp. Univ. Legal Studies Research Paper, No. 19, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1635319](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635319).

43. *Citizens United*, 130 S. Ct. at 971 (Stevens, J., dissenting).

44. See *id.* at 898–99 (majority opinion) (discussing speech-related rights of disadvantaged persons).

45. See *id.* at 899 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.").

minority. Not only do they wield an immense degree of political power, they do not have the attributes of persons necessitating protection from “discrimination.”<sup>46</sup>

The Court’s invented no-differentiation doctrine, wherein corporations are treated as if they are human beings, ignores obvious distinctions that justify differential treatment. Corporations do not breathe, drink, or eat—meaning they have no human-like interest in clean air, clean water, and safe food.<sup>47</sup> Corporations have perpetual life and do not get sick—meaning they have no human-like interest in ensuring the availability of affordable, quality healthcare; avoiding injury; or preventing illness. Corporations have no conscience, feelings, belief, capacity to love, or concern for community—meaning they do not have human-like interests in family, community, and society. Corporations cannot be imprisoned and have no sense of shame—meaning they are immune to key forms of punishment and social sanction. Further, corporations have many superhuman powers: the ability to be in more than one place simultaneously, combine, split apart, and create unlimited numbers of progeny (subsidiaries). These special attributes give them the ability to exercise social, political, and economic power vastly disproportionate to humans. Most crucially, corporations are driven by a single objective: pursuit of profit.<sup>48</sup> To that end, they agglomerate unparalleled amounts of wealth.

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46. See *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938) (indicating “prejudice against discrete and insular minorities” should be reviewed with heightened level of scrutiny because ordinary political process is not able to prevent prejudice in this context).

47. To be sure, they may have business interests in these outcomes, but that is precisely the point. Any such interest is derivative of their overriding interest in profit maximization, which is qualitatively different than the interests of humans.

48. As a practical matter, the markets punish publicly traded corporations that fail to deliver strong short-term (typically quarterly) results. *Shooting the Messenger: Quarterly Earnings and Short-term Pressure to Perform*, KNOWLEDGE@WHARTON (July 21, 2010) <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2550>; see also DAVID KORTEN, *WHEN CORPORATIONS RULE THE WORLD* 175–229 (2d ed. 2001) (discussing ways in which modern markets value and reward short-term gain over long-term value).

As the Committee for Economic Development articulated in its important report on “short-termism,” stock price is highly responsive to short-term interests and instant information. RES. & POL’Y COMM., COMM. FOR ECON. DEV., *BUILT TO LAST: FOCUSING CORPORATIONS ON LONG-TERM PERFORMANCE* 8–9 (2007), available at [http://ced.org/images/library/reports/corporate\\_governance/report\\_corpgov07.pdf](http://ced.org/images/library/reports/corporate_governance/report_corpgov07.pdf).

Top executives at companies with falling share prices will eventually be fired. Steven N. Kaplan & Bernadette A. Minton, *How Has CEO Turnover Changed? Increasingly Performance Sensitive Boards and Increasingly Uneasy CEOs* 10 (Nat’l Bureau of Econ. Res., Working Paper No. 12465, 2006), available at <http://www.nber.org/papers/w12465>. As a result, executives pay attention to the daily ups-and-downs of their companies’ share price. While executives have some latitude and may sponsor art exhibits, waste some money on corporate jets, or make sensible long-term investments in research and development, the pressure to deliver short-term profits is intense; and chief executives that do not deliver strong profits do so at their own peril.

Although it is often stated that corporations have a legal duty to prioritize profits, this is not precisely accurate. By way of illustration, Delaware’s corporate law establishes that companies may exist for the “purposes set forth in its certificate of incorporation.” DEL. CODE ANN. tit. 8, § 121 (2001). That is a general grant of authority, with no requirement to maximize profit.

Corporations generally take advantage of this kind of language to establish that their purpose is to do anything that corporations are able to do—a circular reference that means they have general purpose with no restriction save adherence to the law. For an example of a corporate charter setting forth a broad corporate purpose, see *Exxon Mobil Corporation Certificate of Incorporation*, EXXONMOBIL (June 20, 2011), [http://www.exxonmobil.com/corporate/investor\\_governance\\_incorporation.aspx](http://www.exxonmobil.com/corporate/investor_governance_incorporation.aspx).

To appreciate the relative financial dominance of large corporations, consider that all campaign spending in the federal elections of 2008—including expenditures by the presidential and congressional candidates, political parties, and independent groups—totaled approximately \$5.3 billion.<sup>49</sup> As against this sum, ExxonMobil generated more than \$40 billion in profits in 2008;<sup>50</sup> Pfizer generated more than \$26 billion in sales for its best-selling drug, Lipitor, during 2007 and 2008;<sup>51</sup> and Goldman Sachs paid \$16.2 billion in employee compensation in 2009.<sup>52</sup> If the top 100 corporations had spent just one percent of their profits on election-related activity, they would have spent more than the entirety of what was spent on campaigns during the 2008 election cycle.<sup>53</sup>

Publicly traded corporations, however, have obligations to their shareholders, and if a corporation wastes assets, or pursues policies that recklessly cost the company, courts will hold the corporation and/or its directors liable to shareholders. In some cases, courts have held that companies have a duty to maximize value for shareholders in the short-term. The main instance where this applies is when a company is being sold: there, courts have held that directors must obtain the greatest revenue for shareholders. *See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986). In other cases, courts have established a duty by company management to maximize value for shareholders; courts typically recognize that the duty includes both short-term profits and longer-term returns, and that this permits both long-term investment and charitable contributions (and other expenditures that are not directly and immediately profitable), on the grounds that charitable contributions benefit a corporate brand and the long-term interests of a corporation. As summarized by Professor Robert Clark:

Perhaps surprisingly, the state business corporation statutes under which corporations are chartered generally do not say explicitly that the purpose of a business corporation is to make or maximize profits. When the statutes do refer to the corporation's purposes, they usually mean its lines of business. The general profit-maximizing purpose has nearly always been assumed by courts and lawyers, however, and legal authorities sometimes state and use the general purpose as a basis of decision. In the famous case of *Dodge v. Ford Motor Co.*, for example, the Michigan Supreme Court viewed as "bad faith" and a breach of fiduciary duty Henry Ford's use of his power to withhold corporate dividends, over the objection of minority shareholders, in order to be able to sell cars more cheaply and benefit the American public at the expense of corporate profits. The court told Mr. Ford that the corporation was not an eleemosynary institution and that, though his objective was laudable, he should not be generous with other people's money. In addition, the statutory and case law formulations of the directors' and officers' duty of care can easily be read to imply profit maximization as the ultimate goal.

ROBERT CHARLES CLARK, *CORPORATE LAW* 678–79 (1986) (footnotes omitted). For warnings about the hazards of excessive short-term focus by investors, see generally Peggy Hsieh et al., *The Misguided Practice of Earnings Guidance*, MCKINSEY ON FINANCE (Spring 2006), available at <http://www.uic.edu/classes/actg/actg516tr/Readings/Markets/Earnings-Guidance-McKinsey.pdf>. For an advancement of principles geared toward guarding against excessive short-term focus, especially with respect to corporate management, see THE ASPEN INST., *LONG-TERM VALUE CREATION: GUIDING PRINCIPLES FOR CORPORATIONS AND INVESTORS* (June 2007), available at [http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Aspen\\_Principles\\_with\\_signers\\_April\\_09.pdf](http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Aspen_Principles_with_signers_April_09.pdf).

