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## THE CONSEQUENCES OF *CITIZENS UNITED*: WHAT DO THE LAWYERS SAY?

ANN SOUTHWORTH\*

### I. INTRODUCTION

This Essay considers lawyers' perspectives on the consequences of one of the most controversial Supreme Court decisions of our time—*Citizens United v. Federal Election Commission*,<sup>1</sup> a 5–4 decision overturning limits on corporate and union expenditures in federal elections. Drawing on confidential interviews with thirty-one lawyers who participated in the case as counsel for parties and amici,<sup>2</sup> it explores what the lawyers say about how the decision has affected the political process.

Why should we care about the views of these lawyers? As evidence of how the Supreme Court's ruling in *Citizens United* actually has affected the political process, there are good reasons to be cautious. The lawyers may be deeply committed to arguments they made in briefs and unwilling to concede valid counterarguments. Their commentary may also reflect their ongoing efforts to influence the debate. On the other hand, many of these lawyers are close observers of how *Citizens United* has played out on the ground, and their reflections offer a useful complement to opinions expressed by scholars, politicians, advocacy groups, and ordinary citizens.<sup>3</sup> The fact that lawyers on both sides largely agree about the short-term consequences of

\* Professor and Founding Faculty Member, University of California, Irvine School of Law. I am indebted to the lawyers who allowed me to interview them for this research and sacrificed their valuable time to help me understand their work and perspectives. I am also grateful to Rick Hasen and Bryant Garth, who commented on an earlier draft.

1. 558 U.S. 310 (2010).

2. I have thus far conducted fifty-two interviews with lawyers who have been active on campaign finance regulatory issues since 2006, when John Roberts became Chief Justice. This Essay draws primarily from interviews with the thirty-one lawyers who filed briefs on behalf of parties or amici in *Citizens United*, 558 U.S. 310 (2010). Of those thirty-one lawyers, fifteen filed briefs on the side of the Federal Election Commission, and sixteen filed briefs on the side of Citizens United.

3. For some data on those other perspectives, see Albert W. Alschuler et al., *Why Limits on Contributions to Super PACS Should Survive* Citizens United, (Univ. of Chi. Law Sch., Pub. Law & Legal Theory Working Papers Series, Paper No. 626, 2017), <https://ssrn.com/abstract=3015462> [<https://perma.cc/ZG6Z-YDRW>].

*Citizens United* also provides some assurance about the reliability of their views on that topic.

These lawyers' perspectives about the consequences of *Citizens United* may also be worth considering for reasons having nothing to do with their accuracy or truthfulness. Lawyers' ideas and rhetoric play an important part in constitutional interpretation and constitutional change in the United States.<sup>4</sup> Even if Supreme Court Justices are the ultimate arbiters of constitutional questions that come before the Court, they nevertheless rely on lawyers to supply arguments to explain, support, and defend their decisions.<sup>5</sup> Lawyers are also part of the "audience" for judicial decision-making—those whose approval the Justices care about and who hold them accountable.<sup>6</sup> Lawyers' selection of frames sometimes influence judicial outcomes<sup>7</sup> and shape perceptions in other important arenas of contest over constitutional interpretation, including the media and popular opinion.<sup>8</sup> Their commentary may also reveal something about interests potentially affected and about popular attitudes and legal consciousness, since lawyers serve as intermediaries, translating laypersons' claims and perspectives into legal language<sup>9</sup> and interpreting the Court's opinions for the public.<sup>10</sup> As Jack Balkin has suggested, lawyers are influenced by the "larger public culture—and subcultures—in which [they] live," and they also shape those subcultures.<sup>11</sup> In

4. See generally JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 86–91 (2011).

5. See AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 12 (2015); MARTIN SHAPIRO & ALEC SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* (2002).

6. See generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *Geo. L.J.* 1515 (2010).

7. See LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 307 (1992); GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009); Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 *AM. J. POL. SCI.* 617 (2010).

8. See generally Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 *MICH. L. REV.* 877 (2013) (reviewing BALKIN, *supra* note 4) [hereinafter NeJaime, *Constitutional Change*]; Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 *UCLA L. REV. DISCOURSE* 184 (2013); Mary Ziegler, *Grassroots Originalism: Rethinking the Politics of Judicial Philosophy*, 51 *U. LOUISVILLE L. REV.* 201 (2013); Cf. DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 225 (2016) (arguing that "framing and messaging are as essential to a constitutional campaign as formal legal argument").

9. NeJaime, *Constitutional Change*, *supra* note 8, at 895; BALKIN, *supra* note 4, at 238.

10. Cf. Jane S. Schacter, *Obergefell's Audiences*, 77 *OHIO ST. L.J.* 1011, 1028–34 (2016) (noting the easy availability of Supreme Court opinions through social media but observing that most readers of the opinions are lawyers and that the public's response is likely shaped by how those lawyers and public officials, movement leaders, public intellectuals, and others respond).

11. BALKIN, *supra* note 4, at 16 ("Lawyers . . . soak up conceptions of what is just and reasonable from their society, and from the subcultures they inhabit, as a tree soaks up water through its roots. Conversely, they also influence non-professionals through their work in shaping official law."); cf. ROBERT

short, lawyers' commentary on the consequences of *Citizens United* provides a window into how they seek to influence constitutional politics through their work, and it may also reveal something about how their clients and the constituencies they claim to serve understand the issues, even if the direction of influence is unclear.

This Essay explores a polarized world of advocacy around campaign finance regulation.<sup>12</sup> Part II briefly summarizes the facts and holding of *Citizens United* and the deeply divided perspectives of the Justices on what was at stake in the case. Part III considers the views of lawyers who sided with the Federal Election Commission, and Part IV describes the perspectives of lawyers on the challengers' side. Part V highlights the primary points of consensus and discord, showing that the lawyers generally agree about the direct consequences of *Citizens United* but strongly disagree about the broader implications and what lessons the public should draw. It explores the competing frames that lawyers bring to campaign finance regulation and fundamental differences in their attitudes about where the greatest threats to representative democracy lie. As one lawyer noted, “[t]here’s this amazing dichotomy between [the] two worldviews.”<sup>13</sup>

I use the term “defenders” throughout this Essay to describe the lawyers who championed the legal restrictions invalidated in *Citizens United* and “challengers” to refer to lawyers who urged the Court to strike down these limitations on First Amendment grounds.

