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SHOW ME THE MONEY: PUBLIC ACCESS AND ACCOUNTABILITY AFTER *CITIZENS UNITED*

Abstract: The U.S. Supreme Court's 2010 decision in *Citizens United v. FEC* has been called both a broadside assault on democracy and a victory for free speech. Both extremes exaggerate the importance of the case. On the one hand, the case denied Congress's ongoing attempt to curtail corporate domination of elections. On the other hand, the very assumption that the pre-*Citizens United* campaign finance regime had accomplished its stated goals of reducing corruption or its appearance is flawed. As a result of judicially imposed limitations on the federal campaign finance laws, corporations have been allowed to engage in all but unfettered electioneering since the 1970s. Reform proponents should take advantage of a unique opportunity in history to marshal popular sentiment and create a new model of public access and accountability in the Internet age. This Note proposes a coding requirement in political advertisements that will allow viewers to easily identify a message's funding source.

INTRODUCTION

On January 27, 2010, a week after the U.S. Supreme Court decided *Citizens United v. FEC*,¹ President Barack Obama voiced his disapproval of the decision in his State of the Union address: “[L]ast week, the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests . . . to spend without limit in our elections.”² As the cameras turned to Justice Samuel Alito, who joined in the majority opinion, he appeared to utter the words “not true” under his breath.³ A frenzy of outrage in the national media ensued: conservatives objected to the president targeting the judicial branch in a political forum, while liberals complained that Justice Alito should not have joined the political fray.⁴

¹ 130 S. Ct. 876 (2010).

² See President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H418 (daily ed. Jan. 27, 2010).

³ See Robert Barnes, *In the Court of Public Opinion, No Clear Ruling*, WASH. POST, Jan. 29, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html>.

⁴ See *id.*

Public reaction to the decision was perhaps less dramatic but no less divided.⁵ Senator Patrick Leahy of Vermont argued that *Citizens United* “turns the idea of government of, by and for the people on its head”⁶ Professor Richard Hasen assailed what he characterized as Chief Justice Roberts’s broken promise to “call balls and strikes,” and said the decision “opened up our political system to a money free-for-all.”⁷ Former FEC Chairman Bradley Smith took the opposite tack, applauding the decision as a guarantee against state attempts to ban electoral advocacy books.⁸ And Republican Senator Mitch McConnell echoed Smith’s conclusion, saying the decision ended the suppression of speech.⁹ Other political leaders, journalists, and academics echoed these divided sentiments.¹⁰

Sweeping declarations like these pervade the campaign finance discourse.¹¹ But they are nothing new: in 1894, for example, Elihu Root, then an influential lawyer and later U.S. Secretary of State, called

⁵ See *infra* notes 6–10 and accompanying text.

⁶ Susan Crabtree, *Sen. Leahy: Court’s Decision Most Partisan Since Bush v. Gore*, THEHILL.COM (Jan. 28, 2010), <http://thehill.com/homenews/senate/78527-sen-leahy-courts-decision-most-partisan-since-bush-v-gore>.

⁷ Richard L. Hasen, *Money Grubbers*, SLATE (Jan. 21, 2010), <http://www.slate.com/id/2242209>.

⁸ Bradley A. Smith, Opinion, *Newsflash: First Amendment Upheld*, WALL ST. J., Jan. 23–24, 2010, at A15, available at <http://online.wsj.com/article/SB10001424052748704509704575019112172931620.html>. The claim that Congress could ban electoral advocacy books—that is, corporate-funded books that expressly advocate for the election or defeat of a candidate for national office—first arose during the government’s first oral argument in *Citizens United*, in March 2009. See Transcript of Oral Argument at 29–30, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf. In response to Chief Justice Roberts’s question whether Congress could prohibit a 500-page book that expressly advocated for the election of candidate X, Deputy Solicitor General Malcolm Stewart answered yes. See *id.* Not surprisingly, the government abandoned this position when the case was reargued in September 2009. See *Citizens United*, 130 S. Ct. at 894–95; Transcript of Oral Argument at 64–66, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at [http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205\[Reargued\].pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf).

⁹ 156 CONG. REC. S332–01 (daily ed. Jan. 28, 2010) (statement of Sen. McConnell).

¹⁰ See, e.g., Jan Witold Baran, Op-Ed, *Stampede Toward Democracy*, N.Y. TIMES, Jan. 26, 2010, at A23 (“*Citizens United* . . . will restrain Congress from flooding us with arcane, burdensome, convoluted campaign laws that discourage political participation.”); Daniel JH Greenwood, *Beyond Citizens United: The Solution*, AM. CONST. SOC’Y BLOG (Jan. 21, 2010), <http://www.acslaw.org/node/15154> (“The decision turns the First Amendment on its head.”). Even the satirical newspaper, *The Onion*, jumped into the fray with a news headline mocking the decision: *Supreme Court Allows Corporations to Run for Political Office*, THE ONION (Feb. 3, 2010), <http://www.theonion.com/articles/supreme-court-allows-corporations-to-run-for-polit,7071>.

¹¹ See, e.g., sources cited *supra* note 10.

corporate influence in politics “a constantly growing evil.”¹² In 1957, the U.S. Supreme Court in *United States v. United Automobile Workers* approved the assessment of two historians that the power of corporate wealth “threatened to undermine the political integrity of the Republic.”¹³ Foreshadowing the next several decades of debate, the dissent in that case accused the majority of “abolish[ing] First Amendment rights on a wholesale basis.”¹⁴

These arguments exemplify the bitter divisions surrounding campaign finance regulation.¹⁵ Critics denounce campaign finance laws as barriers to the free exchange of ideas, akin to trade restrictions.¹⁶ In their view, the government should not be trusted, nor did the framers intend it to be trusted, to decide who can and cannot speak.¹⁷ Proponents, in contrast, focus on the particular dangers inherent in allowing unlimited corporate wealth to dominate the electoral process: the advantages corporations enjoy in amassing capital;¹⁸ the risk of corporate money corrupting, or at least unduly influencing, the political process;¹⁹ and the marginalization of individual voters.²⁰

¹² See ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143–44 (Robert Bacon & James Brown Scott eds., 1916), *quoted in* *United States v. United Auto. Workers*, 352 U.S. 567, 571 (1957).

¹³ *Auto. Workers*, 352 U.S. at 570 (quoting 2 SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 355 (4th ed. 1950)).

¹⁴ *Id.* at 597 (Douglas, J., dissenting); see also *Section 304, Taft Hartley Act: Validity of Restrictions on Union Political Activity*, 57 YALE L.J. 806, 827 (1948) (arguing that the statutory ban on union and corporate expenditures “in connection with” federal elections violates the First Amendment).

¹⁵ *Cf.* Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1095 (2002) (noting that a leading campaign finance case is reviled by campaign finance critics and proponents alike, but for different reasons).

¹⁶ See, e.g., *McCConnell v. FEC*, 540 U.S. 93, 258–59 (2003) (Scalia, J., dissenting) (“The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source.”); Richard Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1705 (2006) (comparing the limitation of campaign advertising to improve democratic participation to the curtailment of commercial advertising to increase consumption); Bradley Smith, *The Myth of Campaign Finance Reform*, NAT’L AFFS., Winter 2010, at 75, 88 (arguing that campaign finance regulations restrict freedom of speech).

¹⁷ See Smith, *supra* note 16, at 76.

¹⁸ See *Citizens United*, 130 S. Ct. at 957 (Stevens, J., dissenting).

¹⁹ See Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2661–62 (2008) (arguing against extending full First Amendment protections to corporations); *cf.* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 825–826 (1978) (Rehnquist, J., dissenting) (noting the “special dangers” that corporate spending may pose in the political sphere as a result of the state-conferred advantages of the corporate form).

²⁰ See *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting).

Notwithstanding public consternation over the holding in *Citizens United* that corporations enjoy First Amendment protection commensurate with individuals,²¹ there is ample reason to doubt the decision's practical significance.²² Judicial constructions of federal statutes limiting corporate spending on elections have constrained the FEC's power to control the flow of money into elections since the Supreme Court's 1976 decision in *Buckley v. Valeo*.²³ Moreover, *Citizens United* struck down a limited prohibition on corporate-funded ads, which had only been in operation since 2002.²⁴ Although the decision's doctrinal commands will bear significance for as long as it remains binding precedent, its limited practical effect should caution against overstated outrage.²⁵

This Note contextualizes the recent shift in campaign finance jurisprudence in light of the practical experience of the last four decades of political spending, and builds on reform-minded scholarship by proposing a voter information-based disclosure regime.²⁶ By way of background, Part I presents an overview of federal laws governing corporate electoral spending, beginning with a summary of the decision in *Citizens United* and then turning to the development of campaign finance laws from around the turn of the century.²⁷ Part II then explains the modern era of campaign finance regulation beginning in 1972 with the Federal Election Campaign Act and the Court's response to each new attempt to curtail corporate political spending.²⁸ Part III analyzes the practical effects of *Citizens United* in light of the history of campaign finance reform and argues that the case is far less significant than its detractors contend.²⁹ Finally, Part IV reviews the remaining legislative options for the campaign finance reform project and argues that reformers should take advantage of a unique moment of popular anxiety over the growth of corporate power to develop effective disclosure measures; the Part pro-

²¹ See Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

²² See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 646–50 (2011) (summarizing the narrow reach of corporate expenditure limitations); *infra* notes 177–239 and accompanying text.

²³ See *infra* notes 177–204 and accompanying text.

²⁴ See *infra* notes 205–221 and accompanying text.

²⁵ See *infra* notes 177–204 and accompanying text.

²⁶ See *infra* notes 177–315 and accompanying text.

²⁷ See *infra* notes 31–88 and accompanying text.

²⁸ See *infra* notes 89–171 and accompanying text.

²⁹ See *infra* notes 172–239 and accompanying text.

poses a coding requirement that gives voters an expedient way to learn the true financial and ideological source of political messages.³⁰

I. BACKGROUND: A CENTURY OF CAMPAIGN FINANCE LAWS

Campaign finance laws in America have come in fits and starts.³¹ Between the trust-busting days of the late nineteenth century and the modern era of corporate excesses, efforts to limit the power of business in the political realm have been gradual, uncertain, and ineffective.³² To illuminate this history, this Part begins with a summary of the 2010 U.S. Supreme Court decision in *Citizens United v. FEC* to introduce the reader to the major themes in campaign finance jurisprudence and explain the case's doctrinal meaning.³³ It then turns back a century and narrates the development of campaign finance laws in America: key legislation, judicial responses, and political undercurrents.³⁴

A. Citizens United: A Doctrinal Shift

The Supreme Court in *Citizens United* held that the government may not restrict independent corporate-funded electoral advocacy, overruling both its 1991 decision in *Austin v. Michigan Chamber of Commerce*³⁵ and key provisions of the 2002 Bipartisan Campaign Reform Act (BCRA).³⁶ *Citizens United*, a conservative non-profit advocacy corporation, had produced a documentary critical of then-presidential candidate Hillary Clinton and sought to broadcast it the month before the 2008 primary election, in violation of section 203 of BCRA.³⁷ The organization sued to prevent the FEC from enforcing BCRA's thirty-day "blackout" period before the primary election, in which no corporate-funded electoral ads could appear on television in the district of the relevant national primary

³⁰ See *infra* notes 240–315 and accompanying text.