49. *The Money Behind the Elections*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/index.php> (last Oct. 20, 2011).

50. Steve Hargreaves, *Exxon 2008 Profit: A Record \$45 Billion*, CNNMONEY.COM, [http://money.cnn.com/2009/01/30/news/companies/exxon\\_earnings/index.htm](http://money.cnn.com/2009/01/30/news/companies/exxon_earnings/index.htm) (last updated Jan. 30, 2009, 11:44 AM).

51. *Top 15 Global Products*, IMS, [http://www.imshealth.com/deployedfiles/imshealth/Global/Content/StaticFile/Top\\_Line\\_Data/Global\\_Top\\_15\\_Products.pdf](http://www.imshealth.com/deployedfiles/imshealth/Global/Content/StaticFile/Top_Line_Data/Global_Top_15_Products.pdf) (last visited Oct. 16, 2011).

52. Graham Bowley, *Record Profit at Goldman, but Bonuses Will Shrink*, N.Y. TIMES, Jan. 22, 2010, at B1.

53. *See* Editorial, *A Threat to Fair Elections*, N.Y. TIMES, Sept. 8, 2009, at A24 (stating that profits by Fortune 100 companies totaled \$605 billion, which "dwarfs the \$1.5 billion that Federal Election Commission-

In short, corporations are not people. They possess features that give them an enormous ability to influence politics without the richness of human motivations and concerns. Their single-minded purpose—a psychotic trait in humans<sup>54</sup>—makes them singularly ill-suited to participate in the electoral and political process; and their wealth-accumulation capacity gives them the ability to overrun a democratic process that is supposed to express rule by the people. These special features require that they be treated differently than humans—especially in the area of election spending.

#### IV.

The second key premise of *Citizens United* is that corporate spending on elections—so long as it is not coordinated with candidates—poses no risk of corruption, or even the perception of corruption.<sup>55</sup> The anti-corruption interest had permeated Court decisions dating back through *Buckley v. Valeo*.<sup>56</sup> Even as the Court had expanded the right of individuals and corporations to spend money on elections, it had maintained a consistent concern about the potentially corrupting influence of such expenditures. It was this concern that underlay the Court's upholding of a variety of campaign spending limits.<sup>57</sup>

In *Citizens United*, the majority's logic was that the spending at issue was independent expenditures (i.e., campaign spending not coordinated with a campaign). Since such spending is not coordinated, the Court reasoned, there can be no quid pro quo corruption, nor would it be reasonable for any member of the public to perceive such an arrangement as corrupting.<sup>58</sup> This circular reasoning betrays a failure to understand—or acknowledge—the distinct features of corporations; rests on a static, naïve, and empirically starved conception of corruption and distortion of the political process; and contravenes common sense.

Corporations do not spend money on politics to express their inner feelings, but to advance their economic agenda. Simply from a theoretical standpoint, the heavy presumption must be that large corporations, and especially publicly traded corporations, spend money on elections precisely because they expect something in return. There is a great deal of confirming evidence for this theoretical starting point,

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registered political parties spent during the same election period, or the \$1.2 billion spent by federal political action committees”).

54. See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 60 (2004) (characterizing corporations as “psychopathic creature[s]” driven solely by profit).

55. *Citizens United v. FEC*, 130 S. Ct. 876, 909–10 (2010).

56. 424 U.S. 1, 26–28, 45–46, 67 (1976) (discussing policy of corruption prevention underlying campaign contributions limits and disclosure requirements).

57. See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456, 464–65 (2001) (holding that a restriction on party's coordinated spending was “‘closely drawn’ to match what we have recognized as the ‘sufficiently important’ government interest in combating political corruption”); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210–11 (1982) (“The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals.” (citation omitted)).

58. *Citizens United*, 130 S. Ct. at 909–10. (“[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”).

including the common practice of large corporations contributing substantial sums to both major political parties.<sup>59</sup>

The majority's view that quid pro quo corruption is impossible with independent expenditures rests on the assumption that candidates provide no guarantees to corporations that make independent expenditures on their behalf. Yet even if this assumption generally holds true, it is not, as the Court mistakenly asserted, the end of the inquiry. A corporation may seek to collect favors after the election is over, even if no explicit promises were made during the election period. Similarly, an official may provide a favor to a corporation that had made independent expenditures on his or her behalf, with the expectation that future independent expenditures will thereby be forthcoming.

These arrangements may not satisfy *Citizens United's* definition of corruption, but they surely reflect the view of the general public. As Justice Stevens noted in his dissent, "[t]here are threats of corruption that are far more destructive to a democratic society than the odd bribe."<sup>60</sup> Indeed, "the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses."<sup>61</sup> Surely these arrangements create an appearance of corruption.

Justice Stevens was correct to criticize the majority for its cramped version of corruption, whereby only the most "discrete abuses" can be addressed. Yet the majority dismissed out of hand even specific examples of serious abuse. In the same term that *Citizens United* was first argued, the Court decided *Caperton v. A.T. Massey Coal Co.*,<sup>62</sup> in which Don Blankenship, the CEO of Massey Coal, successfully orchestrated an effort to defeat a West Virginia Supreme Court justice by spending \$3 million on direct mailings and other independent expenditures, including donations to an independent entity called "And For The Sake Of The Kids" that ran ads attacking the candidate Blankenship opposed.<sup>63</sup> The candidate who benefited from that expenditure then participated in a decision before the West Virginia Supreme Court involving Blankenship's company.<sup>64</sup> The U.S. Supreme Court held that the justice had a duty to recuse himself.<sup>65</sup>

Although *Caperton* seemed to highlight exactly how large expenditures can give rise to the appearance of corruption, Justice Kennedy—who wrote the majority opinion for both *Caperton* and *Citizens United*—asserted that there was no conflict between the two cases. According to Kennedy, "*Caperton's* holding was limited to the rule that the

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59. See *Top Overall Donors*, OPENSECRETS.ORG, <http://www.opensecrets.org/overview/topcontribs.php> (last visited Oct. 25, 2011) (listing top 100 donors to Democratic and Republican parties with many of the corporate donors giving to both parties).

60. *Id.* at 962 (Stevens, J., dissenting).

61. *Id.*

62. 129 S. Ct. 2252 (2009). For a review of this case, see Marie McManus Degnan, Comment, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 TEMP. L. REV. 225–40 (2010).

63. *Caperton*, 129 S. Ct. at 2257. The entity, "And For The Sake Of The Kids," was formed under 18 U.S.C. § 527. *Id.* For further discussion of 527 organizations, and other independent entities that do not need to disclose the source of their funding, see *infra* notes 86–90.

64. *Id.* at 2257–58.

65. *Id.* at 2264–65.

judge must be recused, not that the litigant's political speech could be banned."<sup>66</sup> What Kennedy failed to acknowledge, however, is that the judge had to be recused—and the litigant's right to a fair trial had been placed in jeopardy—precisely because of the corrupting effect of independent expenditures, or at least the appearance of such corruption.

Another robust doctrine that *Citizens United* discarded in reaching its conclusion that unlimited corporate campaign spending will not harm democracy is the concept of distortion. First articulated in *Austin v. Michigan State Chamber of Commerce*,<sup>67</sup> the distortion concept refers to the notion that the special, state-created attributes of corporations, particularly their capacity to aggregate wealth, give them power to distort the political process.<sup>68</sup> While not altogether separate from the concept of corruption, the doctrine tends to introduce more systemic concerns that cannot be reduced to quid pro quo bribery.