## II. THE *CITIZENS UNITED* DECISION

*Citizens United v. Federal Election Commission* involved a conservative political action committee’s plan to air on cable television a movie that was highly critical of Democratic presidential candidate Hillary Clinton. The group had already distributed the film on DVD and in theaters, but it wanted

W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 277–78 (2017) (noting that “mandarin materials” produced by lawyers and judges “are among the richest artifacts of a society’s legal consciousness”; that there are likely to be “trickle-down effects” from elites to other elements of society, as well as “refracted trickle-up effects” to lawyers and judges from “a consciousness whose primary producers are to be found all over the society”).

12. This Essay does not attempt to capture the lawyers’ views about the process that led to the ruling in *Citizens United*, the breadth of the holding, the quality of the Court’s analysis, and its use of precedent. Nor does it consider their perspectives on other major campaign finance decisions of the Roberts Court and the jurisprudential legacy on which they build. I will address those questions and others in a forthcoming book on the lawyers, organizations and patrons on both sides of campaign finance litigation in the Roberts Court and their roles in generating and promoting competing understandings of the relationship between the First Amendment and money in politics.

13. Confidential Interview 14.

to use treasury funds to make it available as a free download to cable subscribers. Section 203 of the Bipartisan Campaign Reform Act<sup>14</sup> (BCRA, also known as McCain–Feingold) prohibited corporations and unions from using money from their general treasuries to fund “electioneering communications,” defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within sixty days before a general election or thirty days before a primary election.<sup>15</sup> The United States District Court for the District of Columbia ruled that section 203 prevented Citizens United from using treasury funds to distribute the movie within thirty days of the 2008 Democratic primaries. Citizens United still could have paid for the ads and distribution through its political action committee, and it could have used its general treasury funds for this purpose if it had declined to take money from for-profit corporations.

The Supreme Court heard the case in March 2009 but did not decide the case that term. Rather, in a highly unusual move, it called for supplemental briefing and a second oral argument early in the following term on whether the Court should find section 203 unconstitutional and upset two precedents. In January 2010, the Supreme Court invalidated section 203 and held that corporations—and, by extension, labor unions—have a First Amendment right to spend unlimited amounts independently to support or oppose candidates for public office. It found that corporations should not “be treated differently under the First Amendment simply because [they] are not ‘natural persons.’”<sup>16</sup> The Court further determined that campaign expenditures could not be regulated for the purpose of limiting access and influence; the only basis for restricting corporate expenditure was to prevent quid pro quo corruption—a direct exchange of money for political favors, and the Court found that the government could not prove that independent expenditures could lead to such corruption or the appearance of corruption. The decision overruled *Austin v. Michigan Chamber of Commerce*,<sup>17</sup> which upheld a Michigan statute limiting the amount that corporations could spend to support or oppose candidates in elections for state office. It also partially overruled *McConnell v. Federal Election Commission*,<sup>18</sup> which upheld the very provision of the BCRA that the Court found unconstitutional in *Citizens United*. Justice Kennedy wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

14. 2 U.S.C. § 441b (2002).

15. 2 U.S.C. § 434(f)(3)(A)(i).

16. 558 U.S. 310, 343 (2010).

17. 494 U.S. 652 (1990).

18. 540 U.S. 93 (2003).

Justice Stevens wrote a passionate dissent, joined by Justices Ginsburg, Breyer, and Sotomayor. Stevens's dissenting opinion criticized the majority for overturning *Austin* and parts of *McConnell* when it could instead have ruled in Citizens United's favor on narrower grounds.<sup>19</sup> He rejected the majority's claim that corporations hold the same right to spend money in elections as natural persons.<sup>20</sup> He also took strong issue with the majority's assertion that the only justification for regulating campaign expenditures is to avoid quid pro quo corruption.<sup>21</sup> He asserted that this "crabbed view of corruption"<sup>22</sup> "disregards our constitutional history and the fundamental demands of a democratic society."<sup>23</sup>

The equation of election spending with speech and the corruption rationale for evaluating the constitutionality of campaign finance regulations date back to the Supreme Court's 1976 opinion in *Buckley v. Valeo*.<sup>24</sup> *Buckley* upheld contribution limits and disclosure requirements imposed by the Federal Election Campaign Act of 1971, as amended in 1974 (FECA), but struck down limits on campaign spending. The Court found that political contributions and expenditures implicated core political speech<sup>25</sup> and that

19. The dissenters argued that the Court could have decided that a feature-length film distributed through video-on-demand to willing viewers does not qualify as an "electioneering communication" under § 203 of BCRA, or that Citizens United was entitled to a media exemption to the spending rules, or that § 203 was unconstitutional as applied to Citizens United, a nonprofit corporation that accepted only de minimis contributions from for-profit corporations. *Citizens United*, 558 U.S. at 405–08 (Stevens, J., concurring in part and dissenting in part).

20. The dissent took strong issue with the Court's critique of identity-based distinctions:

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. . . . The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

*Id.* at 394.

21. *Id.* at 313.

22. *Id.* at 447 (quoting *McConnell*, 540 U.S. at 152).

23. *Id.*

24. 424 U.S. 1 (1976).

25. Here is some of the key language from *Buckley* on the relationship between speech and election spending:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. . . .

campaign finance regulations were consistent with the First Amendment's free speech and association guarantees only if they could be justified in terms of the government's interest in preventing "corruption" or "the appearance of corruption."<sup>26</sup> Without precisely defining those terms,<sup>27</sup> it found that the interest in preventing the reality and appearance of corruption was a constitutionally sufficient justification for the contribution limit because contributions could corrupt politicians, but that it did not justify the limitations on independent expenditures, which could not.<sup>28</sup> The *Buckley* Court rejected alternative rationales for campaign spending limits based in arguments about the government's interest in promoting political equality.<sup>29</sup>

In *Citizens United*, the majority and dissent painted starkly different pictures of the competing stakes. The majority equated campaign spending with political speech and asserted that protecting such speech, from whatever source, is a foundational principle enshrined in the First Amendment. Justice Kennedy's opinion expressed outrage about section 203's purposes: "[U]nder our law and our tradition it seems stranger than fiction for our Government to make . . . political speech a crime. Yet this is the statute's purpose and design."<sup>30</sup> The majority invoked the word "speech" and its variations 270 times, twice as often as the dissent, and it used the word "ban" forty-two times to characterize the statute's requirement that any corporate expenditures on electioneering must come from PACs rather than general treasury funds.