³¹ See *infra* notes 52–88 and accompanying text.

³² See *infra* notes 63–88 and accompanying text.

³³ See *infra* notes 35–51 and accompanying text.

³⁴ See *infra* notes 52–88 and accompanying text.

³⁵ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 652 (1991).

³⁶ *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (invalidating 2 U.S.C. § 441b (2006)).

³⁷ *Id.* at 887. *Citizens United* received most of its money from individuals but also accepted donations from for-profit corporations, thus falling outside an exemption for non-profit corporations and within BCRA's electioneering prohibition. See *id.* at 891; *infra* notes 133–135 and accompanying text. *Citizens United* also challenged the disclosure, disclaimer and reporting provisions, but the Court upheld them. 130 S. Ct. at 913–14.

vote if the ads mentioned a candidate for office.³⁸ The Court struck the provision down on First Amendment grounds.³⁹

The Court in *Austin* had allowed the government—in that case, the state of Michigan—to restrict corporate electoral advocacy expenditures in the interest of preventing what the Court described as the “corrosive and distorting effects of immense aggregations of wealth” on the political process.⁴⁰ The “antidistortion” rationale, Justice Anthony Kennedy wrote for the 5–4 majority in *Citizens United*, failed to justify BCRA’s blackout period or any other restrictions on corporate spending done independently of a political campaign.⁴¹ Regardless of the risk that the particular characteristics of the corporate form will “distort” the electoral speech marketplace, the First Amendment prohibits distinctions based solely on the identity of the speaker.⁴²

Framing the issue in this way, the Court effectively erased a century of attempts by Congress to distinguish, for election spending purposes, between individuals on the one hand and legal entities like corporations and unions on the other.⁴³ The decision rejected the longstanding belief underlying campaign finance laws that corporate and union money poses unique risks of corrupting political candidates and threatening the primacy of voters in the democratic process.⁴⁴ When corporations want to spend their own treasury funds on political campaigns, independently of an office-seeker’s campaign, they should be permitted to do so without government interference.⁴⁵

After *Citizens United*, the government may no longer limit independent corporate spending on political elections, whether or not such spending expressly advocates for or against a candidate for federal office.⁴⁶ Because corporations enjoy First Amendment protections on an equal footing with individuals, laws that single out corporate speech for special treatment will be subject to the most rigorous scrutiny.⁴⁷ Thus, burdens on corporate speech must be narrowly tailored to address a

³⁸ *Citizens United*, 130 S. Ct. at 888.

³⁹ *Id.* at 896–900, 913.

⁴⁰ *Id.* at 913; *Austin*, 494 U.S. at 660.

⁴¹ *Citizens United*, 130 S. Ct. at 904.

⁴² *Id.* at 903.

⁴³ *See id.* at 900–01 (discussing congressional attempts to limit political contributions by corporations and unions).

⁴⁴ *See id.* at 903–04.

⁴⁵ *See id.* at 906, 913.

⁴⁶ *See id.* at 913.

⁴⁷ *Citizens United*, 130 S. Ct. at 898.

compelling government interest.⁴⁸ Because section 203 of BCRA effectively banned corporate speech for the blackout period before an election, it could only withstand First Amendment scrutiny if it were justified by interests of the highest public necessity.⁴⁹ Although corruption and the appearance of corruption remain cognizable interests that the government may address in narrowly tailored ways, the *Austin* Court's antidistortion rationale—an "aberration," in the *Citizens United* Court's reading—fails to justify restrictions on speech.⁵⁰ In fact, no claimed electoral danger, whether corruption, the appearance of corruption, or the distorting effects of corporate wealth, can undermine the principle that the First Amendment disallows political speech restrictions based on the speaker's corporate identity.⁵¹

B. *The Pre-Reform Era: Corporate Theory in the Gilded Age*

The view adopted in *Citizens United* of the corporation as a political constituent with full First Amendment rights is a modern development, but it has origins in industrial-era jurisprudence.⁵² In the late nineteenth century, the American business corporation underwent a dramatic period of growth, concomitant with the rapid industrial changes of the "Gilded Age."⁵³ A general concentration of wealth in the hands of a few coincided with growing popular distrust of industrial elites perceived to be enriching themselves at the expense of the general public.⁵⁴ At the same time, the legal framework governing corporate action evolved to allow greater freedom to pursue profits without gov-

⁴⁸ *Id.*

⁴⁹ *See id.*

⁵⁰ *See id.* at 907.

⁵¹ *See id.* at 903, 906–07.

⁵² *Cf.* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1751 (2001) (noting that, in the Fourteenth Amendment context, the Court has consistently adhered to the principle that corporations count as persons).

⁵³ *See* *United States v. United Auto. Workers*, 352 U.S. 567, 570 (1957) ("The concentration of wealth consequent upon the industrial expansion in the post-Civil War era had profound implications for American life."). The "Gilded Age" refers to the period of industrial expansion, immigration, and economic growth between the end of the Civil War and the turn of the century. *See* Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 370 (1977). The term generally refers to a period of perceived political corruption by the large American trusts. *Id.* The term took root following the publication of Mark Twain's book of the same name, a fictional story of greed, lobbying, and corruption that chronicled the lives of several characters involved in land speculation. *See generally* MARK TWAIN & CHARLES DUDLEY WARNER, *THE GILDED AGE* (1873).

⁵⁴ *See Auto. Workers*, 352 U.S. at 570.

ernment interference.⁵⁵ States gradually eliminated the common law requirement of the early years of the American republic that corporations serve a public purpose⁵⁶ and instead allowed incorporation for any lawful purpose.⁵⁷ As the corporate form was made universally available, the old view of the corporation as an artificial organization granted special privileges by the state—the so-called “concession theory”—gave way to the modern view of the corporation as a natural and ordinary business entity.⁵⁸

The U.S. Supreme Court was friendly to these changes and developed a legal framework recognizing that corporations enjoy at least some of the same constitutional rights as natural persons.⁵⁹ Most notably, in 1886 the Court announced in *Santa Clara County v. Southern Pacific Railroad Co.* that corporate “persons” enjoy the same right to equal protection under the Fourteenth Amendment as natural persons.⁶⁰ That decision and subsequent changes in legal doctrine facilitated the expansion of corporate power and “shifted the presumption of corporate regulation against the state.”⁶¹ The view of the corporation as a natural business entity implicitly predominates in Supreme Court jurisprudence today, with arguments premised on the special, state-conferred nature of the corporation often relegated to dissenting opinions.⁶²

⁵⁵ See Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561, 562 n.4 (1981) (book review).

⁵⁶ See Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 637 (1819). Chief Justice Marshall defined the corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law.” *Id.* at 636. The power of the early corporation was limited, he noted, to “only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.” *Id.*

⁵⁷ See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 202 (observing that towards the end of the nineteenth century, the “notion of the corporation as a natural creation of private initiative and market forces replaced the idea that the corporation was artificial”).

⁵⁸ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 72–73 (1992). The concession theory of corporate law posits that because a state concedes the privilege of incorporation, which includes limited liability for shareholders and favorable tax treatment, states can in turn heavily circumscribe the powers of a corporation. See Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 8–10 (1990).

⁵⁹ See *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886); see also Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 566–67 (1987).

⁶⁰ See *Southern Pacific Railroad*, 118 U.S. at 396.

⁶¹ See HORWITZ, *supra* note 58, at 74.

⁶² See, e.g., *FEC v. Wis. Right to Life*, 551 U.S. 449, 508 (2007) (Souter, J., dissenting); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S., 765, 824 (1978) (Rehnquist, J., dissenting) (“[T]he mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons.”).

The industrial expansion and perceived abuses of capitalism led to a reform movement aimed at limiting corporate influence over the legislature and restoring control of the political process to voters.⁶³ During the Progressive Era in the late nineteenth century, movement leaders railed against the use of corporate money to finance political candidates, claiming that it tended to corrupt the political process.⁶⁴ The influential lawyer Elihu Root, for example, argued in 1894 for a New York state constitutional amendment “to prevent . . . the great aggregations of wealth[] from using their corporate funds, *directly or indirectly*, to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interests as against those of the public.”⁶⁵ Root, a key proponent of later reforms, believed that laws against bribery were insufficient to guard against the undue influence corporations wielded and the consequent erosion of popular confidence in government.⁶⁶

C. Reform Takes Hold: 1907–1972

Although efforts at campaign finance reform in the late nineteenth century failed, by the time Theodore Roosevelt was elected president in 1904 under a taint of corruption, public opinion had crystallized in favor of limiting corporate spending on elections.⁶⁷ Controversy over Roosevelt’s campaign receiving large donations from corporations, amounting to seventy-three percent of his campaign war chest, spurred Roosevelt to support reform.⁶⁸ In 1905, he argued to Congress that “[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law.”⁶⁹ Congress responded by

⁶³ See *Wis. Right to Life*, 551 U.S. at 508 (Souter, J., dissenting) (describing “momentum for civic reform” in the wake of post-Civil War industrial expansion). In 1957, the Supreme Court, in *Automobile Workers*, told the story this way: “The nation was fabulously rich but its wealth was gravitating rapidly into the hands of a small portion of the population, and the power of wealth threatened to undermine the political integrity of the Republic.” 352 U.S. at 570 (quoting MORISON & COMMAGER, *supra* note 13, at 355).

⁶⁴ See, e.g., ROOT, *supra* note 12, at 143–44.

⁶⁵ *Id.* at 143 (emphasis added).

⁶⁶ See *id.* at 144.

⁶⁷ See A. Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in A. CORRADO ET AL., *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 27 (A. Corrado ed., 1997).

⁶⁸ See Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV’T L. REV. 1, 12, 15 (2008).

⁶⁹ 40 CONG. REC. 96 (1906).

passing the Tillman Act of 1907, which prohibited bank and corporate contributions to national candidates or parties.⁷⁰

Congress slowly tinkered with the campaign finance framework throughout the twentieth century.⁷¹ In 1910, Congress passed the Publicity Act, which required post-election disclosure of all donations above one hundred dollars in election years to House candidates.⁷² Fifteen years later, in 1925, Congress added disclosure requirements for any congressional candidates, including senators, receiving corporate money in any year.⁷³

In 1947, Congress passed the Taft-Hartley Act over President Truman's veto, bringing unions within the Tillman Act's prohibition on direct contributions to candidates, and adding broad language banning corporate or union spending "in connection with" a candidate for federal office.⁷⁴

The Tillman Act and its successor statutes proved to be profoundly ineffective tools to limit money in politics—"[m]ore loophole than law," as President Lyndon Johnson concluded.⁷⁵ Congress neglected to establish a functioning regulatory regime to monitor and enforce the new limits.⁷⁶ In addition, corporations found and exploited loopholes by keeping full-time campaign workers on the company payroll, donat-

⁷⁰ Tillman Act, ch. 420, 34 Stat. 864, 864–65 (1907) (codified as amended at 2 U.S.C. § 441b (2006)). The Act provided that:

[I]t shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.

Id.

⁷¹ See *infra* notes 72–98 and accompanying text.

⁷² Publicity Act, ch. 392, 36 Stat. 822, 823 (1910) (codified as amended at 2 U.S.C. § 434).