In overturning *Austin*, the *Citizens United* majority dismissed the distortion rationale out of hand. According to the Court, since the doctrine might justify limiting the speech rights of media corporations, or regulating the publication of books, it is self-evidently an illegitimate doctrine.<sup>69</sup> As is often the case with slippery-slope arguments, this argument proves too much. There is an obvious differential impact between publishing a book and spending hundreds of millions of dollars on television attack ads; one may reasonably choose to afford more protections to the latter activity than the former.<sup>70</sup> So too might one distinguish between media corporations and other corporations (as the BCRA did). The *Citizens United* Court alleged that there is no history of such distinctions, but First Amendment speech protections did not attach to corporations—other than freedom of the press—until the 1970s. While the distinction may not have been expressly stated as a matter of principle, it was reflected in First Amendment doctrine for the first 200 years of U.S. history.

The more substantive rationale put forward in *Citizens United* for dismissing the anti-distortion interest was the claim that it aimed at “equalizing” speech, which, under *Buckley*, is an illegitimate government interest.<sup>71</sup> This, however, is a stunted and flawed reading of distortion. The underlying concern with the anti-distortion doctrine is not to

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66. *Citizens United*, 130 S. Ct. at 910 (citation omitted).

67. 494 U.S. 652 (1990).

68. *Austin*, 494 U.S. at 659–60 (finding that corporate campaign contributions distort political process because “immense aggregations of wealth that are accumulated with the help of the corporate form . . . have little or no correlation to the public's support for the corporation's political ideas”).

69. *Citizens United*, 130 S. Ct. at 904 (“If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books.”).

70. TV ads would tend to distort the political process far more than books for a variety of reasons: Ads must be purchased and are expensive, making them much more feasible for corporations and the wealthy than regular people. Economic barriers to writing and publishing a book are far less; and wealth cannot compel people to read a book, as it effectively can compel viewership of ads. Compounding the wealth distorting effect is the temporal proximity of ads to elections: they are heavily concentrated in the period immediately before elections, affording minimal time for response and particularly not through methods are than counteradvertisements—which themselves are expensive and generally not feasible for most regular people.

71. *Id.* (noting that “equalizing the relative ability of individuals and groups to influence the outcome of elections” is not a legitimate government interest (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

ensure that everyone can participate equally in democracy—a worthy objective, to be sure, but a separate one. Rather, the underlying concern is that uniquely powerful, nonhuman interests could fundamentally undermine democracy. In this sense, the doctrine speaks directly to the gravest threats posed by corporate dominance of the political process. As Justice Stevens noted,

When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders “call the tune” and a reduced “willingness of voters to take part in democratic governance.” To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation.<sup>72</sup>

Unfortunately, the 2010 election provided ample reason to suspect that these worst-case suspicions will be realized.

## V.

Issued less than ten months before the 2010 mid-term election, *Citizens United* remade the electoral landscape. Not only did it enable corporations to write large checks to affect who would and would not be elected, it also established that Wild West rules would prevail for the 2010 campaigns. Thus was set in motion the process that led to an expensive, nasty election with results very favorable to the corporate beneficiaries of *Citizens United*.<sup>73</sup>

While *Citizens United*'s broad holding directly overturned, in whole or in part, two recent Supreme Court decisions and swept away more than a half-century's precedent of limiting corporations' campaign expenditures,<sup>74</sup> the actual portion of the

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72. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting); see also *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process*, PUB. CITIZEN, 13 (Jan. 13, 2011), <http://www.citizen.org/documents/Citizens-United-20110113.pdf> (“The issue boils down to one simple question that a House staffer asked during a congressional briefing on the impact of the *Citizens United* decision: ‘How do I say “no” to a deep-pocketed corporate lobbyist who now has all the resources necessary to defeat my boss in the next election?’ The question remains unanswered.”).

73. See Erika Franklin Fowler & Travis N. Ridout, *Advertising Trends in 2010*, FORUM, Dec. 2010, at 10, available at [http://election-ad.research.wesleyan.edu/files/2011/01/Forum\\_EFF\\_TNR.pdf](http://election-ad.research.wesleyan.edu/files/2011/01/Forum_EFF_TNR.pdf) (concluding that “2010 campaign was the most negative in recent history”).

74. See *Citizens United*, 130 S. Ct. at 912–13 (overturning *Austin*, 494 U.S. 652, which held that corporate election spending may be regulated to prevent “distortion” of elections and political process); *id.* at 913 (overturning in part *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which upheld BCRA restrictions on corporate independent expenditures). Restrictions on corporate spending on elections date back to the first half of the twentieth century. The first restrictions were imposed by the Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864. Later, in 1947, the Taft-Hartley Act barred corporations and unions from making campaign expenditures or contributions. Labor Management Relations (Taft-Hartley) Act, § 302, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 186 (2006)).

BCRA that was directly overruled was relatively narrow: namely, the Act's restrictions on corporate electioneering and independent expenditures thirty days prior to a primary and sixty days prior to a general election.<sup>75</sup> The prevailing view after *Citizens United* was that it would have a dramatic effect on the election landscape.<sup>76</sup> Some, however, hypothesized that the effects would be muted because of the narrow reach of the rule that was actually overturned.<sup>77</sup> As evident by the 2010 election, those who predicted a major effect were correct.<sup>78</sup>

As an initial matter, one impact of the decision was to signal to corporations, as well as to large individual donors, that previous restraints on election spending would no longer apply. Thus, not only did *Citizens United* have a legislative and regulatory impact, it had an impact on the political culture as well by encouraging a loosening of self-imposed customary restraints.<sup>79</sup> On one hand, the importance of customary restraints is not self-evident. After all, corporations and the wealthy spend a lot on campaigns.<sup>80</sup> Consider, however, the previously mentioned differential between corporate wealth and campaign spending. If only an eighth of Exxon's profits would equal all federal election spending, and given Exxon's explicit interest in affecting government policy, why does the company not spend more from its coffers? While there is no single answer to this question, an important part of it is that there are societal norms—beyond legal limits—that restrain spending.<sup>81</sup> This reflects a general

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75. Electioneering communications are messages depicting a federal candidate within sixty days of a general election or thirty days of a primary that stop short of asking the audience to vote for or against a candidate. Bipartisan Campaign Reform Act of 2002, § 211, Pub. L. No. 107-155, 116 Stat. 81, 88–89 (2002) (codified at 2 U.S.C. §431). Independent expenditures are payments for activities expressly intended to influence the outcomes of elections. *Id.* § 201, 116 Stat. at 92–93.

76. E.g., James Bopp, Jr. et al., *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251, 331–61 (2010).

77. E.g., Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L & POL'Y REV. 217, 218–23 (2010). For a general discussion on the *Citizens United* impact, see Laurence Tribe, *Laurence Tribe on Citizens United v. Federal Election Commission*, HARVARD LAW SCHOOL (January 25, 2010), <http://www.law.harvard.edu/news/spotlight/constitutional-law/related/tribe.on.citizens.united.html>.

78. See *infra* notes 84–118 and accompanying text for a discussion on the ways in which *Citizens United* had a harmful effect on the 2010 elections.

79. See Robert Barnes, *In Wis., Feingold Feels Impact of Court Ruling*, WASH. POST., Nov. 1, 2010, at A8 (“*Citizens United* put a Supreme Court Good-Housekeeping-seal-of-approval on corporations being allowed in elections.” (quoting former FEC Chairman, Trevor Potter)).