Justice Stevens's dissent took strong issue with the majority's finding that corporations must be treated identically to natural persons in the political sphere.<sup>31</sup> Stevens wrote that the Court's ruling was "profoundly misguided" and "threatens to undermine the integrity of elected institutions across the

the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

*Id.* at 19–20.

In his partial dissent, Justice Byron White rejected the majority's equation of political spending and speech: "[T]he argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much." *Id.* at 262 (White, J., concurring in part and dissenting in part).

26. *Id.* at 26–27 (majority opinion).

27. *Id.* at 27–28 ("[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.").

28. *Id.* at 26, 45.

29. *Id.* at 48–49 (concluding that the idea that the 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").

30. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (majority opinion).

31. *Id.* at 394 (Stevens, J., concurring in part and dissenting in part).

Nation.”<sup>32</sup> His opinion also complained about the majority’s emphasis on the specter of government suppression of dissent: “Pervading the Court’s analysis is the ominous image of a ‘categorical ba[n]’ on corporate speech. Indeed, the majority invokes the specter of a ‘ban’ on nearly every page of its opinion. This characterization is highly misleading . . . .”<sup>33</sup>

In his book on campaign finance and the Constitution, Robert Post characterized the strong disagreements between the majority and dissent in *Citizens United* as a “horrifying disjunction.”<sup>34</sup> He observed that the two sides “seemed to inhabit entirely different constitutional universes,” reflecting “a country divided, not united.”<sup>35</sup> My research suggests that lawyers active on campaign finance issues, like the Justices they seek to persuade, inhabit different constitutional universes. As they battle to shape the law and public policy through the courts, legislatures, and agencies, and as they compete to shape public opinion through the media, these lawyers project radically different visions of the First Amendment and its relationship to money in politics.

### III. THE DEFENDERS’ VIEWS

The fifteen defenders whose views I summarize here were overwhelmingly, though not exclusively, Democrats who attended elite law schools and worked in major metropolitan areas, mostly in D.C. and the Northeast. In

32. *Id.* at 394, 396.

33. *Id.* at 415 (alteration in original) (citation omitted).

34. ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 4 (2014).

35. *Id.* The ideological divide among the Justices on campaign finance regulation is not new. Writing about *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), Robert Mutch noted “the ‘unbridgeable ideological gulf’ between the majority and dissenting opinions.” ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 160 (2014). In 2007, Lillian BeVier, a strong opponent of campaign finance regulation, wrote:

There is little hope for reconciliation of the competing views of the current majority and the dissenters. Their disagreement is far more fundamental than a simple dispute about doctrine. . . . The problem . . . is that the justices do not reason from the same premises, either as a matter of First Amendment principle or as a matter of the empirical assumptions that drive their respective analyses. They assess the worth of political freedom differently. They entertain wildly divergent assessments of the need for legislation to “promote democracy.” And they hold entirely disparate views about either the possibility that legislation can actually effectuate genuine improvement or the reliability of the elected officeholders who claim to have acted as guardians of the interests of those who seek to have them voted out of office. . . .

. . . Compromise on such matters is not in the cards.

Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life*, 2007 CATO SUP. CT. REV. 77, 112–13.



these respects, the defenders' characteristics reflect those of the larger category of all lawyers who filed briefs on the FEC's side in the case.<sup>36</sup>

Not all of the defenders were particularly troubled that the plaintiff, Citizens United, prevailed; several noted that they would not have been shocked or particularly concerned if the Court had ruled in Citizens United's favor on narrower grounds. But they all disapproved of the holding's breadth, the Court's finding that commercial corporations have the same First Amendment rights as ordinary individuals to spend on elections, and the opinion's narrow definition of corruption.

Defenders decried the Supreme Court's "activism" in finding section 203 of the BCRA unconstitutional and overruling *Austin* and parts of *McConnell*. One defender grumbled that "[t]he Supreme Court majority won the case that *they brought* . . . and the process of this case was awful. We were not allowed to build any kind of record."<sup>37</sup> Another said of the Court's dismantling of key features of existing campaign finance law in *Citizens United*: "They did it, in my view, in a completely sort of lawless way, untethered to the precedent and untethered to the facts."<sup>38</sup>

Defenders also uniformly rejected the idea that commercial corporations should hold the same rights to political expression as individual persons. This comment was typical:

I think that government can appropriately . . . limit participation in politics to human beings, which would include organizations of human beings that I don't think needs to include entities that are created for economic purposes to amass wealth as participants in a market economy. I don't think they need to be privileged with the ability to deploy that as if they were flesh and blood people, or even coalitions or sort of membership groups of flesh and blood people. I think that the idea that a corporation that is organized to be in business is for First Amendment purposes indistinguishable from a human being is not correct. And I think one area where it's legitimate to treat them differently is in political participation.<sup>39</sup>

Another lawyer reached the same conclusion but more directly anchored his argument in the Constitution's text and history, which, he said, require us to recognize "this fundamental divide between living, breathing persons who the Declaration tells us were created and given unalienable human rights,

36. See Ann Southworth, *Elements of the Support Structure for Campaign Finance Litigation in the Roberts Court*, LAW & SOC. INQ. 1, 18–20 (2017) (finding that eighty-one percent of the fifty-four lawyers who filed party or amicus briefs on the FEC's side in *Citizens United* worked in D.C. or the Northeast, and eighty-seven percent attended law schools ranked in the top twenty by *U.S. News & World Report*).