⁷³ Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070, 1070–74 (repealed 1974).

⁷⁴ Labor Management Relations (Taft-Hartley) Act, ch. 120, § 304, 61 Stat. 136, 159 (1947) (codified as amended at 2 U.S.C. § 441b) (making it unlawful for corporations to "make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office" (emphasis added)).

⁷⁵ See Marty Jezer et al., *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 333 & n.6 (1993); see also Corrado, *supra* note 67, at 29; Bradley Smith, *Searching for Corruption in All the Wrong Places*, 2003 CATO SUP. CT. REV. 187, 191.

⁷⁶ See Corrado, *supra* note 67, at 29.

ing non-cash items to the campaigns, and simply reimbursing individual corporate directors for large donations to favored politicians.⁷⁷ Nevertheless, the early statutes represented “the first concrete manifestation[s] of a continuing congressional concern for elections free from the power of money.”⁷⁸

In 1957, the U.S. Supreme Court, in *United States v. United Automobile Workers*, began its attempt in the latter part of the twentieth century to balance these increasingly restrictive federal enactments on corporate spending against the First Amendment implications of attempting to cork the flow of corporate money into politics.⁷⁹ That decision rejected a union’s First Amendment challenge to the Taft-Hartley Act after the union was indicted for buying a campaign ad out of its general treasury funds.⁸⁰ In so doing, the Court endorsed the importance of two government interests whose characterization later came to dominate the debate between reformers and their critics: preventing corruption and the appearance of corruption.⁸¹ In upholding the broad-based ban on spending “in connection with” federal elections, the Court sought to protect what it defined as “the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.”⁸² The court dismissed the First Amendment concerns with the statute as “abstract issues of constitutional law.”⁸³

The Court’s reluctance to address the First Amendment concerns of campaign finance laws, however, would not last long.⁸⁴ Indeed, the three dissenting justices in *Automobile Workers* argued that the Taft-Hartley Act was a “broadside assault on the freedom of political expression guaranteed by the First Amendment.”⁸⁵ When Congress seeks to address an evil such as political corruption or the appearance of it, the dissenters argued, any regulatory measure must be “narrowly drawn” to

⁷⁷ See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 18, 24 (2001); Urofsky, *supra* note 68, at 17.

⁷⁸ See *Auto. Workers*, 352 U.S. at 575 (internal quotation marks omitted).

⁷⁹ See generally 352 U.S. 567.

⁸⁰ See *id.* at 568–69, 592–93.

⁸¹ *Id.* at 570 (recognizing popular outrage with corporate abuses).

⁸² *Id.*

⁸³ See *id.* at 592.

⁸⁴ See *Buckley v. Valeo*, 424 U.S. 1, 19–20 (1976). After 1976, the Court deferred to Congress and state legislatures for laws limiting contributions to candidates, but analyzed expenditure limitations under *Buckley*’s First Amendment balancing approach. See, e.g., *McCormell v. FEC*, 540 U.S. 93, 137 (2003); *FEC v. Beaumont*, 539 U.S. 149, 162 (2003).

⁸⁵ *Auto. Workers*, 352 U.S. at 598 (Douglas, J., joined by Warren, C.J. & Black, J., dissenting).

meet the evil that government intends to control.⁸⁶ This reasoning would become the dominant mode of analyzing campaign finance laws in the years to come.⁸⁷ The new legal battleground, beginning with *Buckley v. Valeo* in 1976, pitted the need to minimize the evils of political corruption against the restrictive command of the First Amendment.⁸⁸

II. FULL-FLEDGED REFORM AND JUDICIAL CUTBACKS

Having surveyed early American attempts to curtail corporate spending on elections, this Note next turns to the modern era of campaign finance legislation and the judicial response to it.⁸⁹ This Part aims both to sketch out the modern doctrinal framework of corporate electoral spending and to set up a discussion in Part III suggesting that corporations have endured few meaningful limitations on their political spending since the 1970s.⁹⁰ After introducing the Federal Election Campaign Act of 1971 (FECA) and the U.S. Supreme Court's limitations on it in the 1976 case of *Buckley v. Valeo*,⁹¹ this Part reviews the legislative and judicial adjustments to the campaign finance system leading to the 2010 decision in *Citizens United v. FEC*.⁹²

A. FECA and *Buckley*: The Court Charts a Middle Ground

The Federal Election Campaign Act of 1971 was the country's most comprehensive campaign finance reform effort to date.⁹³ FECA limited individual, corporate, candidate, and political party activity in connection with national elections.⁹⁴ It limited the amount individuals could contribute to any single candidate to \$1000 and set a maximum total annual contribution limit of \$25,000.⁹⁵ The law also imposed a

⁸⁶ *Id.* at 596 (internal quotation marks omitted).

⁸⁷ See *infra* notes 101–106 and accompanying text.

⁸⁸ See Zephyr Teachout, *The Anti-Corruption Rationale*, 94 CORNELL L. REV. 341, 346 (2009) (“The *Buckley v. Valeo* line of cases has forced courts to balance two interests against each other—the right to free political speech and the societal interest in being free from corruption.”).

⁸⁹ See *infra* notes 93–171 and accompanying text.

⁹⁰ See *infra* notes 172–239 and accompanying text.

⁹¹ 424 U.S. 1, 1 (1976).

⁹² See 130 S. Ct. 876, 876 (2010); *infra* notes 93–171 and accompanying text.

⁹³ See Federal Election Campaign Act (FECA) 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.).

⁹⁴ See *Buckley*, 424 U.S. at 12–13 (“[FECA] includes restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process.”).

⁹⁵ FECA § 608, 86 Stat. at 9–10.

\$1000-per-year ceiling on independent expenditures made “in connection with a candidate” and strengthened existing disclosure and reporting requirements.⁹⁶ Three years later, in response to revelations about President Nixon’s financial abuses in the 1972 presidential campaign,⁹⁷ Congress passed comprehensive amendments to FECA, including: strict limits on candidate contributions and expenditures, a provision allowing limited corporate spending through political action committees (PACs), and the creation of the Federal Election Commission to monitor and enforce the new rules.⁹⁸

The modern era of campaign finance jurisprudence began when the U.S. Supreme Court addressed FECA’s constitutionality in 1976, in *Buckley*.⁹⁹ In response to a facial challenge, the Court invalidated the act’s candidate spending limits but upheld the individual and party contribution limits as well as its disclosure and public financing provisions.¹⁰⁰

The Court’s approach in *Buckley* balanced the burden each provision placed on free expression against the governmental interest asserted to justify those burdens.¹⁰¹ At the outset, the Court noted that FECA operated in an area of core First Amendment activities because it affected the discussion of public issues and the qualifications of political candidates.¹⁰² But the Court established an important conceptual dividing line between contribution limits and expenditure limits.¹⁰³ Contribution restrictions entail only “marginal” burdens on the donor’s expressive interests because giving money constitutes an undifferentiated and symbolic act and relies on someone else to convert the money into speech.¹⁰⁴ Expenditure restrictions, by contrast, place direct and substantial restraints upon the spender’s political speech because they limit the number of issues being discussed and the depth of their ex-

⁹⁶ *Id.*

⁹⁷ See Corrado, *supra* note 67, at 32. Detailed investigations revealed that Richard Nixon’s ability to outspend his opponent, Hubert Humphrey, was made possible by a reliance on large contributions, illegal corporate gifts, and undisclosed slush funds. *Id.*

⁹⁸ See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 26, and 47 U.S.C.); FEC, TWENTY YEAR REPORT 8 (1995), available at <http://www.fec.gov/pdf/20year.pdf>.

⁹⁹ See Teachout, *supra* note 88, at 383–84 (identifying *Buckley* as the “single most influential case in the modern law governing political processes”). See generally 424 U.S. at 40–44.

¹⁰⁰ *Buckley*, 424 U.S. at 143.

¹⁰¹ See *id.* at 20–21; Smith, *supra* note 75, at 192.

¹⁰² *Buckley*, 424 U.S. at 14.

¹⁰³ See *id.* at 20–21.

¹⁰⁴ *Id.* at 21.

ploration.¹⁰⁵ Moreover, expenditures pose little risk of corruption because, in the absence of coordination with campaigns, a political candidate has little use for independent corporate-funded ads.¹⁰⁶

Although *Buckley* did not directly address the limits on corporate expenditures “in connection with” a national election, it introduced in a footnote an “express advocacy” requirement on the individual spending limitation “relative to a clearly identified candidate.”¹⁰⁷ In the Court’s reading, that language could survive First Amendment scrutiny if it applied only to ads that use express words of advocacy or defeat: “vote for,” “vote against,” “defeat,” and so on.¹⁰⁸ The Court adopted this construction to distinguish between “issue advocacy”—expenditures made for discussion of issues—and “express advocacy,” referring to “more pointed exhortations to vote for particular persons.”¹⁰⁹ This construction avoided the need to invalidate the expenditure prohibition on vagueness grounds.¹¹⁰ Even assuming that independent expenditures posed risks of corruption, the Court reasoned, only ads that “in express terms advocate the election or defeat of a clearly identified candidate” could be prohibited.¹¹¹

This test came to be known as the “magic words” test, so named to point out the limited utility of a standard that exempts ads that have the intent and effect of influencing the outcome of an election, but do not in fact use the magic words.¹¹² The Court later explicitly extended the “express advocacy” construction to the federal ban on corporations and unions using general treasury funds “in connection with” federal elections.¹¹³

Buckley’s dividing line between expenditures and contributions continues to operate upon campaign finance laws to this day.¹¹⁴ After

¹⁰⁵ *Id.* at 19.

¹⁰⁶ *See id.* at 46 (“[T]he independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”).

¹⁰⁷ *Id.* at 44 n.52.

¹⁰⁸ *Buckley*, 424 U.S. at 44 & n.52 (“This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

¹⁰⁹ *See* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (explaining *Buckley*’s express advocacy requirement).

¹¹⁰ *See Buckley*, 424 U.S. at 44 n.52.

¹¹¹ *Id.* at 44.

¹¹² *See* *McConnell v. FEC*, 540 U.S. 93, 216–17 (2003).

¹¹³ *See Mass. Citizens for Life*, 479 U.S. at 249.

¹¹⁴ *See, e.g.,* *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (striking down a state contribution limit as too low to withstand even intermediate scrutiny); *McConnell*, 540 U.S. at

Buckley, corporations could not spend general treasury funds on express advocacy but they could spend freely on issue advocacy, whether or not its purpose or effect was to influence the outcome of an election for federal office.¹¹⁵ In contributions cases, the Court has reaffirmed the government's compelling interest in preventing corruption and the appearance of corruption, as well as the conclusion that contribution restrictions impose only marginal burdens on speech.¹¹⁶ In expenditure cases, by contrast, the Court considers the government's interest in preventing corruption less compelling and the individual interest in engaging in political speech more substantial.¹¹⁷ Thus, a law that substantially burdens free expression must be narrowly tailored to a compelling government interest, but a law that only marginally burdens free expression must meet an intermediate standard of review.¹¹⁸

B. *Life After Buckley*

The first post-*Buckley* campaign finance case decided by the Supreme Court reaffirmed the balancing approach even when the law at issue concerns only corporate spending, not individual spending.¹¹⁹ In 1978, the Court in *First National Bank of Boston v. Bellotti* invalidated a Massachusetts law that prohibited corporate-funded advertisements on any vote, including referendums, other than those materially affecting the property, business, or assets of the corporation.¹²⁰ In striking the law down, the Court noted that the government's interest in preserving both the integrity of the electoral process and the citizen's confidence in government are "interests of the highest importance."¹²¹ The risk of corrupting an actual candidate, however, is not present in a referendum on a public issue.¹²² Notably, the Court rejected the government's asserted interest in preventing corporate wealth from drowning out

138 n.40 (justifying an intermediate standard of review for contribution limitations); *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003) (upholding a contribution restriction based on *Buckley*).