80. Barack Obama's election was hailed as a small donor revolution, but even Obama relied heavily on the very wealthy. See Michael Luo and Griff Palmer, *In the Fine Print, a Proliferation of Large Donors*, N.Y. TIMES, October 20, 2008, at A1. Obama's reliance on the super rich is the norm. In the primary elections for 2004, for example, George Bush raised nearly 30 percent of his funds from 548 bundlers—individuals who raised at least \$100,000 each, typically in donations of \$1000 or more; John Kerry raised 17 percent of his funds from 564 bundlers. PUB. CITIZEN, THE IMPORTANCE OF BUNDLERS TO THE BUSH & KERRY CAMPAIGNS: POST-ELECTION SUMMARY OF FINDINGS (2004), available at <http://www.whitehouseforsale.org/documents/postelection.pdf>. Meanwhile, corporations funnel huge amounts into elections. If campaign spending by individuals in corporate management is included, corporate spending outdistances labor by more than seventeen to one. Ctr. for Responsive Politics, *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates and Parties*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/blio.php?cycle=2008> (last visited Oct. 22, 2011).

81. See Barnes, *supra* note 79 (noting that, even though there was ample corporate campaign spending prior to *Citizens United*, “the ruling made clear that there were no legal obstacles to [corporate] participation,”

sense of what the public will bear before turning on a campaign donor, or campaign donors as a class. *Citizens United* sends a message that the restraining effect of these social norms is loosening.<sup>82</sup> And, unless and until there is a public backlash, there is every reason to expect such norms to loosen further.<sup>83</sup>

With respect to the 2010 mid-term election, a first noticeable effect of *Citizens United* was the huge infusion of corporate and deep-pocketed-individual cash. Reported spending by the independent entities permitted to undertake the kind of independent expenditures and electioneering covered by *Citizens United* totaled nearly \$300 million in 2010.<sup>84</sup> This amount exceeds what was spent by independent organizations in all mid-term elections since 1990 combined.<sup>85</sup>

Second, corporations did not spend money directly on election advertisements and advocacy efforts. Instead, they funneled their money through independent entities, organized under sections 527, 501(c)(4), and 501(c)(6) of the tax code.<sup>86</sup> The use of these intermediaries meant that a voter viewing a corporate-funded ad did not know who was behind the ad. For example, an ad paid for by an organization with a name like Americans for Job Security may have been funded by the health insurance industry. With only a handful of exceptions, these independent organizations have no public profile. Their names mean nothing to voters, and voters cannot hold them accountable.

Third, almost half of the outside funding in the 2010 election—and almost certainly a higher proportion of the corporate money—went to independent groups that were not required to disclose their donors.<sup>87</sup> Although 527 organizations must disclose their funding sources, neither 501(c)(4) nor 501(c)(6) organizations are required to do so.<sup>88</sup> Of the 308 independent groups that spent money on the 2010 election, forty-six percent were non-disclosing groups, with only three of the top ten spending groups

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a significant development for “cautious” boards of directors and CEOs (quoting former FEC Chairman, Trevor Potter)).

82. *Id.* (“After *Citizens United*, it was almost like [corporations’] patriotic duty” to participate in elections (quoting former FEC Chairman, Trevor Potter)).

83. Diminishing the prospect of a backlash are two factors: First, individual corporate spenders are able to shield their identities by funneling their contributions through independent organizations that do not disclose their funders. Bipartisan Campaign Reform Act of 2002, § 212, Pub. L. No. 107-155, 116 Stat. 81, 93 (codified at 2 U.S.C. § 424 (2006)). Second, there is a high likelihood that Democrat-friendly independent groups will follow Republican-friendly groups in soliciting large-scale corporate contributions, which, in turn, will make it harder for the public to manifest opposition to corporate spending through the ballot box.

84. These independent committees are required to report only independent expenditures and electioneering spending—funding that aims to generate support or opposition to named candidates. It does not include the very substantial sums spent on issue advertising or get-out-the-vote efforts. The \$300 million in reported expenditures, therefore, greatly understates the extent of corporate spending.

85. Ctr. for Responsive Politics, *Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/index.php> (last visited Oct. 12, 2011).

86. Section 527 entities are organized for political advocacy. I.R.C. § 527(e)(1)–(2) (2006). Section 501(c)(4) entities are charitable organizations permitted to lobby and spend less than a predominant share of their funds on electioneering. *Id.* § 501(c)(4). Section 501(c)(6) entities are trade associations. *Id.* § 501(c)(6).

87. TAYLOR LINCOLN, PUB. CITIZEN, DISCLOSURE ECLIPSE: NEARLY HALF OF OUTSIDE GROUPS KEPT DONORS SECRET IN 2010, at 3 (2010), available at <http://www.citizen.org/documents/eclipseddisclosure11182010.pdf>.

88. *Id.* § 527(j)(2).

required to disclose.<sup>89</sup> In total, non-disclosing groups spent fifty-two percent of the money spent by outside groups.<sup>90</sup>

The secrecy surrounding the funding of these organizations has significantly heightened the accountability vacuum for independent spending. Nondisclosure of corporate funders means that the public generally, and consumers in particular, cannot hold them accountable. It also means that candidates targeted by corporations are not able to respond by highlighting the corporations that are funding the attack ads to which they are being subjected. Such secrecy stands in stark contrast to the *Citizens United* majority's supposition about how transparency would enable corporations to be held accountable for their campaign spending. Wrote Justice Kennedy:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests." . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.<sup>91</sup>

Justice Kennedy overstated the value of disclosure. Even if corporate expenditures were disclosed, it is not possible in most instances for citizens and shareholders to hold corporations accountable for election-related activity. This is true for a variety of reasons, including that such spending is too pervasive to be punished in the marketplace, and giving candidates the ability to highlight the identities of their attackers is generally not sufficient to blunt the effect of the attacks.<sup>92</sup> That said, disclosure is important, and would mitigate the damage from *Citizens United*.

Any such move to require disclosure, however, is bound to meet resistance, precisely because of the increased accountability that would result. After the 2010 election, U.S. Chamber of Commerce President and CEO Tom Donohue was explicit that the Chamber would not disclose corporate contributions to its political operations. According to Donohue, "it is important to the Chamber not to change its practices [of not disclosing donors] because when it is known who made a contribution, it gives others the opportunity to demagogue them, attack them, or encourage them not to do it."<sup>93</sup> The Chamber's concerns were realized when disclosure about Target's campaign spending in Minnesota sparked a national public campaign against the retailer.<sup>94</sup> A

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89. LINCOLN, *supra* note 87, at 3.

90. *Id.*

91. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (citation omitted).

92. Most attack ads are by candidates or parties, not independent groups. There is full disclosure of the source in these cases, and yet the ads remain effective.

93. Cheryl Bolen, *U.S. Chamber Plans to Continue Practice of Not Disclosing Contributors*, MONEY & POL. REP. (BNA) (Jan. 13, 2011).

94. See Editorial, *Voter (and Customer) Beware*, N.Y. TIMES, Aug. 19, 2010, at A26 (describing nationwide protests by gay, lesbian, and transgender groups); Brian Montopoli, *Target Boycott Movement*

video of a flash mob protest at a Target outlet generated more than a million views on YouTube,<sup>95</sup> and the company suffered significant adverse publicity as a result.