37. Confidential Interview 18.

38. Confidential Interview 22.

39. Confidential Interview 34.

and corporations who were created to power the economy but with a recognition that they would be subject to regulation to ensure that they didn't abuse their special privileges."<sup>40</sup>

Regarding the definition of corruption used in *Citizens United*, lawyers complained about both process and substance. One strongly denied that the definition followed from the cited precedents: "[A]ll the cases between *Buckley* and *Citizens United* said the same thing. They talked about undue influence and access. They didn't just talk about quid pro quo corruption. It's just a lie. But once you write it once with five votes, there it is, it's the law of the land."<sup>41</sup> Another complained that "the Roberts Court . . . has so narrowed and eviscerated the meaning of corruption that it almost no longer provides any platform to stand on in terms of justifying regulation of money in politics. And that narrow corruption frame, in my view, doesn't speak to the deepest values that we need to talk about in defending the regulation of money in politics."<sup>42</sup> Another defender observed that

[t]he corruption rationale, the definition of corruption, prior to *Citizens United* was bad enough and it's a cramped framework but, at least the courts had managed to bend and stretch it to mean so many different things. But now that it's limited to quid pro quo corruption, it's absurdly narrow.<sup>43</sup>

One lawyer warned that "we're really knocking on the door of just turning [the definition] into bribery. I think that's a harmful development."<sup>44</sup>

The defenders generally conceded that *Citizens United* has not unleashed a wave of massive for-profit corporate spending in elections, as some of the decision's critics had predicted at the time of the decision.<sup>45</sup> One defender acknowledged that the consequences have been less momentous than expected:

40. Confidential Interview 7.

41. Confidential Interview 22.

42. Confidential Interview 23.

43. Confidential Interview 47.

44. Confidential Interview 4.

45. See, e.g., Editorial, *The Court's Blow to Democracy*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/opinion/22fri1.html> [<http://perma.cc/MY99-SW4U>] ("With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century. Disingenuously waving the flag of the First Amendment, the court's conservative majority has paved the way for corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding."); Editorial, *Corporate Money in Politics*, WASH. POST (May 9, 2010), [http://www.washingtonpost.com/wp-dyn/content/article/2010/05/08/AR2010050803134\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/05/08/AR2010050803134_pf.html) [<https://perma.cc/6FQM-C4WB>] ("The Supreme Court's ruling in the *Citizens United* campaign finance case opened a dangerous pathway for corporations to spend money in direct support of—or in opposition to—candidates for federal office.").

Are we down to the political process that was essentially dominated by unlimited corporate spending? That's not actually what happened. You're not seeing . . . . And I'm not saying it never will happen. . . . But you're not seeing Mobil Oil or JP Morgan or Pepsi Cola or whatever suddenly pumping vast amounts of money into independent expenditures to influence the outcome of elections. . . . So I think, in that sense, it may be, in the short term at least, not knowing what's going to happen next, less significant than people thought.<sup>46</sup>

Another defender asserted that while “you don't see business corporations doing a tremendous amount of political spending in their own names” because they do not perceive that it's an effective strategy, “there's still a direct effect of non-profit corporations that receive large amounts of corporate funding, engaging now directly in political speech that would not have been permissible prior to Citizen's United.”<sup>47</sup> He noted that one of the Roberts Court's previous rulings, *Federal Election Commission v. Wisconsin Right to Life, Inc.*,<sup>48</sup> had already found that BCRA's limitations on corporate electioneering were unconstitutional as applied to issue advocacy—that they were permissible only as to “express advocacy or its functional equivalent.”<sup>49</sup> But *Citizens United* eliminated the need to distinguish between issue and express advocacy: “So the Chamber of Commerce now no longer has to worry about whether its advocacy crosses the line. I mean, [*Wisconsin Right to Life*] had already allowed them to engage in non-express advocacy. Now they don't even have to worry.”<sup>50</sup>

Some defenders emphasized that it was never their primary concern that business corporations would pour money directly into election campaigns. One said:

We weren't that concerned that Chevron and Exxon and McDonald's and Wendy's and Pepsi and Coke were going to jump into elections and spend a bunch of money . . . . We didn't think that would happen because generally businesses don't want their names explicitly associated with partisan politics because it alienates huge sections of their consumer base.<sup>51</sup>

46. Confidential Interview 12.

47. Confidential Interview 34.

48. 551 U.S. 449 (2007).

49. *Id.* at 465.

50. Confidential Interview 34.

51. Confidential Interview 10. For an example of consumer backlash triggered by a business's political contribution, consider the response to Target's contribution to a business group that supported Republican Tom Emmer's campaign for Minnesota governor. Emmer was a prominent opponent of same-sex marriage. See Josh Duboff, *Target Issues Apology After Donation to Anti-Gay, Conservative Republican*, N.Y. MAG. (Aug. 5, 2010, 9:30 PM), [http://nymag.com/daily/intelligencer/2010/08/target\\_issues\\_apology\\_after\\_do.html](http://nymag.com/daily/intelligencer/2010/08/target_issues_apology_after_do.html) [<https://perma.cc/LZP6-RVHE>].

Rather, defenders worried that corporations and their owners would channel corporate money into nonprofit groups that do not disclose their donors: “What we were concerned about is that 501(c)(4) corporations like the plaintiffs, Citizens United, would be free to serve as conduits for business community money and evade disclosure, and that’s exactly what has unfolded.”<sup>52</sup>

Some defenders also predicted that for-profit corporations would become increasingly willing to devote substantial amounts of money to influence elections in the wake of *Citizens United*. One said that the individual business owners, or business owners coordinating through PACs, now handle political spending that serves their business interests: “Corporations themselves, I don’t think, have poured a great deal of money in. But then they don’t have to. . . It’s the rich guys that own them.”<sup>53</sup> But this lawyer asserted that corporations would get more directly into the game when they concluded that the strategy would benefit them: “There’s a slight inhibition now, and the inhibition now is because General Motors doesn’t want to sell Democratic cars and Ford doesn’t want to sell Republican cars. . . But there will come settings in which the stakes are such that they won’t hold back.”<sup>54</sup>

Several defenders claimed that one of the worst consequences of *Citizens United* is an indirect one—the large amount of money now contributed to “independent-expenditure only committees,” more commonly known as Super PACs. In *SpeechNow.org v. Federal Election Commission*,<sup>55</sup> the D.C. Circuit Court of Appeals held that limits on contributions to Super PACs are unconstitutional; it struck down a federal statute that limited such contributions to \$5000 per year.<sup>56</sup> The court based its reasoning on language in *Citizens United* indicating that corporations could make unlimited independent expenditures because independent expenditures are not corrupting.<sup>57</sup> *SpeechNow* held that “[i]n light of the Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of . . . corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”<sup>58</sup> Super PACs can now raise unlimited funds from individuals, corporations, unions, nonprofits, and other sources.