¹¹⁵ See *McConnell*, 540 U.S. at 126, 164–65; *Buckley*, 424 U.S. at 44 n.52.

¹¹⁶ Compare *Beaumont*, 539 U.S. at 154 (applying intermediate scrutiny to contribution limitations), with *Citizens United*, 130 S. Ct. at 898 (applying strict scrutiny to expenditure limitations).

¹¹⁷ See *Buckley*, 424 U.S. at 19, 46.

¹¹⁸ See *Beaumont*, 539 U.S. at 162 (contribution restrictions must be "closely drawn to a sufficiently important interest").

¹¹⁹ See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978).

¹²⁰ *Id.* at 784.

¹²¹ *Id.* at 788–89.

¹²² *Id.* at 790.

other points of view: the government may not “restrict the speech of some elements in our society in order to enhance the relative voice of others”¹²³

The Court in *Bellotti* avoided discussing the nature of the corporate form and instead emphasized the First Amendment’s role in affording the public access to free and open debate on ideas.¹²⁴ An open question remained, however, as to how much the government could limit independent corporate spending on elections for candidates, rather than issues.¹²⁵

In 1990, the Court answered that question in *Austin v. Michigan Chamber of Commerce*, a case involving a Michigan law prohibiting corporations from funding the advocacy of any candidate for statewide office.¹²⁶ If corporations wanted to pay for campaign advertisements, Michigan law, much like FECA, required them to establish and administer a PAC and pay for political messages through donations solicited from the corporation’s shareholders.¹²⁷

The Court in *Austin* upheld the Michigan statute based on a new, more flexible articulation of corruption than previously recognized.¹²⁸ It held that the statute’s burden upon a corporation’s expressive activity was justified by the government’s interest in reducing “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.”¹²⁹ In order to square this reasoning with *Buckley*’s proclamation that the government may not seek to restrict the voice of some entities by enhancing the relative voice of others, the Court characterized the Michigan law in terms of preventing corruption.¹³⁰ The law did not attempt to equalize voices, the Court reasoned, but rather ensured that

¹²³ See *id.* at 790–91 (quoting *Buckley*, 424 U.S. at 48–49). The court also noted that the government made no showing that the corporate spending at issue had drowned out individual voices. See *id.* at 789–90.

¹²⁴ See *id.* at 776.

¹²⁵ *Bellotti*, 435 U.S. at 788 n.26.

¹²⁶ 494 U.S. 652, 654 (1990).

¹²⁷ *Id.* at 655–56. In the case itself, the Michigan Chamber of Commerce, a corporation funded by annual dues from over 8000 members, of which three-quarters were for-profit corporations, sought to use its general treasury funds, rather than its PAC, to fund a newspaper advertisement supporting a candidate to the state legislature. *Id.* at 656. Doing so would have violated the law. *Id.*

¹²⁸ See *id.* at 660.

¹²⁹ See *id.*

¹³⁰ See *id.*

election expenditures reflect “*actual public support* for the political ideas espoused by corporations.”¹³¹

This was not a new development in the Court’s reasoning, but it was the first time the Court had relied on the flexible “antidistortion” logic to approve a prohibition on for-profit corporations funding express advocacy of a candidate from general treasury funds.¹³² Only four years earlier, in 1986, the Court in *FEC v. Massachusetts Citizens for Life* had held such a restriction unconstitutional as applied to a non-profit political advocacy corporation.¹³³ In both cases, the Court accepted the government’s argument that corporations, which benefit from a state-conferred structure that facilitates wealth accumulation, skirted contribution limitations by making independent expenditures on behalf of a candidate.¹³⁴ Only in *Austin*, however, did the Court accept the contention that for-profit corporations, through their amassed wealth, create unique risks of monopolizing the political speech marketplace with little correlation to actual public support for a candidate.¹³⁵

FECA governed campaign finance for nearly three decades, subject to the limitations announced in *Buckley*.¹³⁶ A new reform movement began in 1998 after the Senate Committee on Governmental Affairs released a report detailing widespread abuses and corrupt practices in the 1996 presidential election.¹³⁷ The report outlined a “meltdown” of the campaign finance system caused by the “twin loopholes” of soft money and bogus issue advertising.¹³⁸ The soft money loophole was the practice of political parties soliciting donations from corporations and channeling the funds through local party affiliates to

¹³¹ *Id.* (emphasis added).

¹³² See *Austin*, 494 U.S. at 660; accord *Mass. Citizens for Life*, 479 U.S. at 263 (“We acknowledge the legitimacy of Congress’ concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.”); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (recognizing the need to regulate “substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization”); *Auto. Workers*, 352 U.S. at 585 (accepting the need to curb the political influence of “those who exercise control over large aggregations of capital”).

¹³³ See *Mass. Citizens for Life*, 479 U.S. at 263.

¹³⁴ See *Austin*, 494 U.S. at 660; *Mass. Citizens for Life*, 479 U.S. at 263.

¹³⁵ See *Austin*, 494 U.S. at 658–59.

¹³⁶ See Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL’Y 283, 293–300 (2010) (noting that *Buckley*’s distinction between contributions and expenditures is “relatively robust” and reviewing the Court’s adherence to that distinction even while the justices disagree about the government’s interest in regulating corporate speech).

¹³⁷ *McConnell*, 540 U.S. at 129–32 (citing S. REP. NO. 105-167, vol. 4, at 4611 (1998)).

¹³⁸ *Id.* at 129.

circumvent contribution limits to the national parties.¹³⁹ The issue advocacy loophole allowed the proliferation of sham “issue ads” financed by corporations in order to influence elections while still in technical compliance with *Buckley*’s “express advocacy” limitation.¹⁴⁰ In light of the Senate report’s findings and the *Buckley* standard, the reform movement’s challenge was to create a rule that both broadened the law’s reach to cover sham issue ads and avoided being struck down under strict scrutiny.¹⁴¹

C. BCRA’s Statutory Expansion of Express Advocacy and Subsequent Judicial Narrowing

1. BCRA: Addressing Soft Money and Sham Issue Advocacy

In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA) to address the two problems identified in the 1998 Senate investigation report.¹⁴² BCRA’s soft money provision banned national party committees from soliciting or receiving any funds not subject to FECA’s limitations, prohibitions, and reporting requirements.¹⁴³ This rule addressed the concern that political parties regularly asked donors to give money beyond the maximum amount under FECA by giving instead to local parties that would in turn pay for voter registration, voter identification, get out the vote, and other generic campaign activities for national candidates.¹⁴⁴

BCRA addressed the sham issue advocacy problem by creating a new definition of express advocacy subject to FECA’s general prohibition on corporate- or union-funded advertisements and its disclosure and reporting provisions.¹⁴⁵ BCRA adopted the term “electioneering communications” to replace *Buckley*’s “express advocacy” limitation.¹⁴⁶ Electioneering communications under BCRA encompassed any broadcast, cable, or satellite communication that clearly identifies a candidate for federal office within 60 days of a general election or 30 days of

¹³⁹ *Id.* at 131.

¹⁴⁰ *Id.* at 32.

¹⁴¹ *See Buckley*, 424 U.S. at 44 n.52 (creating the magic words test).

¹⁴² *See supra* notes 137–141 and accompanying text.

¹⁴³ Bipartisan Campaign Reform Act, Pub. L. No. 107-155, §§ 101–103, 116 Stat. 81, 82–88 (2002) (codified as amended in scattered sections of 2 U.S.C.).

¹⁴⁴ *See McConnell*, 540 U.S. at 165, 168–69.

¹⁴⁵ *See* 2 U.S.C. § 434(f)(3)(A)(i) (2006); *McConnell*, 540 U.S. at 189.

¹⁴⁶ *McConnell*, 540 U.S. at 189–90; *see id.* at 193 (noting that all three district court judges had agreed that *Buckley*’s “magic words” test was “functionally meaningless”).

a primary and is targeted to the relevant voting electorate.¹⁴⁷ Congress adopted this definition to avoid the kind of vagueness that troubled the *Buckley* Court in interpreting FECA's prohibition on corporate expenditures "relative to a clearly identified candidate."¹⁴⁸ Thus, under BCRA, all "electioneering communications" funded by union or corporate general treasuries were prohibited.¹⁴⁹

2. *McConnell* and *Wisconsin Right to Life*

In *McConnell v. FEC* in 2003, the U.S. Supreme Court upheld both BCRA's soft money provision and its "blackout" period for electioneering communications through a straightforward application of *Buckley*'s distinction between contributions and expenditures.¹⁵⁰ Because the soft money provision addressed contributions, it involved only "marginal" burdens on free speech and could be upheld under an intermediate standard of review.¹⁵¹ To the extent that closing the soft money loophole infringed such marginal speech interests, it did so to prevent the practice of candidates and parties circumventing otherwise valid contribution limits.¹⁵²

The *McConnell* Court also approved the electioneering communications definition, holding that the circumvention of federal campaign finance laws through "candidate advertisements masquerading as issue ads" justified imposing the 30- and 60-day blackout periods.¹⁵³ Like in *Buckley*, the Court in *McConnell* upheld the restrictions through narrow statutory interpretation designed to avoid constitutional vagueness or overbreadth.¹⁵⁴ "Electioneering communication," the Court noted, referred "(1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within the specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners."¹⁵⁵ Genuine issue advocacy remained unregulable.¹⁵⁶

Having accepted BCRA's statutory definition of electioneering communications, the Court in *McConnell* went on to validate *Austin*'s

¹⁴⁷ See 2 U.S.C. § 434(f)(3)(A)(i), (C).

¹⁴⁸ See *McConnell*, 540 U.S. at 189; *Buckley*, 424 U.S. at 41.

¹⁴⁹ 2 U.S.C. § 441b(a)-(b); *McConnell*, 540 U.S. at 204.

¹⁵⁰ See *McConnell*, 540 U.S. at 138; *Buckley*, 424 U.S. at 19.

¹⁵¹ See *McConnell*, 540 U.S. at 134-35.

¹⁵² See *id.* at 137.

¹⁵³ *Id.* at 132.