It is perhaps not surprising, therefore, that Karl Rove and the former chair of the Republican National Committee, Ed Gillespie, had trouble raising funds for their organization, American Crossroads, until they created a parallel organization, Crossroads GPS, that was not required to disclose its funders.<sup>96</sup> Then the money came pouring in.<sup>97</sup> “Disclosure was very important to us, which is why the 527 was created,” Carl Forti, political director for American Crossroads, told *Politico*.<sup>98</sup> “But some donors didn’t want to be disclosed and, therefore, a (c)4 was created.”<sup>99</sup>

A fourth feature of *Citizen United*’s impact on the 2010 election is the extremely concentrated nature of the campaign spending it facilitated. While there were 308 organizations that reported campaign-related spending, just ten of these organizations accounted for fifty-two percent of the total money spent.<sup>100</sup> More shocking was how so few donors provided the bulk of the funding. As Public Citizen reported:

Independent groups (counting those engaging in independent expenditures, electioneering communications, or both), have collectively disclosed \$70.7 million in contributions this year from about 124,000 donors through October 21, 2010. But the top 150 donors are responsible for \$47.2 million of the disclosed contributions, meaning that 0.12 percent of the donors are responsible for 66.8 percent of the reported contributions.<sup>101</sup>

*Citizens United* thus empowered a tiny number of organizations, relying on a tiny number of corporate and superwealthy contributors— many hidden behind a veil of secrecy—to raise and spend huge sums of money and exert a very substantial impact on the campaigns.

Fifth, the spending facilitated by *Citizens United* was channeled overwhelmingly into negative advertisements. In the Illinois Senate race between Alexander Giannoulis and Mark Kirk, for example, outside groups spent a total of \$10.6 million,<sup>102</sup> with attack ads receiving seven times more outside funding than ads supporting the candidates.<sup>103</sup> Similar patterns were evident in other Senate races as

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*Grows Following Donation to Support ‘Antigay’ Candidate*, CBS NEWS POL. (July 28, 2010, 4:10 PM), [http://www.cbsnews.com/8301-503544\\_162-20011983-503544.html](http://www.cbsnews.com/8301-503544_162-20011983-503544.html) (same).

95. *Target Ain’t People*, YOUTUBE (Aug. 15, 2010), <http://www.youtube.com/watch?v=9FhMMmqzbd8>.

96. Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, POLITICO (Dec. 14, 2010), <http://www.politico.com/news/stories/1210/46355.html>.

97. *See id.* (noting that Crossroads GPS raised \$43 million). American Crossroads was also ultimately able to raise a prodigious sum. *See id.* (noting that American Crossroads and Crossroads GPS together raised more than \$70 million).

98. *Id.*

99. *Id.*

100. LINCOLN, *supra* note 87, at 3.

101. PUB. CITIZEN, 2010 INDEPENDENT ELECTIONEERING ACTIVITIES 1–2 (2010), available at <http://www.citizen.org/documents/2010-Independent-Electioneering-Activities.pdf>.

102. *2010 Outside Spending, by Races*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=R&pty=N> (last visited Oct. 16, 2011).

103. *Id.*

well.<sup>104</sup> Outside organizations use negative ads, of course, because they know attack ads work,<sup>105</sup> and that attack ads from unaccountable organizations with no real membership work best of all. At least candidates who run negative ads must pay a reputational price. By contrast, independent campaign groups do not care about their reputation, and thus are not susceptible to even this modest form of accountability.

Sixth, the impact of the outside spending facilitated by *Citizens United* was not only a result of the sheer amount spent, but of the highly coordinated strategies that were employed. The business-friendly outside groups, for example—which spent virtually all of their money to support Republicans<sup>106</sup>—did not spread their money equally. Instead, they concentrated on closely contested races,<sup>107</sup> or invested in races to give effect to a national strategy.<sup>108</sup> The major outside groups coordinated their efforts directly, and indirectly, with parts of the Republican Party apparatus. Rove and Gillespie, for example, invested their organizations' funds into Senate races as part of “a strategic decision that freed the other groups to concentrate on the House—a project the Chamber [of Commerce] had already planned to take on.”<sup>109</sup> The strategy was so effective that in many key races the outside groups overshadowed the efforts of the Republican candidates themselves.<sup>110</sup>

Seventh, the outside spending facilitated by *Citizens United* enabled individual corporate interests to target specific elected officials they found offensive. Consider, for example, the case of Wisconsin Senator Russell Feingold. As one of the leading proponents of campaign finance reform and other measures to limit corporate influence in politics, Feingold was considered “the number one enemy of Washington lobbyists.”<sup>111</sup> After *Citizens United* struck down the law that Feingold helped enact,<sup>112</sup>

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104. *Id.*

105. See Mark Penn, *Negative Ads: They Really Do Work*, POLITICO (Aug. 11, 2008), <http://www.politico.com/news/stories/0808/12455.html> (“The tactic meets with media and pundit disapproval and spawns accusations of negativity, but the reality is that a clever negative ad can be devastatingly effective.”).

106. See *Stealth PACs*, PUB. CITIZEN, <http://citizen.org/stealthpacs> (last visited Oct. 16, 2011) (listing top ten groups contributing to 2010 election where eight out of ten favor Republican party).

107. In the closely fought Colorado Senate race, for example, outside groups spent more than \$15 million; with Karl Rove's American Crossroads spending more than \$5.9 million, and the Chamber of Commerce spending more than \$1.8 million. See *2010 Outside Spending, by Races*, *supra* note 102 (listing amount American Crossroads and Chamber of Commerce contributed to Colorado race).

108. See Jeanne Cummings, *Republican Groups Coordinated Financial Firepower*, POLITICO (Nov. 3, 2010), <http://www.politico.com/news/stories/1110/44651.html> (“[A] cadre of big-money Republican outside groups worked together to spend millions to take down the Democratic House majority, carefully coordinating their ad buys and political messages through a series of regular meetings and phone calls aimed at picking off selected Democrats. . . . Republican groups had never coordinated like this before, participants said, and backed by millions in corporate cash and contributions by secret donors, they were able to wield outsized influence on the results. . . . The joint efforts were designed to spread the damage to as many of the majority Democrats as possible, without wasting money by doubling-up in races where others were already playing.”).

109. *Id.* (noting that “[a]s each group exposed a little more of their plans or agreed to fill-in where needed, the effort began to move forward”).

110. *Id.* (“In more than one district, the coordinated attacks turned political campaigns largely into contests between business-backed, GOP outside groups and the Democratic incumbents—with the Republican challengers often outgunned and overshadowed by them.”).

111. Barnes, *supra* note 79.

112. Barnes, *supra* note 79.

outside groups overwhelmingly supported his opponent, Ron Johnson. According to an analysis by *The Washington Post*, ninety-two percent of the outside funding supported Johnson.<sup>113</sup> Feingold, a Senator since 1993, was not reelected. Consider as well the case of Oregon Representative Peter DeFazio, a longstanding and very progressive member of Congress. An outfit called Concerned Taxpayers of America spent nearly \$600,000 to defeat DeFazio.<sup>114</sup> Concerned Taxpayers of America spent money in only two races.<sup>115</sup> It had only two funders, one of whom was hedge fund mogul Bob Mercer. Many speculated that Mercer targeted DeFazio for introducing a bill to impose a small tax on Wall Street speculative trades.<sup>116</sup> While DeFazio survived the independent campaign against him, the money spent against him sent a clear message to office holders: take on powerful interests and prepare to pay a price. The prospect of losing their jobs will likely deter others from following in DeFazio's footsteps.<sup>117</sup>

There is good reason to believe that this kind of targeting will increase in future elections, especially at the state and local level, where a particular company finds its interests thwarted by a particular official—for example, an elected official who blocks a development firm from obtaining a building permit, or who insists on the prosecution of a major polluter. Government decisions routinely impact business at a scale far beyond the cost of running state or local elections, making a targeted ad campaign against unwelcome officials likely—if the political culture permits it.