52. Confidential Interview 10.

53. Confidential Interview 28.

54. *Id.*

55. 599 F.3d 686 (D.C. Cir. 2010) (en banc).

56. 52 U.S.C. § 30116(a)(1)(C) (2016).

57. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) (“[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption.”).

58. 599 F.3d at 694.

In the years since *SpeechNow*, Super PACs have flourished and multiplied. Super PAC spending increased from \$609 million in the 2012 election cycle to \$1.06 billion in the 2016 cycle, and the number of Super PACs almost doubled in those years from 1265 to 2392.<sup>59</sup> In the 2016 election, liberal Super PACs spent \$440 million, and conservative Super PACs spent \$648.2 million.<sup>60</sup> Sixty-eight percent of the \$1.6 billion raised by Super PACs in the 2016 federal election cycle came from 100 individuals and groups.<sup>61</sup> Super PAC spending in the 2016 election cycle constituted sixty-three percent of all reported spending on federal campaigns.<sup>62</sup>

The defenders generally saw the rise of Super PACs as a momentous and highly problematic development. One said that “[t]he Super PAC . . . has really transformed the political landscape . . . . You just have massive infusions of money from sources that are able to give in the hundreds of thousands and millions of dollars, concentrated in entities that then expend it in unlimited amounts.”<sup>63</sup> Another asserted that Super PACs have facilitated “the vast increase in the amount of money from the one-tenth of the one percent.”<sup>64</sup> The defenders acknowledged that most of the money contributed thus far to Super PACs has come not from commercial corporations but from wealthy individuals, who have long been legally permitted to make unlimited independent expenditures in connection with elections under the *Buckley* framework.<sup>65</sup> One stressed that “that’s the thing people don’t understand, that the money coming from individuals, the big wealthy donors, could come before *Citizens United* and can come now.”<sup>66</sup> Another lawyer observed that “[w]hat you are seeing is a lot of money that’s attributed to *Citizens United* but it’s being spent by very wealthy people, typically individuals—individuals who before this case could have gone ahead and spent that money directly anyway.”<sup>67</sup> But prior to *SpeechNow*, wealthy individuals who wanted

59. *Outside Spending*, CTR. FOR RESPONSIVE POLITICS, [https://www.opensecrets.org/outsidespending/fes\\_summ.php?cycle=2016](https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2016) [<https://perma.cc/WN24-392Z>].

60. Emily Dalgo & Ashley Balcerzak, *Seven Years Later: Blurred Boundaries, More Money*, CTR. FOR RESPONSIVE POLITICS: OPENSECRETS BLOG (Jan. 19, 2017), <https://www.opensecrets.org/news/2017/01/citizens-united-7-years-later/> [<https://perma.cc/7KHZ-T935>].

61. *See 2016 Super PACs: How Many Donors Give?*, CTR. FOR RESPONSIVE POLITICS, [https://www.opensecrets.org/outsidespending/donor\\_stats.php?cycle=2016&type=B](https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=B) [<https://perma.cc/A7RR-QDKW>].

62. *Outside Spending*, *supra* note 59.

63. Confidential Interview 34.

64. Confidential Interview 28.

65. The amounts involved are large: in the 2016 election cycle, 135 donors gave more than \$1 million to outside groups, including Super PACs, “dark money” groups, and other types of outside groups. Dalgo & Balcerzak, *supra* note 60.

66. Confidential Interview 11.

67. Confidential Interview 12.

to spend huge sums to influence elections would have been required to take personal responsibility for the advertisements that the individuals placed (“I am Bob Billionaire, and I approve the message.”)<sup>68</sup>

Some defenders noted that the consequences of *Citizens United* as to both corporations and wealthy individuals have been more “psychological” than legal. One explained that “[t]he game that you played” before *Citizens United* “was that companies stayed away from express advocacy” or “they would fund organizations and you would get these . . . letters of assurance that the organization would not do anything that would require them to disclose the donors. . . . It’s a concern to this day.” He added, “but I’ve noticed a psychological difference, which is prior to *Citizens United*, had they ended up funding express advocacy, they were doing something illegal. After *Citizens United* it was no longer illegal; they’d just be embarrassed.”<sup>69</sup> Another defender described a similar psychological phenomenon with respect to wealthy individuals:

I think the *Citizens United* opinion unlocked any inhibitions that very wealthy people had to work out mechanisms to pour money into the campaign. The Super PACs and the vast increase in the amount of money from the one-tenth of the one percent, in part, I think, is attributable to the Supreme Court—the powerful rhetoric in the Supreme Court.<sup>70</sup>

Defenders scorned several factual premises of the majority opinion. In particular, they found highly implausible its assumption that, because expenditures are legally required to be independent of campaigns, they actually are independent. One said that the Court seemed to “have no idea that the FEC has gutted all the coordination rules . . . plus the fact the FEC doesn’t enforce the laws anyway.”<sup>71</sup> Some also criticized Justice Kennedy’s assertion that expenditures would be transparent because they would be disclosed.<sup>72</sup> One lawyer rejected both of those assumptions:

The Kennedy opinion basically operates as follows. The First Amendment protects spending by corporations and that does not pose any threat of corruption or the appearance of corruption because of two salient facts. One, that by definition the spending is totally independent of a campaign so there is no opportunity for corruption, and two, because the spending will

68. See Alschuler et al., *supra* note 3, at 27–28.

69. Confidential Interview 11.

70. Confidential Interview 28.

71. Confidential Interview 18.

72. *Citizens United v. FEC*, 558 U.S. 310, 370–71 (2010) (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages”).