¹⁵⁴ *Id.* at 194.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 206.

antidistortion rationale as a legitimate justification for government regulations, even though it does not involve the traditional “quid pro quo” definition of corruption.¹⁵⁷ The Court recognized that “unusually important interests underlie the regulation of corporations’ campaign-related speech,” including “[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government”¹⁵⁸

Just four years after *McConnell*, however, in *FEC v. Wisconsin Right to Life, Inc.*, the Court backtracked on its endorsement of the antidistortion rationale by creating a new standard that echoed *Buckley*’s magic words test.¹⁵⁹ At issue in *Wisconsin Right to Life* was a conservative non-profit advocacy organization’s advertisement opposing the use of filibusters to stall President George W. Bush’s judicial nominees.¹⁶⁰ The advertisement fell within BCRA’s definition of electioneering communications because it was funded in part by corporate treasury funds, included a message urging voters to call Senator Russ Feingold, and would be aired within the blackout period.¹⁶¹ The Court held that an advertisement is only the functional equivalent of express advocacy (and thus regulable) if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁶² In other words, “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”¹⁶³ Both *Buckley*’s “magic words” limitation and *Wisconsin Right to Life*’s “tie goes to the speaker” standard reflected the Court’s reluctance to allow the government to regulate genuine issue advocacy like the referendum ads at issue in *Bellotti*.¹⁶⁴ The Court went on to hold BCRA unconstitutional as applied to the advertisement at issue because it could reasonably be construed as something other than an appeal to vote for or against Senator Feingold.¹⁶⁵

¹⁵⁷ See *McConnell*, 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660).

¹⁵⁸ *Id.* at 206 n.88 (internal quotation marks omitted) (quoting *Bellotti*, 435 U.S. at 788–89).

¹⁵⁹ See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007).

¹⁶⁰ *Id.* at 458–59.

¹⁶¹ *Id.* at 458–60. The so-called “MCFL exemption” did not apply to the corporation at issue in *Wisconsin Right to Life* because it did not have a policy of rejecting corporate funds. See *infra* text accompanying notes 198–201 for a full explanation of the MCFL exemption.

¹⁶² *Wis. Right to Life*, 551 U.S. at 470.

¹⁶³ *Id.* at 474.

¹⁶⁴ See *id.*; *Bellotti*, 435 U.S. at 776; *Buckley*, 424 U.S. at 44.

¹⁶⁵ *Wis. Right to Life*, 551 U.S. at 476.

In *Citizens United*, the Court scrapped its attempts in *Wisconsin Right to Life* and *McConnell* to reconcile BCRA's electioneering restriction with its post-*Buckley* First Amendment doctrine.¹⁶⁶ *Buckley*, the Court reasoned, held that the government cannot attempt to equalize voices in the political marketplace—exactly the justification relied on to uphold the spending restrictions in *Austin*.¹⁶⁷ Moreover, *Bellotti* prohibited the government from making distinctions based solely on the corporate identity of the speaker.¹⁶⁸ If these two principles—no equalizing voices, and no distinctions based on the corporate form—are to be taken at face value, then *Austin* could not possibly stand.¹⁶⁹ Moreover, section 203 of BCRA targeted core political speech, which is protected irrespective of who is speaking or how much money the speaker has.¹⁷⁰ The Court concluded that the antidistortion interest simply does not address corruption; it addresses inequality in the political speech marketplace.¹⁷¹

III. A CHANGE WITHOUT A DIFFERENCE: PRACTICAL CONSIDERATIONS IN CORPORATE POLITICAL SPENDING

Notwithstanding the well-publicized drama at the State of the Union address, it is questionable whether the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC* will alter the way corporations spend money on federal elections at all.¹⁷² Several historical and jurisprudential realities diminish the importance of the case's principal holding that corporations enjoy the same free speech rights as individuals to fund electoral advocacy, and its immediate legal effect of striking down section 203 of BCRA and overruling the Court's 1991 decision in *Austin v. Michigan Chamber of Commerce*.¹⁷³ This Part evaluates the practical consequences of *Citizens United* and proposes that, with apologies to Mark Twain, reports of the death of popular democratic participation have

¹⁶⁶ See *Citizens United*, 130 S. Ct. at 913.

¹⁶⁷ See *id.* at 904.

¹⁶⁸ See *id.* at 898–99 (citing *Bellotti*, 435 U.S. at 784). Such distinctions, the Court explained, are “all too often simply a means to control content.” *Id.* at 899.

¹⁶⁹ See *id.* at 921–22 (Roberts, C.J., concurring).

¹⁷⁰ See *id.* at 892 (majority opinion).

¹⁷¹ See *id.* at 921 (Roberts, C.J., concurring) (“*Austin*’s reasoning was—and remains—inconsistent with *Buckley*’s explicit repudiation of any government interest in ‘equalizing the relative ability of individuals and groups to influence the outcome of elections.’”).

¹⁷² See *infra* notes 177–239 and accompanying text. See generally *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

¹⁷³ See *infra* notes 177–239 and accompanying text.

been greatly exaggerated.¹⁷⁴ Indeed, arguments predicting a hitherto unseen flood of corporate wealth in elections fall flat against the history of campaign finance regulations, the limited nature of section 203, the continuing operation of disclosure and disclaimer requirements, and the nature of money in politics.¹⁷⁵ The purpose of this analysis is to set up a discussion in Part IV that reviews the scholarly response to *Citizens United* and proposes legislative changes designed to minimize the risks of corruption and undue influence by giving voters easy access to information about the financial and ideological support behind political messages.¹⁷⁶

A. Campaign Finance Laws Had a Limited Effect Before *Citizens United*

The slow evolution of federal campaign finance regulations, beginning with the Tillman Act in 1907, undercuts dramatic proclamations that *Citizens United* portends a new Gilded Age where corporate interests trump the public interest and politicians do the will of the highest bidder.¹⁷⁷ Corporations in the early twentieth century not only faced scattered and weak enforcement of the Tillman Act's contribution ban (and thus no great deterrent to violating the ban), but also exploited glaring legal loopholes that allowed them to bankroll their favored campaigns with relative ease.¹⁷⁸ Even after the enactment of independent corporate expenditure restrictions, corporations faced minimal barriers to political spending on television or in other national media.¹⁷⁹ Until the FEC's creation in 1974, the ban on independent corporate spending on elections was not rigorously enforced.¹⁸⁰ Thus, the relevant timeframe for evaluating the decision's practical consequences is, at the very longest, the period after Congress substantially amended FECA in 1974.¹⁸¹

Even in the post-FECA era, however, there were only a few years of rigorous, to-the-letter enforcement of the ban on independent corporate electoral spending.¹⁸² In 1976, just four years after FECA's enact-

¹⁷⁴ See *infra* notes 177–239 and accompanying text.

¹⁷⁵ See *infra* notes 177–239 and accompanying text.

¹⁷⁶ See *infra* notes 240–315 and accompanying text.

¹⁷⁷ See *supra* notes 63–88 and accompanying text.

¹⁷⁸ See *supra* notes 75–88 and accompanying text.

¹⁷⁹ See FEC, *supra* note 98, at 7; Jezer et al., *supra* note 75, at 333 & n.6.

¹⁸⁰ See FEC, *supra* note 98, at 7.

¹⁸¹ See *supra* notes 93–98 and accompanying text.

¹⁸² See Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 147, 167 (2004) (noting that *Buckley's* magic words test has been “ridiculously” easy to evade and concluding that *McConnell v. FEC* represented a “stunning

ment, the U.S. Supreme Court in *Buckley v. Valeo* established the “magic words” limitation allowing corporations to spend general treasury funds freely in national elections as long as the advertisements they purchased did not use express words of advocacy or defeat.¹⁸³ Indeed, Congress sought to redefine *Buckley*’s “magic words” test with BCRA’s blackout period in 2002.¹⁸⁴ In 2007, however, the Supreme Court, in *FEC v. Wisconsin Right to Life*, revived the magic words limitation, stating that BCRA’s blackout period only extended to ads “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁸⁵ That language effectively placed the burden on the regulators because most “sham issue ads” (those that purport to expound on an issue but in reality call the viewer’s attention to a candidate’s position for the purpose of influencing the outcome of an election) would be untouchable under that test.¹⁸⁶ Thus, important judicial limitations on post-1974 corporate electoral advocacy statutes have been in place for all but nine years: 1974–1976, and 2002–2007.¹⁸⁷

Those judicial limitations belie the inference that a flood of corporate spending on elections is imminent in the post-*Citizens United* world.¹⁸⁸ Both *Buckley*, in 1976, and *Wisconsin Right to Life*, in 2007, prohibited the government from regulating all but the narrowest class of advertisements, by a limited class of corporations—namely, for-profit business corporations or nonprofits that receive money from them.¹⁸⁹ The Court’s motivation behind both cases was to protect genuine issue advocacy—purely political speech—from the government’s regulatory reach.¹⁹⁰ Similarly, the Court struck down the law at issue in *Bellotti* because, unlike in candidate elections where an actual politician might be convinced to do the bidding of a corporation, an issue cannot be cor-

triumph” for reformers because it validated BCRA’s definition of electioneering communications); Kathleen M. Sullivan, *The Supreme Court, 2009 Term—Comment: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 169 (2010) (noting that the *Buckley* distinction between contributions and expenditures created a situation where “demand for political money has remained unlimited while government nonetheless has limited its supply”).

¹⁸³ See 424 U.S. 1, 44 & n.52 (1976).

¹⁸⁴ See *McConnell v. FEC*, 540 U.S. 93, 132 (2003).

¹⁸⁵ See *FEC v. Wis. Right to Life*, 551 U.S. 449, 470 (2007).

¹⁸⁶ See *id.*

¹⁸⁷ See Briffault, *supra* note 22, at 646–50 (summarizing judicial and other limitations on campaign finance laws); Briffault, *supra* note 182, at 156.

¹⁸⁸ See *Wis. Right to Life*, 551 U.S. at 469–70; *Buckley*, 424 U.S. at 44 n.52.

¹⁸⁹ See *Wis. Right to Life*, 551 U.S. at 469–70; *Buckley*, 424 U.S. at 44 & n.52.

¹⁹⁰ See *Wis. Right to Life*, 551 U.S. at 469 (explaining that an intent-based test would chill political speech); *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)) (implying the same).

rupted.¹⁹¹ The First Amendment does not permit the government to target so baldly spending on speech *solely* because of the speaker's corporate form.¹⁹² Moreover, although the 1991 decision in *Austin v. Michigan Chamber of Commerce* validated the government's interest in mitigating the "distorting" effects of corporate wealth, it did not overrule *Buckley's* "magic words" limitation.¹⁹³

In practical effect, the *Buckley/Wisconsin Right to Life* standards have allowed corporations to purchase *any* electoral advertisements that fall short of calling for the election or defeat of a candidate for federal office.¹⁹⁴ As the Court in *McConnell v. FEC* explained in 2003, "Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted" because suggestive political ads are generally more effective than outright calls to vote for or against a candidate.¹⁹⁵ Corporations have therefore faced restrictions only on ads they would not typically make.¹⁹⁶ That observation cannot be overstated in evaluating the practical consequences of overturning *Austin*: since 1976, corporations have been *allowed* to buy the most effective campaign ads, and *prohibited* from

¹⁹¹ See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) (observing that the risk of electoral corruption "simply is not present" in a popular vote on an issue); see also *supra* notes 119–123 and accompanying text.

¹⁹² See *Bellotti*, 435 U.S. at 789.

¹⁹³ See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (upholding the Michigan Campaign Finance Act of 1976).

¹⁹⁴ See *McConnell*, 540 U.S. at 193–94; Richard Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1066 (2008). As the Court in *McConnell* noted in approving BCRA's electioneering communications definition, *Buckley's* "express advocacy" standard prohibited the government from regulating the following election advertisement:

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

McConnell, 540 U.S. at 193 n.78.