Eighth, the outside spending facilitated by *Citizens United* had a crucial impact on the 2010 election results. While there is no question that the deep, ongoing recession was the key factor in the Republican tide, there is strong evidence that outside-group funding played an important role as well. Of seventy-four contests in which power changed hands in the 2010 congressional elections, outside groups backed the winners in fifty-eight contests.<sup>118</sup>

Taken together, the multiple effects from *Citizens United* point to a broader impact which is nearly impossible to document or meter. There is near-universal agreement among political watchers, however, that *Citizens United*-enabled spending will be far greater in the presidential election of 2012 than it was in the midterm campaign of 2010. Indeed, the Karl Rove-affiliated Crossroads groups have already announced plans to raise and spend \$120 million in the 2012 election (compared to

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112. Together with Senator John McCain, Feingold was a co-sponsor of the BCRA, which is “generally referred to as McCain-Feingold.” Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1458 (2007).

113. Barnes, *supra* note 79.

114. See *2010 Outside Spending, by Races*, *supra* note 102, for the amount spent against DeFazio by following the “Oregon District 4” link.

115. Dan Eggen, *Concerned Taxpayers Group Is Powered by Only Two Donors*, WASH. POST, Oct. 17, 2010, at A06.

116. *Id.*

117. The reality of having to endure this kind of external-attack funding might even deter some candidates critical of corporations from running in the first place.

118. *Outside Job: Winning Candidate Enjoyed Advantage in Unregulated Third-Party Spending in 58 of 74 Party-Shifting Contests*, PUB. CITIZEN 3 (Nov. 3, 2010), <http://www.citizen.org/documents/Outside-Job-Report-20101103.pdf>.

their reported \$70 million in spending in 2010).<sup>119</sup> Moreover, the Obama administration has signaled that it supports efforts to generate outside spending,<sup>120</sup> and Democratic Party-allied operatives have made clear that they intend to emulate their Republican-allied counterparts.<sup>121</sup> This effort to emulate Republicans is likely to result in a deepening reliance by the Democratic Party on corporate donors and superwealthy contributors.<sup>122</sup>

## VI.

Although *Citizens United* was decided by a 5–4 vote, the majority did not view the case as a close call. The majority held that restrictions on corporate campaign spending are an affront to the First Amendment, even in the limited context of the modest restraints imposed by the BCRA.<sup>123</sup> Given the equally vociferous dissent, a future Court of a different composition might well decide to revisit the case.<sup>124</sup> There is no prospect, however, of the current Court doing so. And, if it did, all indications are that the five-member majority would be more likely to extend *Citizens United* than curtail it. Future litigation appears, therefore, to offer little chance of limiting the impact of the decision. Accordingly, the available options to address the decision include: legislation to reduce the role of private money in public elections; legislation to mitigate the harm from the *Citizens United* ruling; and/or a constitutional amendment.

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The post-*Citizens United* world is one in which corporations are free to spend an increasing amount from their general treasuries to influence election outcomes.<sup>125</sup> Campaign finance reforms that aim to give all candidates a platform to run a viable race without resort to seeking big money donations would help offset the impact of corporate-funded outside groups. The most important such reform, by far, would be a robust system of voter-financed elections, relying on public financing and small donor

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119. Brian Montopoli, *Karl Rove-Linked Group Seeks to Raise \$120 Million for 2012 Elections*, CBS NEWS (Mar. 1, 2011, 11:56 AM), [http://www.cbsnews.com/8301-503544\\_162-20037742-503544.html](http://www.cbsnews.com/8301-503544_162-20037742-503544.html).

120. Jeanne Cummings, *White House Open to Democratic Outside Groups in 2012*, POLITICO (Nov. 9, 2010), <http://www.politico.com/news/stories/1110/44868.html>.

121. Greg Sargent, *Gearing Up: David Brock to Launch Outside Group for 2012*, WASH. POST, Nov. 10, 2010, [http://voices.washingtonpost.com/plum-line/2010/11/gearing\\_up\\_david\\_brock\\_to\\_laun.html](http://voices.washingtonpost.com/plum-line/2010/11/gearing_up_david_brock_to_laun.html).

122. Much of the money for outside groups will surely come from labor unions, but it is questionable whether unions can spend more than they already do, given their previous spending through channels previously available and their resource limitations.

123. See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (overruling precedent that upheld BCRA's restrictions on independent expenditures by corporations).

124. See generally *id.* at 929–79 (Stevens, J., dissenting).

125. In practical terms, as the 2010 election illustrates, this translates primarily into corporate-funded groups running attack ads against candidates. See *supra* notes 102–05 and accompanying text.

contributions, as proposed in the Fair Elections Now Act.<sup>126</sup> Other reforms that would give candidates a base to run viable campaigns without resorting to corporate or superwealthy donors—such as a right to free airtime on broadcast television and radio—would similarly dampen the potential impact of outside corporate funding.

But while public financing and other desirable campaign finance reforms would strengthen the hand of candidates against corporate independent expenditures, it would do nothing to directly lessen the scope or impact of such expenditures. The powers conferred by *Citizens United* would not be diminished.

A different set of reforms, however, could more directly limit the impact of *Citizens United*. First, robust disclosure of corporate donors—perhaps with “stand by your ad” statements by the CEOs of corporate donors—would help the public understand who was behind the barrage of attack ads triggered by *Citizens United*. That understanding would almost surely diminish their power, and it would help the public hold at least some corporate donors accountable.

Second, corporations could be required to seek shareholder approval of their political expenditures. To be effective in providing genuine shareholder accountability—rather than being a mere rubber stamp—a shareholder-approval requirement would need to include two key features. One feature would require an absolute-majority vote to authorize campaign spending, treating unvoted shares as a “no” vote. A second feature would require institutional shareholders (mutual funds and pension funds) to seek approval from their individual owners or beneficiaries before voting to authorize campaign spending. Absent these features, virtually all corporate requests for approval of campaign spending would be approved. Indeed, shareholder resolutions almost always fail because unvoted shares count as support for management, and institutional shareholders overwhelmingly vote with management.<sup>127</sup> Were these two features present, it is plausible that shareholders might refuse to authorize management requests for campaign-related spending.

A third reform that could directly mitigate the impact of *Citizens United* would be the enactment of “pay-to-play” restrictions on campaign spending—including independent expenditures—by contractors and lobbyists.<sup>128</sup> The rationale for pay-to-

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126. In 2011, the Fair Elections Now Act (S. 750 and H.R. 1404), which gathered 165 co-sponsors in the previous 111th Congress, was re-introduced in the Senate by Sen. Dick Durbin (D-Ill.) and in the House of Representatives by Reps. John Larson (D-Conn.), Walter Jones, Jr. (R-N.C.), and Chellie Pingree (D-Maine).

127. See SOC. INV. FORUM, SOCIALLY RESPONSIBLE INVESTING: 10 FREQUENTLY ASKED QUESTIONS AND ANSWERS 7, [http://www.socialinvest.org/resources/factsheets\\_resources/documents/10mediaquestions\\_FINAL.pdf](http://www.socialinvest.org/resources/factsheets_resources/documents/10mediaquestions_FINAL.pdf) (“In 2007, the 195 shareholder resolutions that came to votes on social and environmental issues won average support of 15.3 percent, an all-time record, according to records maintained since 1973 by SIF member RiskMetrics Group and its predecessors.”).