be entirely transparent and subject to complete disclosure . . . . His whole worldview is premised on these twin assumptions about the spending not being coordinated and the spending being subject to disclosure. Neither of those premises are correct in the real world. . . . *Citizens United* leeches pretty quickly from just being a case about corporate spending to also kind of a change in the law relating to contributions to political committees that engage only in independent spending—Super PACs . . . Super PACs . . . quickly mutated into this kind of sub-species of individual candidate Super PACs which are as a practical matter functioning basically just as a soft money arm of the campaign. So, if you look at the relationship between a candidate . . . and that candidate’s individual candidate Super PAC, nobody in their right mind would describe that as an independent operation that poses no threat of corruption when a donor gives a \$10 million contribution to the Super PAC and essentially there’s no wall between the donor, the Super PAC, and the candidate. It’s all one integrated operation. So that premise of the Kennedy opinion as it has been implemented through the growth of individual candidate Super PACs . . . is just ludicrous.<sup>73</sup>

Another lawyer made a similar argument about what the lawyer viewed as the majority’s failure to anticipate the likely ramifications:

The Court didn’t know what the hell they were doing. . . . Now they knew what they were doing in saying “[w]e don’t like restrictions, period.” But they didn’t know what the implications were. They didn’t know they were going to wind up with Super PACs and unlimited contributions flooding the system and nonprofit groups spending hundreds of millions of dollars in secret contributions.<sup>74</sup>

A third defender stated that “the Roberts Court is very unrealistic about politics, intentionally unrealistic. I don’t think they’re naïve; I think they’re just ignoring what’s going on.”<sup>75</sup>

Many of the defenders asserted that the combination of the narrowed definition of corruption adopted in *Citizens United*, the Court’s general skepticism about campaign finance regulation, and the FEC’s lack of enforcement of existing regulations, has resulted in an almost complete breakdown of campaign finance regulation. These responses were typical:

[T]he experiment we’re running today, which is largely result of *Citizens United* and the kind of implementation of the vision of the five conservative justices, is an experiment in basically a completely deregulated campaign finance system. There are still rules on the books. There are still contribution limits on the books. There are still disclosure rules on the books, which the Roberts Court purports to uphold and support. . . . But,

73. Confidential Interview 6.

74. Confidential Interview 18.

75. Confidential Interview 11.

as a practical matter in the real world, if you look at the 2016 campaign, what you see is a world in which there are no contribution limits. And as a practical matter, it's so easy for individuals and candidates to get around disclosure rules that anybody who's interested in avoiding the disclosure rules can do so. So as a practical matter, we're living in a world without contribution limits and disclosure rules.<sup>76</sup>

[*Citizens United*] has led all these other things to start to tumble down. . . . [I]t was kind of a signal to the world and to the lower courts to not take these laws very seriously and to start thinking about ways to get rid of them. A lot of what you've seen is people just ignoring them, in terms of setting up these Super PACs and using them basically as campaign arms. . . . Because nobody thinks any of these laws are constitutional anymore and so they don't pay [attention to them] . . . . And the FEC has gotten itself into a position where it doesn't enforce anything because the Republicans have gotten into the position of absolutism on these laws, all of it encouraged indirectly by *Citizens United*. So they don't think any of these laws should be enforced and then they won't let any of these laws be enforced, and so the whole thing has kind of unraveled. And it's going to continue to unravel, I think.<sup>77</sup>

Another lawyer said that *Citizens United* “open[ed] the door for the destruction of the campaign finance regime that the Court had upheld for decades.”<sup>78</sup>

The larger consequences of the deregulation of campaign finance, defenders say, is increased inequality in the political process and a grave threat to the future of American democracy. Their comments on the consequences of *Citizens United* are filled with references to the need to protect the integrity of elections and political equality against the outsized influence of wealthy individuals and commercial corporations. Their words evoke images of physical power, intimidation, coercion, and control by those who would harm vulnerable democratic processes:

I think this is a world that's largely dominated by the smallest segment of the richest people in the country who have the ability to stand up a presidential candidate or congressional candidate, and just on the power of money take that candidate very, very far down the road, and certainly bend candidates to their will in terms of policy positions and positions on issues. You look at the spectacle of candidates. . . the Republican candidates, traipsing to Las Vegas and kind of bending the knee to Sheldon Adelson, and you have to ask questions about whether this is really the way our government should work, or politics should work, or democracy should work. And whether the kinds of extreme, increasingly extreme forms of inequality that characterize society generally, and characterize sort of the

76. Confidential Interview 6.

77. Confidential Interview 21.

78. Confidential Interview 18.



economic sphere, should leech over to such an extreme extent into the political sphere.<sup>79</sup>

It's hard to doubt all the ways in which *Citizens United* has kind of undermined our democracy by allowing corporations and the wealthy to spend huge amounts of money to help elect candidates to do their bidding.<sup>80</sup>

The ramifications of [*Citizens United*] are huge. . . . You have millionaires and billionaires playing a dominant role . . . with unlimited contributions to so-called individual candidate Super PACs that are . . . not independent; they're arms of the campaigns. We've had hundreds of millions of dollars of secret money coming into the campaigns. We have corporate money, mostly in the form of money spent by incorporated nonprofits, but that was prohibited prior to this decision. . . . [*Citizens United*] basically says that democracy has no capacity to protect itself from corruption when you're dealing with the right of people to spend money.<sup>81</sup>

In *McConnell*, the Court upheld a system that, while not perfect, went a long way towards limiting the ability of wealthy individuals and corporations to essentially control the process. And in *Citizens United*, . . . the Court completely undermined that whole system of regulating money in politics.<sup>82</sup>

The Roberts Court [is] giving us the Anatole France First Amendment, which means that the First Amendment in its majestic impartiality allows gigantic corporations and ordinary citizens alike to spend as much as they want electing their preferred candidates to office. And that's the vision of equality and of the First Amendment that we're left with. It is a completely sterile and formalistic view of rights and how they play out in our democracy, and it leaves people who don't have money, don't have immense aggregations of wealth that they can spend on politics . . . with less of a voice, and it leaves us with a system where . . . the strength of your voice depends on the size of your wallet. That's not what democracy is supposed to look like.<sup>83</sup>