¹⁹⁵ See *McConnell*, 540 U.S. at 193.

¹⁹⁶ See *id.* at 216; see also *McConnell v. FEC*, 251 F. Supp. 2d 176, 529 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.) (noting that modern campaign ads do not use express advocacy because it is an ineffective way to convince voters to defeat or elect a candidate), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003); John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 623–24 (2005) (noting that savvy political operatives can easily circumvent BCRA's electioneering restrictions).

buying those ads they would be least likely to buy were they permitted to do so.¹⁹⁷

The Court has also insulated certain corporations from regulation.¹⁹⁸ Even in the face of broad statutory language restricting corporate spending “in connection with” an election for federal office, non-profit advocacy corporations have been exempt.¹⁹⁹ In 1986, the Court held that the FEC may not subject a corporation to FECA’s restrictions if the corporation (1) was established for advocacy purposes, (2) did not have shareholders with an economic disincentive to severing ties if they disagreed with the corporation’s political views, and (3) had a policy of eschewing donations from business corporations.²⁰⁰ That exemption demonstrates that the Supreme Court does not consider the corporate form *per se* to create a danger of *Austin*-style corruption; rather, only the business corporation poses such risks because of its unique ability to amass capital to establish political war chests without any connection to public support for an idea or candidate.²⁰¹

The only constant restriction on corporate spending in national elections in the last one hundred years has been the Tillman Act’s ban on direct contributions to candidates, which the government did not reliably enforce until it established the FEC in 1974.²⁰² *Citizens United* left those restrictions—and with them *Buckley*’s distinction between giving money and spending money—intact.²⁰³ Given that corporations have spent freely on federal elections for most of the post-*Buckley* period, it follows that criticism of the result in *Citizens United* is not rooted in fear of an *unforeseen* flood of wealth corrupting the political process, but one of two possibilities: either a disagreement with *Buckley* itself and a corresponding belief that American elections have always been distorted by corporate wealth and influence, or a simple misunderstanding of the *Buckley* lineage.²⁰⁴

¹⁹⁷ See *McConnell*, 540 U.S. at 193–94.

¹⁹⁸ See *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263–64 (1986).

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *id.* at 259 (“Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes.”).

²⁰² See *supra* notes 75–78, 96 and accompanying text.

²⁰³ See *Citizens United*, 130 S. Ct. at 908.

²⁰⁴ See *supra* notes 188–203 and accompanying text; see also Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 147–48 (2010) (noting that campaign finance reformers often repackage inequality concerns as corruption concerns and assume that unequal economic power translates to unequal political power).

B. *BCRA Itself Imposed a Minor Restraint in a New Media Landscape*

Beyond the historical context outlined in Part III.A, the facts of *Citizens United* were limited to a narrow provision prohibiting ads in a narrow window of time before an election.²⁰⁵ That provision, though in some sense significant given its operation immediately before an election, only slightly altered the myriad ways citizens receive information before making voting decisions.²⁰⁶ The advent of new media and consumer controls over content has diminished the influence of television advertising in elections, making a statute like BCRA seem like a relatively minor imposition.²⁰⁷

The modes and capabilities of political messaging are vastly different today than they were throughout the twentieth century.²⁰⁸ Corporate expenditure limitations first arose in 1947, when television had begun to play a unique and pervasive role in informing and influencing the public on issues and candidates for national office.²⁰⁹ Television continued to dominate the electoral marketplace throughout the twentieth century.²¹⁰ BCRA itself covered only cable, satellite, and broadcast communications, suggesting a special concern by Congress that monopolization of those mediums by corporations posed unique distorting dangers.²¹¹

Today, however, the nature of the electoral marketplace is dramatically different.²¹² Cable and satellite providers compete to provide consumers with the best and most convenient control over content.²¹³ Viewers can now record their preferred programs in advance and watch them later or purchase them online.²¹⁴ They can fast-forward through advertisements.²¹⁵ Moreover, voters can now choose among an array of cable news programs that have specific ideological slants and whose

²⁰⁵ See 130 S. Ct. at 888 (explaining the statutory definition of electioneering communications).

²⁰⁶ See 2 U.S.C. §§ 434(f)(3)(A)(i), 441b(a) (2006).

²⁰⁷ See DARRELL M. WEST, *AIR WARS* 63 (5th ed. 2010) (analogizing the Internet revolution in the 2008 presidential election to the television revolution in the 1950 presidential election).

²⁰⁸ See *id.*

²⁰⁹ See Labor Management Relations (Taft-Hartley) Act, ch. 120, § 304, 61 Stat. 136, 159 (1947) (codified as amended at 2 U.S.C. § 441b).

²¹⁰ See WEST, *supra* note 207, at 2–4.

²¹¹ See 2 U.S.C. §§ 441b, 434(f)(3)(A)(i).

²¹² See WEST, *supra* note 207, at 63.

²¹³ See Seth Schiesel, *Video on Demand Is Finally Taking Hold*, N.Y. TIMES, Nov. 25, 2002, at C4.

²¹⁴ See *id.*

²¹⁵ See *id.*

political ads often reflect those perspectives.²¹⁶ The traditional paradigm of television advertising providing campaigns and advertisers with access to a passive, seated audience with little control over content has been replaced by a new world of consumer preference and control over information.²¹⁷

The growing role of the Internet in political campaigns, in particular, has allowed voters to choose their preferred sources of information and select individual stories and opinion pieces for their own information consumption.²¹⁸ Online newspapers, journals, and blogs provide a wide variety of choices from which voters can select political messages.²¹⁹ These sources have opened public officials to heightened and more readily accessible scrutiny, as voters can find and share content quickly and cheaply.²²⁰ Free and easily accessible information online diminishes the reach and scope of traditional television advertising, and therefore mitigates the practical impact of *Citizens United*.²²¹

C. Disclosure and Disclaimer Provisions Live On

Disclosure and disclaimer provisions also continue to operate on advertisers, making it all the more difficult to argue that an outright ban on corporate political spending prevents corruption or undue influence—or even “distorts” the electoral process.²²² BCRA’s disclosure provision, for example, requires corporations spending more than ten thousand dollars on electioneering in a year to file a report with the FEC.²²³ The disclaimer provision requires corporate-funded advertisements to include a message disavowing affiliation with a particular can-

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See Vassia Gueorguieva, *Voters, MySpace, and YouTube, in* POLITICKING ONLINE 239, 242 (Costas Panagopoulos ed., 2009); Jacqueline D. Lipton, *Who Owns “hillary.com”? Political Speech and the First Amendment in Cyberspace*, 49 B.C. L. REV. 55, 55–57 (2008); Benjamin Norris, Note, *Fired Up! in the Blogosphere: Internet Communications Regulation Under Federal Campaign Finance Law*, 84 WASH. U. L. REV. 993, 994–95 (2006) (chronicling the rise of the Internet as a source of political news and information).

²¹⁹ See Norris, *supra* note 218, at 994–95.

²²⁰ See *id.*

²²¹ See WEST, *supra* note 207, at 63; Norris, *supra* note 218, at 994–95.

²²² See 2 U.S.C. § 434(f) (2006) (disclosure provision); *id.* § 441d(d)(2) (disclaimer provision, requiring four-second message declaring who is responsible for the content of the advertising, applying to all electioneering television advertisements).

²²³ *Id.* § 434(f)(1). The disclosure statement must include the identity of the person making the expenditure, the amount spent, the election sought to be influenced, and the names of certain contributors. *Id.* § 434(f)(2). The disclosure and disclaimer requirements were upheld in *Citizens United*. 130 S. Ct. at 914.

didate.²²⁴ The effects of these provisions are threefold: they discourage improper affiliations between elected leaders and influential corporations, they promote informed voting, and they enhance enforcement of other rules.²²⁵

D. *Money in Theory, Money in Practice*

Two other observations further suggest a limited effect of federal campaign finance laws before *Citizens United*.²²⁶ The first is that money is often difficult to contain.²²⁷ Restrictions on electoral spending in one area often have an unintended consequence of channeling the money into an unregulated area.²²⁸ The Tillman Act's prohibition on direct corporate contributions to candidates, for example, channeled the money that corporations could no longer give to campaigns outright into paying for campaign staff and other incidental costs.²²⁹ A complex regulatory structure creates a danger of confusing rather than enlightening the electorate by channeling money into obscure political advocacy organizations with unknown sources of funding.²³⁰ The various PAC and tax regulations, for example, have allowed the proliferation of organizations funded entirely by for-profit corporate interests but operating under non-profit advocacy auspices.²³¹

The second observation is that, although money is needed to run successful political campaigns, there is cause to doubt the power of out-

²²⁴ 2 U.S.C. § 441d(d)(2).

²²⁵ See Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 260, 270 (2010); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326.

²²⁶ See *infra* notes 227–237 and accompanying text.

²²⁷ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1717 (1999).

²²⁸ See *id.* For example, the effect of restricting direct candidate contributions has been to channel money into local parties, which then spend the money to help the targeted federal candidate. See *id.* The unintended consequence of restricting direct contributions to candidates was to create a new market for soft money, which had largely the same effects and created the same risks of corruption as direct contributions because the candidates would simply be told who had donated what. See *id.* Of course, this scenario is exactly what BCRA sought to prevent. See *supra* notes 142–144 and accompanying text. But the “hydraulic theory” is that corporate money earmarked for political purposes will always have a place to go. See Issacharoff & Karlan, *supra* note 227, at 1708.

²²⁹ See Urofsky, *supra* note 68, at 17.

²³⁰ See *McConnell*, 540 U.S. at 128.

²³¹ See *id.* at 128; Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007); Mayer, *supra* note 225, 269–70 (noting that some organizations use “misleading names that hide the true motivations and views of those who created and fund them”).

side money to deliver consistently favorable political outcomes.²³² A correlative relationship between money and political outcomes is not the same as a causal relationship; more money may often simply reflect greater underlying constituent support for a candidate.²³³ At a minimum, the “hedging strategy” of corporations—giving money to both parties—suggests that corporations lack complete confidence that their donations will lead to favorable political outcomes.²³⁴ Money buys access, which in turn influences political outcomes in complicated, morally diverse ways.²³⁵ It is also worth noting that corporations are, in fact, important constituents in American democracy.²³⁶ The goal of campaign finance laws is not to shut the door of democratic participation on corporations or unions, but to keep politicians honest.²³⁷

Of course, these observations do not address the substantive question whether corporate spending should be contained in the first place.²³⁸ They do, however, help to illuminate the real-world experience of campaign finance regulations for reformers as they move into the post-*Citizens United* world.²³⁹

IV. SHOW ME THE MONEY: IMPROVING ACCESS AND ACCOUNTABILITY IN THE INTERNET AGE

This Note has so far suggested that the U.S. Supreme Court decision in *Citizens United v. FEC*,²⁴⁰ which in 2010 struck down a law restricting corporate-funded electioneering on First Amendment grounds, is neither as powerful a blow to democracy, nor as consequential, as its

²³² See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1068 & n.115 (1996) (citing various sources suggesting a complex relationship between money and legislative votes and concluding that “campaign contributions affect very few votes in the legislature”). For a critique of Smith’s argument, see E. Joshua Rosenkranz, *Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 869–70 (1998).