128. “Pay-to-play” restrictions are named for the colloquial description of the practice they aim to curb—contractors making contributions (“pay”) in order to obtain contracts (“play”). A number of states have pay-to-play rules in effect, at least for direct contributions to candidates. See generally Melanie D. Reed, *Regulating Political Contributions by State Contractors: The First Amendment and State Pay-to-Play Legislation*, 34 WM. MITCHELL L. REV. 635 (2008); A similar federal law exists, but has no practical import, since corporations are not permitted to make direct contributions to federal candidates. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.) (barring contractor contributions to candidates for federal office).

play restrictions is that a nexus between contributions and government contracts, or favors, creates an unacceptably great danger of corruption. Because these are the areas where corrupting influence is most intense, pay-to-play prohibitions would be a consequential reform. Depending on the definition of “contractor”—and particularly the threshold level of contract that would disqualify a corporation from campaign spending—such rules might have broad applicability as the federal government purchases everything from toilet paper to financial services, from gasoline to missiles. There is some question, however, about the constitutional viability of pay-to-play rules which encompass independent expenditures. On one hand, the *Citizens United* majority’s declaration that there can be no corruption due to such expenditures would seem to preclude campaign-spending limits even in this area.<sup>129</sup> On the other, an argument can be made that pay-to-play rules inclusive of independent expenditures are constitutional, even post-*Citizens United*, because expenditures by contractors and lobbyists pose a heightened risk of corruption, and present a special case that the Court did not consider in *Citizens United*.<sup>130</sup>

While a combination of public financing and the mitigating measures described here would diminish the effect of *Citizens United*, corporations would still have enormous power to influence elections and no limit on how much they might spend. Thus, even were all of the reforms mentioned here put in place, *Citizens United* would continue to cast a dark shadow over American democracy. The only way to fully repair the damage from the decision is to undo it.

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There surely must be a heavy presumption against amending the Constitution to address damaging Supreme Court decisions. The American system of constitutional government could not easily accommodate a rush to amendment by every party who loses a case involving matters of constitutional interpretation. As a practical matter, there is an appropriate social and cultural reluctance to tinker with the Constitution. And, of course, the Constitution insists on a presumption by establishing a difficult amendment procedure.<sup>131</sup> At the same time, however, the founders did not expect the document to be unchanging, and nor should we.

There is a strong case for an amendment to overturn *Citizens United*. The application of First Amendment rights to corporations has very broad and deeply damaging consequences, striking at the heart of our democracy by undermining our ability to conduct fair elections and undermining vitally important public health and other policies.<sup>132</sup> The gravity of these matters meets the seriousness test for seeking a

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129. See *Citizens United*, 130 S. Ct. at 909 (concluding that “independent expenditures . . . do not give rise to corruption or the appearance of corruption”).

130. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 141 (2010) (“A tightly drawn prohibition premised on the effects of ‘pay-to-play’ on public policy could potentially survive scrutiny under *Citizens United* as a constitutional first step toward effective campaign finance reform.”).

131. See U.S. CONST. art. V (providing procedure for amending Constitution).

132. See *supra* notes 18–22, 25–26, and accompanying text for examples of policies that have been invalidated as a result of corporate-speech protections.

constitutional amendment, as ensuring the functioning of our democracy must surely rank, alongside protection of minority rights, as an appropriate area for constitutional rule making.

The case for a constitutional amendment is further strengthened by the fact that the jurisprudential basis for the corporate speech doctrine is so weak. The Court has invented the idea that corporations have First Amendment rights out of whole cloth. There is no originalist interpretation to support this outcome, since the Court created the rights only in recent decades.<sup>133</sup> Nor can the outcome be justified in light of the underlying purpose and spirit of the First Amendment. Corporations do not have expressive interests like humans, and, unlike humans, they are uniquely motivated by a singular focus on their economic bottom line.<sup>134</sup> Moreover, the doctrine has long ago been unmoored from any concern about supplying consumers or citizens with information, and is now effectively rooted in the “rights” of corporations. In 1978, Justice White warned that the state has no obligation to permit its creations to consume it,<sup>135</sup> yet the present Court seems on a trajectory to exceed White’s direst worries.

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The threshold decision to support a constitutional amendment to overturn *Citizens United* opens the question of what such an amendment should do. The one clearly unsatisfactory option is simply overturning *Citizens United* and doing nothing more. The *Citizens United* decision was a radical extension of corporate power in our democracy, but corporations had far too much influence even before the decision.

There are three general approaches worthy of consideration. One would establish clear, plenary congressional authority to regulate all campaign spending by corporations, or campaign spending generally. Another approach would establish that corporations may not claim any protection under the Constitution. Each of these approaches has their benefits, and each pose difficult drafting and policy questions. Here, however, I consider a third, complementary approach: establishing that corporations are not entitled to First Amendment speech protections.

A constitutional amendment establishing that for-profit corporations do not have First Amendment speech rights would clarify that the First Amendment is designed to protect the speech of real persons, not fictional ones, and that corporations are subject to laws and regulations that “We the People” have the authority to establish. More generally, it would mean that “We the People” through Congress, state legislatures, or

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133. Justice Stevens—who favors First Amendment rights for corporations, though not in the *Citizens United* context—provides an extensive discussion of the Framers’ views on corporations and the First Amendment and corporations. See *Citizens United*, 130 S. Ct. at 949–50 (Stevens, J., dissenting) (“The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.”).

134. See *supra* notes 47–48, 54, and accompanying text.

135. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting).

city councils, could prohibit various kinds of corporate expenditures or regulate different kinds of corporate speech.

Such an amendment would enable prohibitions on corporate spending on elections. The BCRA provision overturned by *Citizens United* was carefully crafted to respect prior Supreme Court precedent, and thereby permitted a great deal of corporate spending on elections. After an amendment, Congress and subfederal legislative bodies could directly eliminate all such spending, including all independent expenditures and electioneering spending by corporations (not just expenditures made shortly before an election), as well as corporate spending on state referenda. Such an amendment would give Congress and subfederal legislative bodies the power to regulate corporate spending on lobbying, “grassroots” lobbying, public relations campaigns around political issues, and donations to think tanks and advocacy groups.

An amendment clarifying that corporations do not have speech rights would also give Congress authority to regulate advertising and marketing to advance public interest objectives, without limits imposed by the existing grant of corporate commercial speech rights. Given the political power of the corporate sector, there is little reason to fear overuse of such powers. Even so, a Court might maintain some protections for corporate commercial speech—but rooted in the rights of consumers, not corporate advertisers.

Of course, pursuing a constitutional amendment that establishes for-profit corporations do not have First Amendment speech rights poses a range of operational and policy challenges and choices. One consideration is what to do about the corporate media. The *Citizens United* majority was disdainful of the idea of providing disparate First Amendment rights to media corporations (as the BCRA did).<sup>136</sup> The majority failed to acknowledge, however, that such disparate treatment had been the hallmark of First Amendment jurisprudence throughout most of U.S. history.<sup>137</sup> Indeed, it was only in the area of press freedom that the Supreme Court had extended First Amendment protections to corporations before the 1970s.<sup>138</sup>

The argument for excluding media corporations from the amendment’s reach is also practical. Since much of the institutional press is organized under the corporate form, it is hard to see how the United States could maintain robust free press rights if they do not attach, for example, to the *New York Times*.<sup>139</sup>

There are two potential counterarguments to this claim. One is that press rights should simply not attach to for-profit corporations. Under such a rule, media operations

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136. See *Citizens United*, 130 S. Ct. at 905–06 (“There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”).