Pick up any newspaper on any day this year. . . . And you'll see an article about the problems that *Citizens United* has [along with other campaign finance decisions by the Roberts Court] caused. My own view is that money in politics, big money in big politics, creates an inherent, inescapable risk of corruption, properly defined as including influence and access, a definition the Court rejected or abandoned. And I think it's important because I think the net result nationally is that there's less speech going on in the country as voters get turned off, and potential voters get turned off and saddened and disgusted by the apparent fact that the candidates,

79. Confidential Interview 6.

80. Confidential Interview 7.

81. Confidential Interview 18.

82. Confidential Interview 22.

83. Confidential Interview 23.

virtually all of them, are dependent on a small handful of very wealthy people to fund their campaign and to help them develop, or push them into the positions they take. I think that has potentially dire consequences for participatory democracy.<sup>84</sup>

The defenders generally agreed that *Citizens United* has been highly consequential in terms of the public's reaction. One called it "an interesting case because of the resonance in popular culture of the decision."<sup>85</sup> Another called the political effect of the decision "enormous" because "it's become a talking point in an age of inequality":

It is a rallying cry. So to the extent that people have criticisms of the Roberts [C]ourt or to the bias of our governing institutions at a time where you have this massive disparity in wealth and growing disparity and diminishing middle class, both purchasing power and prospects, you have *Citizens United* as an example of a country that has built-in protections for privilege. And this is the Supreme Court's contribution. Congress makes its own contribution, right? Wall Street makes its contribution. But this is the Supreme Court's contribution to advancing the political position of the well-to-do at a time when the relative position of the well-to-do to the rest of the country and the tilt of public policy toward the well-to-do is such a central topic in our political debate.<sup>86</sup>

Another asserted that *Citizens United* has led people of diverse political perspectives to take notice of an issue they had not previously considered:

People have heard of *Citizens United* and they do not like it. I think that there are large numbers of people from across the political spectrum who are becoming aware that we have a political system that is not functioning effectively. And they may have different views about what it would mean for it to function effectively and different views about things like guns and abortion. But I don't think that very many members of the public think that what the system really needs is larger infusions of corporate cash.<sup>87</sup>

Some defenders also worried about the pervasive public cynicism they believed had resulted from campaign finance deregulation. One lawyer, for example, observed that campaign finance abuses revealed during Watergate "had the country set its hair on fire in the early '70s" but "are just commonplace now" and that the country had become "inured" to such abuses:

On the one hand, I think people are still very, very upset about it, but there's a kind of sense of hopelessness about being able to do anything . . . . We're at this moment where things that just outraged the public

84. Confidential Interview 26.

85. Confidential Interview 10.

86. Confidential Interview 12.

87. Confidential Interview 34.

following Watergate now are just being met with a sense of futility and, I think, somewhat with a sense of despair.<sup>88</sup>

#### IV. THE CHALLENGERS' VIEWS

Like the defenders, the sixteen challengers worked in a variety of practice settings. But they were more diverse than the defenders in terms of the constituencies they claimed to represent, the law schools they attended, and the location of their offices. In these respects, these lawyers' characteristics mirrored those of the larger pool of lawyers who represented parties and amici on the side of Citizens United.<sup>89</sup> Some were libertarians, some Republican establishment figures, and others business advocates, Tea Partiers, and civil libertarians. Most of the challengers described themselves as Republicans or Independents, although two were Democrats. The lawyers' particular positions in *Citizens United* varied with the interests and commitments of their clients, but all of them indicated that they believed that most campaign finance regulation is unconstitutional.

When asked about what was at stake in *Citizens United*, the challengers endorsed the Court's assertion that it was necessary to strike down these limitations and precedents to vindicate the First Amendment. Their responses included frequent references to the "marketplace of ideas" and "free speech," and they often characterized campaign finance regulations as censorship. These comments about the stakes in *Citizens United* were typical:

[It was] whether the government gets to determine who speaks, how much, on what, for how long, very foundational things to the way that our government works. [The decision] reaffirmed the importance of free speech. You're going to have more groups that will not be hesitant about expressing their views collectively in the public realm.<sup>90</sup>

Rather than limiting speech, we should let more speech enter the marketplace of ideas.<sup>91</sup>

This is an issue of free speech versus government control and ultimately censorship.<sup>92</sup>

88. Confidential Interview 6.

89. See Southworth, *supra* note 36 (finding that lawyers filing briefs on Citizens United's side were more likely than lawyers on the FEC's side to work in the South or Midwest, and that they were less likely than lawyers on the reform side to have attended law schools ranked in the top twenty by *U.S. News and World Report*).

90. Confidential Interview 8.

91. Confidential Interview 3.

92. Confidential Interview 25.

I think it just promotes the freedom of speech. That's what I think the main implications of it are.<sup>93</sup>

I don't think the government has any business telling people what they can say, when they can say it, how they can say it, at what times, and in what volumes, wearing what color hat, and hopping on which leg . . . How about we just go with free speech?<sup>94</sup>

You can't have free speech and exclude millions of organizations, like the ACLU, like the Chamber of Commerce, like the AFL-CIO, like the corporations, from the marketplace. . . *Citizens United* I just think is one of the best First Amendment decisions ever written. . . The First Amendment says, almost without exception, what we say is our choice and not the government's choice. And how loud we say it, or how much we say it is our choice and not the government's choice. So I think it's a great decision.<sup>95</sup>

I think that it has freed people to be able to . . . organizations like the NRA, or other issue organizations, to be able to speak on behalf of their members at election time without fear of being sanctioned or fined.<sup>96</sup>

[H]aving corporate speech and commercial speech added to the marketplace of ideas benefits democracy as a whole.<sup>97</sup>

[G]overnment cannot screw with the marketplace of ideas.<sup>98</sup>

[The statutory provision invalidated in *Citizens United*] violates the corporations' First Amendment rights not to be silenced.<sup>99</sup>