²³³ See Smith, *supra* note 232, at 1064–65.

²³⁴ See Sullivan, *supra* note 225, at 324.

²³⁵ See David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 142 (discussing tensions inherent in the political system between the need to fund political campaigns and the risk of interest groups obtaining undue influence); see also Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 308–09 (1989).

²³⁶ See *Bellotti*, 435 U.S. at 784–86 (recognizing that the First Amendment protects corporate speech); *id.* at 75 n.21 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)) (noting that corporations provide valuable information to the voting public).

²³⁷ See *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

²³⁸ See *supra* notes 226–237 and accompanying text.

²³⁹ See *supra* notes 226–237 and accompanying text.

²⁴⁰ 130 S. Ct. 876, 876 (2010).

many critics contend.²⁴¹ Since at least 1976, Supreme Court-imposed limitations on campaign finance statutes have effectively allowed corporations to fund political advertisements as they please.²⁴² These limitations have rendered even the most restrictive laws all but meaningless in practice.²⁴³ Moreover, not only have disclosure and disclaimer requirements deterred elected officials from having improper relationships with big corporate spenders, but the changing nature of the political speech marketplace itself has also diminished the once monolithic role of television advertisements in electoral messaging.²⁴⁴

The last Part of this Note builds on existing reform-minded scholarship²⁴⁵ and proposes an enhanced scheme of voter access to critical information about the financial and ideological origins of campaign messages.²⁴⁶ Specifically, in light of *Citizens United's* doctrinal shift toward treating corporations and individuals the same for First Amendment purposes, reform advocates at the state and federal level should create and implement an enhanced system of disclosure requirements aimed at providing voters with easy access to the true financial and ideological sources of political information.²⁴⁷ These proposals will not address the danger of inequality in the electoral marketplace, which many campaign finance proponents have become accustomed to defending by arguing that corporations simply do not deserve First Amendment protection.²⁴⁸ They will, however, address the risks of officeholders making judgments based on improper commitments, such as staking only those legislative positions that are favorable to large business interests.²⁴⁹

²⁴¹ See *supra* notes 177–239 and accompanying text.

²⁴² See Hasen, *supra* note 194, at 1066 (admitting that corporations would face no real obstacles to electoral spending after *Wisconsin Right to Life* in 2007); *supra* notes 177–204 and accompanying text.

²⁴³ See *McCormell v. FEC*, 540 U.S. 93, 193 (2003); Briffault, *supra* note 22, at 646–50.

²⁴⁴ See *supra* notes 205–225 and accompanying text.

²⁴⁵ See Mayer, *supra* note 225, at 270–71; Sullivan, *supra* note 225, at 326–27; Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 651 (2010) (proposing a broad mandate for disclosure and disclaimer requirements post-*Citizens United*).

²⁴⁶ See *infra* notes 289–315 and accompanying text.

²⁴⁷ See *infra* notes 289–297 and accompanying text; see also Winik, *supra* note 245, at 651.

²⁴⁸ See, e.g., Piety, *supra* note 19, at 2588 (arguing that none of the justifications for protecting free speech support its strongest application to for-profit corporations); Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 194–95 (1998) (discussing arguments against granting business corporations full First Amendment protection).

²⁴⁹ See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976); see also Richard Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 270 (2000).

This Part begins with a brief survey of existing scholarship assessing the *Citizens United* ruling and calling for reforms.²⁵⁰ Then, it proposes that reformers have a unique opportunity to reassess the goals of the campaign finance project and the effectiveness of the laws they so assiduously defend.²⁵¹ Reformers should harness popular sentiment to enact enhanced disclosure laws that mitigate the danger of corporate capture of elections by giving voters more expedient ways to discover the true financial and ideological sources of political messages.²⁵²

A. After Citizens United: Criticisms and Calls for Reform

The mixed popular and scholarly response to *Citizens United* has reflected a shift in the balance of power between critics and defenders of campaign finance laws.²⁵³ On the one hand, those accustomed to defending the Supreme Court's 1991 decision in *Austin v. Michigan Chamber of Commerce* and its flexible view of corruption balk at the suggestion that the government cannot regulate corporate spending on elections.²⁵⁴ Business corporations are fictional entities created to amass wealth; their participation in political campaigns therefore does not reflect the wishes of voters, but of money itself, and its useful corollary, influence.²⁵⁵ On the other hand, former critics now defend the proposition that any limitations upon political speech strike at the heart of the

²⁵⁰ See *infra* notes 253–271 and accompanying text.

²⁵¹ See *infra* notes 272–288 and accompanying text.

²⁵² See *infra* notes 272–315 and accompanying text.

²⁵³ See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583 (2011) (arguing that *Citizens United* embraced a “crabbed view of corruption”); Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 425–26 (2008) (arguing that the “singularly influential fable” of the longstanding *United States v. Automobile Workers* precedent should be reexamined), cited in *Citizens United*, 130 S. Ct. at 901, 912.

²⁵⁴ See, e.g., Carol R. Goforth, “A Corporation Has No Soul”—*Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 653 (2010) (arguing that it is doubtful the framers intended the First Amendment to protect modern corporations, which have little or no interaction from shareholders in the corporation's political spending policies); Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 295–97 (2011) (suggesting that *Citizens United* departs from the founders' understanding of corruption).

²⁵⁵ See Piety, *supra* note 19, at 2607 & n.115; William Quigley, *Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109, 126 (2004) (noting that the “first commandment” of corporations is profit maximization for shareholders).

First Amendment and must be invalidated.²⁵⁶ That the business corporation enjoys certain state-conferred benefits does not remove its speech from the same First Amendment protections that individuals enjoy.²⁵⁷

The doctrinal criticisms of the decision have been plentiful.²⁵⁸ Professor Hasen contends that despite the Court's effort to harmonize its post-*Buckley* framework, in reality the doctrine is as incoherent now as it ever was.²⁵⁹ Professor Teachout takes a more hairsplitting approach, assailing the decision as unduly disconnected from the realities of modern political campaigns, and in any case premature based on the sparse record before the Court.²⁶⁰ Another scholar argues that the decision failed to recognize that campaign communications have the power to manipulate the electorate rather than inform it, thus justifying certain restrictions.²⁶¹

Reform proposals followed the decision in short order. Among them: reviving public financing schemes,²⁶² increasing disclosure and disclaimer requirements,²⁶³ amending the Constitution,²⁶⁴ eliminating FECA's contribution limit entirely,²⁶⁵ prohibiting independent expenditures by foreign-controlled corporations or those with government contracts,²⁶⁶ requiring shareholder approval for political spending,²⁶⁷ and conditioning public benefits such as the corporate form on a re-

²⁵⁶ See, e.g., Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77, 79–80 (2010), <http://yalelawjournal.org/2010/9/29/abrams.html> (arguing that the First Amendment was *Citizens United's* “only basis”); Smith, *supra* note 16, at 88.

²⁵⁷ See *Citizens United*, 130 S. Ct. at 905 (the distinction between wealthy individuals and wealthy corporations based on state-conferred benefits “does not suffice . . . to allow laws prohibiting speech”).

²⁵⁸ See, e.g., *infra* notes 259–261.

²⁵⁹ See Hasen, *supra* note 253, at 603–05.

²⁶⁰ See Teachout, *supra* note 254, at 298–99.

²⁶¹ See Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2383 (2010).

²⁶² See generally Fair Elections Now Act, S. 1285, 110th Cong. (2007) (proposing a comprehensive public financing scheme requiring candidates for national office to garner a threshold amount of money and public support to qualify for additional public funds).

²⁶³ See, e.g., Sullivan, *supra* note 182 at 172–74; Winik, *supra* note 245, at 651.

²⁶⁴ See, e.g., Tony Romm, *Specter Pitches Constitutional Amendment in Response to Citizens United Case*, THEHILL.COM (Jan. 21, 2010, 7:25 PM), <http://thehill.com/blogs/blog-briefing-room/news/77473-specter-pitches-constitutional-amendment-in-response-to-citizens-united-case>.

²⁶⁵ See Sullivan, *supra* note 182, at 167–70.

²⁶⁶ See generally Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, 111th Cong. (2010).

²⁶⁷ See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 85 (2010).

linquishment of the right to spend freely on elections.²⁶⁸ The legislative response, in particular, has tracked a general popular distaste with the proposition that corporations have free speech rights commensurate with those of individuals.²⁶⁹ The main Democratic response was the DISCLOSE Act, which would have, among other things, required organizations to disclose the identity of large donors and barred government contractors, foreign corporations, and Troubled Asset Relief Program recipients from making any political expenditures.²⁷⁰ That bill passed in the House but stalled in late 2010 in the Senate, reflecting party divisions.²⁷¹

B. *A Boon for Reformers?*

One accidental benefit of the *Citizens United* decision may be to force campaign finance proponents to rethink the main goals of election laws and create workable—if modest—means to attain them.²⁷² Not only have the campaign finance project’s gradual changes failed to accomplish the ambitious goals motivating its original advocates, but the movement’s doctrinal justifications have also been mismatched to the Supreme Court’s post-FECA precedents.²⁷³ A reassessment aimed at mitigating the effects of gross resource inequality between different constituents in the electoral process may in the end lead to a regulatory system that more effectively balances the competing interests of fair elections and free speech.²⁷⁴

As noted,²⁷⁵ scant evidence supports the proposition that a century of federal enactments “designed to purge national politics of what was conceived to be the pernicious influence of big money” has actually suc-

²⁶⁸ See Sullivan, *supra* note 182, at 174–75.

²⁶⁹ See *ABC News/Washington Post Poll Results*, ABC NEWS, <http://abcnews.go.com/images/PollingUnit/1102a6Trend.pdf> (last visited May 19, 2011) (finding eighty percent disapproval of the decision).

²⁷⁰ See *generally* Democracy Is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010).

²⁷¹ Jessica Rettig, *Senate Republicans Block DISCLOSE Act*, US NEWS & WORLD REP. (July 27, 2010), <http://www.usnews.com/news/articles/2010/07/27/senate-republicans-block-disclose-act>.

²⁷² See *infra* notes 273–287 and accompanying text.

²⁷³ Compare, e.g., *ROOT*, *supra* note 12, at 143–44 (articulating a circumscribed role for corporations in elections), with *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790–91 (1978), and *Buckley*, 424 U.S. at 48–49 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .”).

²⁷⁴ See Sullivan, *supra* note 182, at 176.