137. See generally Kairys, *supra* note 42.

138. See *supra* notes 13–14 and accompanying text for a discussion of *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

139. Operationally, this could be done by protecting the First Amendment speech rights of media corporations, or, alternatively, reviving the Freedom of Press clause. The basic principle would be to maintain First Amendment protections for business entities whose purpose is the publication or broadcasting of information, while they are engaged in that business. Under such an amendment, Rupert Murdoch’s News Corporation would not have the right to make political donations, but Fox News would have the right to air whatever it chooses.

would simply have to choose whether to maintain nonprofit status (assuming nonprofits maintained free speech protections) or sacrifice First Amendment protection. This is perhaps not as unsettling a proposal as it first seems; with the corporate media in crisis, serious proposals are being made for a much more robust nonprofit sector, with new, publicly provided funding streams.<sup>140</sup> Still, there is no plausible scenario in which the corporate media fades away—especially when one takes into account entertainment companies as well as news media—and the nation’s free speech culture would thus be significantly eviscerated if First Amendment speech protections did not attach to corporations.

A contrary counterargument was put forward by the majority in *Citizens United*: the need to provide First Amendment protections for corporate media operations, by itself, proves the need for full First Amendment speech protections for corporations.<sup>141</sup> This argument, however, rests on a reflexive refusal to distinguish corporate media operations from other corporate activity. There is no principled reason for such a refusal; the law, constitutional interpretation, and First Amendment jurisprudence are all about making distinctions between different kinds of activity.<sup>142</sup>

Maintaining protections for corporate media poses other challenges. Defining what constitutes “media” in the internet era certainly presents difficult challenges. The internet, however, poses challenges in many areas of law, and although it has made it harder to distinguish media from non-media outlets, meaningful distinctions can still be drawn.<sup>143</sup> Another objection to providing protections to the corporate media is that it may enable large corporations to buy their way into a dominant position for influencing politics. General Electric (GE), for example, long owned NBC. In a post-amendment period, would GE have an incentive to buy NBC so that it could use the media subsidiary to influence political outcomes? This is a legitimate worry, but it would be a risk worth accepting to maintain a robust free press. And, of course, the problem would be no worse in a post-amendment world than it is presently.<sup>144</sup>

A second consideration is whether an amendment should distinguish between for-profit and non-profit corporations. One possibility is that an amendment should strip

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140. See, e.g., ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* (2010) (discussing current state of media and proposing reforms).

141. See *Citizens United*, 130 S. Ct. at 905–06.

142. To offer a few examples: speech receives different kinds of protections depending on whether it is political or commercial; First Amendment protection is available for puffery but not misleading commercial speech; indecency and nudity receive First Amendment protection, but obscenity does not.

143. The law is forced to draw such distinctions in diverse contexts, including, for example, shield laws for reporters which do not cover non-journalists. See Zachary M. Seward, *Shield law: Definition of ‘Journalist’ Gets Professionalized*, NIEMAN JOURNALISM LAB (Sept. 23, 2009, 11:33AM), <http://www.niemanlab.org/2009/09/shield-law-definition-of-journalist-gets-professionalized>. Such distinctions are also drawn throughout federal election law. See generally Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act’s Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6 (2004).

144. One could argue that large corporations might have extra incentive to invest in a media subsidiary if they were not able to influence politics through campaign spending. But even in the pre-*Citizens United* era, the relative influence of any individual corporation through campaign spending paled compared to the influence of a major media corporation.

First Amendment speech protections from all corporations, irrespective of profit-seeking status. Under this view, the price of opting for the corporate form (including the tax and liability benefits available to a non-profit) should be forfeiture of First Amendment protections. But this view elevates form over substance. Non-profit corporations are categorically different than for-profits. Non-profits are commonly associations of real, living human beings who come together for expressive purposes. Adoption of the corporate form is a convenience, but at root, non-profits are associations of the exact sort that should be protected by the First Amendment. The practical arguments in this regard are strong; people do in fact rely on the non-profit corporate structure to carry out exactly the sort of political speech and expressive activity that the First Amendment is designed to protect.

Maintaining First Amendment protections for nonprofits poses one significant operational challenge: How can corporations be prevented from funneling money through nonprofits to circumvent regulations that may be imposed on their speech-related spending? One possible solution would be to treat nonprofits that receive a majority of their funding from corporations—or which cross some other designated threshold of corporate funding—as if they are corporations, and to deny them First Amendment protections. Another possibility would be to require nonprofits that engage in campaign spending (or potentially other types of speech regulated or prohibited for corporations after an amendment is adopted) to segment all corporate donations, so that they are not spent for purposes not permitted for for-profit corporations. Both of these approaches suffer from limitations, but either might be sufficient to curb large-scale abuses.

A third consideration pertains to unions. At least since the passage of Taft-Hartley, campaign finance law has subjected labor unions and corporations to many common limits.<sup>145</sup> This provides some historic basis for arguing that restrictions on corporate speech rights should extend similarly to labor unions. But the equivalence between corporations and unions is a false one. Unions embody First Amendment-guaranteed freedom of association; they facilitate the democratically determined, collective expression of their members' views; and do not share the special powers or single-minded purpose of corporations. It would be misguided and harmful to limit the First Amendment protections of unions.

A final consideration is whether clarifying that corporations do not maintain First Amendment protections does enough to address Supreme Court-created limits on public financing of elections and other campaign finance reforms. While corporate spending is surely an overriding, and worsening, problem in the campaign finance field, *Buckley v. Valeo*<sup>146</sup> and a host of other decisions impose major impediments to a robust public financing system for elections and enable the wealthy to exert far too much influence over the political process.<sup>147</sup> There is a very strong argument, therefore,

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145. See *Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting) (discussing Taft-Hartley).

146. 424 U.S. 1 (1976).

147. The "independent" committees that are the preferred vehicle of choice for *Citizens United*-enabled funding illustrate the point perfectly: they are available to wealthy donors as well as corporations. In the 2010 election, and preceding elections as well, such committees drew very heavily from wealthy individuals. See, e.g., *2010 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/>

for including in a constitutional amendment a provision specifying that Congress has plenary authority to regulate election spending in general.<sup>148</sup>

## VII. CONCLUSION

“[C]orporations have free speech, but they can’t speak like you and me,” stated the comedian Stephen Colbert after the *Citizens United* decision was argued. “They don’t have mouths or hands. Instead, . . . they must speak the only way they can: through billions and billions of dollars.”<sup>149</sup>

Colbert’s parody is funny because it is true. In *Citizens United*, the Court abandoned constitutional moorings and common sense, doing grave damage to American democracy. The consequences—already evident, with much worse effects to come—demonstrate the need for a constitutional amendment to restore the First Amendment to the people. Real people.

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outsidespending/summ.php?cycle=2010&disp=D&type=V (last visited Nov. 6, 2011).

148. A robust system of public financing for elections, enacted following special constitutional authorization, would presumably limit campaign spending by nonprofits and labor unions, notwithstanding their otherwise ongoing First Amendment rights.

149. *The Colbert Report: The Word—Let Freedom Ka-Ching*, (Comedy Central television broadcast Sept. 15, 2009), <http://www.colbertnation.com/the-colbert-report-videos/249055/september-15-2009/the-word--let-freedom-ka-ching>.