²⁷⁵ See *supra* notes 177–239 and accompanying text.

ceeded.²⁷⁶ Neither FECA nor BCRA appears to have curtailed the amount of money corporations have spent on national political advocacy.²⁷⁷ In fact, if any trend can be discerned from a complex data set, it is that independent expenditures have risen dramatically in the twenty years since *Austin*.²⁷⁸ Between 1990 and 2002, for example, *before* BCRA's "electioneering communications" restriction, outside spending on federal elections ranged from \$7 to \$50 million per year.²⁷⁹ By 2004, outside spending totaled over \$200 million, and by 2010 (a non-presidential election year), outside groups spent over \$300 million.²⁸⁰ These numbers should, at minimum, cast some doubt on the proposition that the various legislative fixes over the years have successfully curbed corporate political spending.²⁸¹

Moreover, the idea endorsed by the Supreme Court in *Austin* that independent corporate electoral advocacy threatens the integrity of democratic processes fits poorly within the corruption lexicon, as it reflects a concern not that voters or politicians will be "corrupted," but that electoral outcomes (and thus policy outcomes) will reflect powerful and well-financed interests rather than the public interest.²⁸² In contrast to quid pro quo corruption or undue influence, which involve identifiable perversions of democratic processes, "antidistortion" is a nebulous theory seemingly more about control over political outcomes than a concern about corruption.²⁸³ And the theory is rightly susceptible to accusations of paternalism, endorsing as it does a concern that voters subject to a greater quantity of ads will be misled, irrespective of the underlying truth or persuasiveness of the political message.²⁸⁴ Whatever the merits of those concerns, shoehorning them into the anti-corruption rubric discredits the otherwise legitimate concerns about resource inequality, corporate capture of elections, and democratic self-governance.²⁸⁵

²⁷⁶ See *McConnell*, 540 U.S. at 115 (internal quotation marks omitted).

²⁷⁷ See *infra* notes 278–281 and accompanying text.

²⁷⁸ See *Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/index.php> (last visited May 19, 2011).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *id.*

²⁸² See *Austin*, 494 U.S. at 659; Samuel Issacharoff, *The Supreme Court, 2009 Term—Comment: On Political Corruption*, 124 HARV. L. REV. 118, 126 (2010).

²⁸³ See *Austin*, 494 U.S. at 659–60; Issacharoff, *supra* note 282, at 126.

²⁸⁴ See Sullivan, *supra* note 182, at 156.

²⁸⁵ See generally Strauss, *supra* note 235 (listing five general justifications for campaign finance laws: corruption, interest group politics, extortion, burdens on candidates, and equality).

Citizens United has thus created an opportunity for reformers to realign the legal mechanisms of campaign finance reform with both the realities of a complex political system and the existing Supreme Court-imposed limitations on any attempts to choke off independent corporate spending.²⁸⁶ Recognizing the limited effectiveness of previous attempts to do so should help reformers take advantage of popular distaste with corporate political influence²⁸⁷ to create more effective tools for improving the electoral process.²⁸⁸

C. *Show Me the Money: A Proposal for Reform*

Any reform attempt should include a strengthened disclosure framework to promote informed voting decisions through prompt, relevant, and accessible information about each political message.²⁸⁹ Professor Kathleen Sullivan has argued that mandatory disclosure of political contributions is more effective in the age of instant mass-communication than when disclosure provisions were first enacted.²⁹⁰ In the wake of *Citizens United*, statutory reforms should extend mandatory disclosure to all independent corporate expenditures “in connection with” a federal election, not just express advocacy or “electioneering communications,”²⁹¹ and should improve the FEC’s online database to provide the public with expedient ways to discover relevant financial and ideological information about corporate spending on candidates.²⁹²

One goal should be to give viewers readily accessible information online about each particular ad’s financial and ideological support.²⁹³ Political advertisers spending more than a certain yearly threshold

²⁸⁶ See *supra* notes 272–285 and accompanying text.

²⁸⁷ See *ABC News Poll*, *supra* note 269.

²⁸⁸ See *infra* notes 289–314 and accompanying text.

²⁸⁹ See Sullivan, *supra* note 182, at 174; Sullivan, *supra* note 225, at 326. The Fair Elections Now Act does not currently contain such a proposal. See S. 1285, 110th Cong. § 501 (2007).

²⁹⁰ Sullivan, *supra* note 182, at 174; *supra* note 225, at 326.

²⁹¹ See 2 U.S.C. § 434(f)(1), (3) (2006); see also Democracy Is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. § 201 (2010) (proposing to revise the independent expenditure definition to mean express advocacy or its functional equivalent). For a more thorough exploration of the constitutionality of extending the coverage of disclosure rules beyond express advocacy, and a proposed standard for doing so, see Winik, *supra* note 245, at 651–54.

²⁹² The current disclosure rules mandate reporting of all “electioneering communications”; these reports are searchable on the FEC’s website. See § 434(f)(1); *Independent Expenditure*, FEC, <http://www.fec.gov/data/IndependentExpenditure.do?format=html> (last visited May 23, 2011).

²⁹³ See *Citizens United*, 130 S. Ct. at 916; Mayer, *supra* note 225, at 283.

amount in any medium should be required to embed in each message a visible or audible code allowing viewers to search online and learn who funded each message.²⁹⁴ For example, if a financial services firm buys an ad asserting that Senator Smith opposes tax breaks for the middle class, the end of the ad would contain a simple identifying code and a copy of the FEC's website.²⁹⁵ The curious viewer could then enter that code on the website and view the ad's funding sources.²⁹⁶ In addition, to address the potentially misleading effect of unions or corporations using shell advocacy organizations to produce campaign ads that hide the ad's true financial sources, the disclosure report should include a list of the top financial sources of each organization.²⁹⁷

Shifting gears from BCRA-type restrictions on corporate electioneering to improved voter access to information about political messaging would have several propitious consequences for future elections.²⁹⁸ For decades, courts and regulators have classified ads based on whether they expressly advocate for or against a candidate, placing both in the untenable position of making content-driven (and ultimately meaningless) distinctions.²⁹⁹ By subjecting all political advertisers spending more than a certain yearly threshold limit on independent expenditures—currently at ten thousand dollars³⁰⁰—to a new disclosure requirement, regulators and courts could avoid wading into waters the government traditionally may not attempt to navigate.³⁰¹ Moreover, disclosure-based rules may bring traditional campaign finance reform proponents and opponents together, as they serve the egalitarian goals of the former without offending the libertarian ideals of the latter.³⁰² To the extent that the Supreme Court has been inclined to recognize a

²⁹⁴ Cf. 2 U.S.C. § 434(f) (requiring disclosure of electioneering communications to FEC); *id.* § 441d(a)(2) (requiring disclaimer for ads by outside groups).

²⁹⁵ Cf. H.R. 5175 § 214(b) (requiring “stand by your ad” requirement that CEOs or other officers appear in ads to state personal approval of corporate-funded ads).

²⁹⁶ Cf. Mayer, *supra* note 225, at 283 & n.147 (arguing for a rule to prevent organizations from hiding their true financial sources through entity layering).

²⁹⁷ See *supra* note 231.

²⁹⁸ See *infra* notes 299–315 and accompanying text.

²⁹⁹ See, e.g., *Buckley*, 424 U.S. at 43–44; 11 C.F.R. pts. 100, 106, 109, 114 (2010) (FEC's amendment of regulations to reflect the *Buckley* and *MCFL* decisions and the express advocacy limitation).

³⁰⁰ 2 U.S.C. § 434(f)(1) (2006). For an argument why lower monetary thresholds for disclosure might not survive intermediate scrutiny, see E. Rebecca Gantt, Note, *Toward Recognition of a Monetary Threshold in Campaign Finance Disclosure Law*, 97 VA. L. REV. 385, 419–20 (2011).

³⁰¹ See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 95–96 (1972).

³⁰² See Sullivan, *supra* note 182, at 173–74.

First Amendment right to anonymous speech,³⁰³ the Court's ratification of BCRA's disclosure rules in *Citizens United* suggests that courts will continue upholding them absent a showing that they invite retaliation against corporate speakers.³⁰⁴ Voter information-centric disclosure also circumvents the concern that renewed attempts to constrict the flow of money into the political system post-*Citizens United* will just push more political money into the obscurity of a regulatory labyrinth.³⁰⁵ Notwithstanding Congress's attempt in BCRA to draw issue advocacy-funding PACs into the campaign finance system, third-party funders have been able to hide their involvement in political campaigns through anonymous donations.³⁰⁶ As long as *Citizens United* remains binding precedent, creative new legislative efforts to limit corporate money in elections, if they are not invalidated under strict scrutiny, risk sending more money into backdoor channels of influence.³⁰⁷

More generally, improved disclosure laws would advance many of the goals of pre-*Citizens United* restrictions on corporate spending.³⁰⁸ The knowledge that voters, reporters, and opponents could immediately learn who funded a particular ad would encourage politicians to avoid the appearance or reality of inappropriate relationships with large-scale political spenders.³⁰⁹ In addition, knowing who funded a particular ad would enable voters to credit or discount a particular message, thereby diminishing the risk that well-financed interests will effectively drown out other voices by flooding the airwaves.³¹⁰ Similarly,

³⁰³ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

³⁰⁴ See Sullivan, *supra* note 182, at 173–74; see also Winik, *supra* note 245, at 661–64 (arguing against a corporate right to anonymous speech and, more generally, that a broader mandate for disclosure and disclaimer laws passes constitutional scrutiny).

³⁰⁵ See Issacharoff & Karlan, *supra* note 227, at 1717.

³⁰⁶ See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 960–62 (2005). For a discussion of “stealth PACs” and third-party issue advocacy, see generally Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611 (2003).

³⁰⁷ See Issacharoff & Karlan, *supra* note 227, at 1717.

³⁰⁸ See Strauss, *supra* note 235, at 142–60.

³⁰⁹ See Teachout, *supra* note 88, at 391–94 (summarizing the “undue influence” concern among scholars and judges) (citing David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994)).

³¹⁰ See *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 268 (1986) (Rehnquist, C.J., concurring in part, dissenting in part) (“[I]t is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations or nonprofit corporations . . .”).

the potential of voter backlash to excessive spending or unfair advertising would mitigate the dangers of corporate capture of elections.³¹¹

Adapting disclosure laws to the age of instant mass-communication would also promote truth in advertising and help voters making informed choices when it matters most.³¹² Like juries, voters are the democratic system's fact-finders; as in trials, accurate and relevant information helps voters sort out issues of credibility and trustworthiness, as well as a candidate's likely priorities and policy preferences.³¹³ Giving voters the means and opportunity to assess political messages based in part on their financial and ideological sponsors would promote the First Amendment's goals of democratic self-governance, the ascertainment of truth, and self-autonomy.³¹⁴ In the same spirit of simplicity and transparency, perhaps it is also time to revisit the utility of the PAC designation itself.³¹⁵

CONCLUSION

Contrary to the claims of its most ardent critics and supporters, the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC* will neither poison nor particularly enhance American democracy. Although the decision denied the government's ability to establish regulatory impediments to unfettered corporate spending, the very assumption that the restrictions on independent corporate expenditures had actually succeeded before *Citizens United* is flawed. Campaign finance proponents should take the opportunity to marshal popular sentiment, as Elihu Root and Theodore Roosevelt did in the early twentieth century, to create a muscular new disclosure model fostering voter information and political accountability in the Internet age.

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³¹¹ Cf. Mayer, *supra* note 225, at 283–84 (discussing the hypothetical benefits of enhanced disclaimer rules in the A.T. Massey Coal Company saga involving the corrupt election of a West Virginia Supreme Court judge); Teachout, *supra* note 88, at 391–94 (discussing undue influence and the *Austin* rationale).

³¹² See Tobin, *supra* note 306, at 686.

³¹³ See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2499–2500 (2003).

³¹⁴ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785 (2004) (discussing traditional First Amendment values).

³¹⁵ Cf. Tobin, *supra* note 306, at 613–16.