[I]t simply cannot be forgotten that the government's position in *Citizens United* was that it could ban a documentary movie about a political candidate during an election year.<sup>100</sup>

We've helped ideas get into the marketplace . . . That's a good outcome. I don't care where that money comes from.<sup>101</sup>

[T]o limit money in politics is to simply limit communication or limit speech. It's very simple and very straightforward and very true. And there's simply no refutation of that, that is possible. So, if you're limiting money, you're limiting speech.<sup>102</sup>

93. Confidential Interview 39.

94. Confidential Interview 14.

95. Confidential Interview 32.

96. Confidential Interview 36.

97. Confidential Interview 42.

98. Confidential Interview 25.

99. Confidential Interview 2.

100. Confidential Interview 44.

101. Confidential Interview 14.

102. Confidential Interview 43.

Some challengers emphasized, as the defenders generally conceded, that the decision has not resulted in massive corporate spending on elections. One lawyer stressed that “there’s not been much corporate money, despite all the predictions of cataclysm,”<sup>103</sup> and another noted that predictions that *Citizens United* would lead to a flood of corporate spending on the 2016 presidential race were “totally wrong.”<sup>104</sup> Like the defenders, many of the challengers emphasized that most of the increased spending attributable to *Citizens United* and *SpeechNow.org* has come from wealthy individuals and not from public for-profit corporations:

The major effect wasn’t felt by . . . Fortune 500 corporations. . . . The sorts of entities that people think about when they talk about, “Oh, there’s too much corporate money[.]” Because that money hasn’t really increased. It’s Super PACs or advocacy groups of the kind like the National Federation of Independent Business, or Planned Parenthood, or the NRA . . . . Most of the increased spending . . . has been in independent advocacy groups and individuals—whether that’s Tom Steyer or Sheldon Adelson, or the Koch brothers . . . . There is more independent spending now, but it’s not your Microsofts and your Googles and your Exxons and the traditional big corporations.<sup>105</sup>

Another lawyer observed that despite all the editorials “talking about how big corporations were going to rule America,” that has not happened. Rather, he said, “[i]t’s the Adelsons” and other very wealthy individuals who “[a]fter *Citizens United* . . . started to spend the money that *Buckley v. Valeo* would’ve allowed them to spend, and which was sometimes spent, but not at all as much as is now becoming the norm in American politics.”<sup>106</sup>

Several of the challengers decried the increased role of Super PACs and other vehicles for independent spending and their tendency to expand the influence of extreme and unaccountable elements at the expense of the major political parties. But some challengers offered a more positive account of the infusion of money into politics since *Citizens United* and *SpeechNow.org*, calling it evidence of healthy political engagement. One said that it “shows, sort of bottled up demand for participation in elections, which has been unleashed,”<sup>107</sup> and another claimed that the decisions have “led to increased participation.”<sup>108</sup> One lawyer approved of how Super PACs enabled fifteen

103. Confidential Interview 32.

104. Confidential Interview 31.

105. Confidential Interview 13.

106. Confidential Interview 31.

107. Confidential Interview 37.

108. Confidential Interview 16.

Republican candidates to compete for the 2016 Republican presidential nomination, “kind of buoying them along independently. . . keeping them going with their messages.”<sup>109</sup> Another lawyer cited several instances in which an injection of Super PAC funding has fueled competition between candidates in races that would otherwise have been a lock: “It’s been good for competition. It gets new ideas out, which [is] good.”<sup>110</sup>

Like some defenders, who argued that the consequences of *Citizens United* have been more “psychological” than legal, some challengers said that the primary result of *Citizens United* has been that it clarified where the lines were and emboldened people and organizations to spend money in elections:

As a legal matter, all the ruling did was erase the express advocacy line that unions and corporations, both business and non-profit, could not cross in their public communications, which was really not, to me, a practically meaningful line anyway. One could message effectively towards whatever electoral result one wanted without having to explicitly say, “vote for” or “vote against.” I actually thought it was an unconstitutional restriction. I believe the decision was fundamentally correct. But I think the consequence has been more cultural than legal, in that it has relaxed, to some degree, strictures that organizations and perhaps individuals put on themselves in part because they were afraid there were lines out there.<sup>111</sup>

Another lawyer explained that, for decades prior to *Citizens United*, the FEC “was quite experimental in devising legal standards which they would do primarily through selective enforcement” and that people and organizations subject to these standards tended to settle rather than fight.<sup>112</sup> He maintained that *Citizens United* clarified the law and “basically established rules that people could follow” and “eliminated a great deal of uncertainty as to what the rules were.”<sup>113</sup>

As for critics’ complaints about the definition of corruption used in *Citizens United*, challengers defended the Supreme Court’s approach. One complained that “the bounds of the term ‘corruption’” prior to *Citizens United* “had gotten scarily out of control—that corruption. . . . Well, it could mean almost anything associated with money in politics.”<sup>114</sup> Other challengers suggested that any definition that goes beyond quid pro quo corruption is

109. Confidential Interview 32.

110. Confidential Interview 44.

111. Confidential Interview 19.

112. Confidential Interview 16.

113. *Id.*

114. Confidential Interview 20.

inconsistent with representative democracy.<sup>115</sup> Several lawyers asserted that there is no principled distinction between influence based on financial power and influence based on the techniques used by community organizers to get out the vote, or the influence wielded by celebrities and the mainstream media.<sup>116</sup>

Several challengers acknowledged that *Citizens United* is unpopular but chalked that up to the public's misunderstanding. One insisted that the decision's consequences have been "overstated,"<sup>117</sup> and another said that they have been "very different than what the Left would have you believe."<sup>118</sup>

115. See, e.g., Confidential Interview 25 ("If you have a government whose main check is the will of the people, so to speak, then people are going clamor to influence politics and get government to do what they want it to. That's not a good thing, but in a free society with a representative form of government if you call that corruption then you're saying that the government itself is corrupt in some sense, which I actually think is true.")

The view that politicians' responsiveness to donors is a necessary feature of democracy is suggested by the Supreme Court in *Citizens United*, 558 U.S. 310 (2010), and again in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), which invalidated overall limits on the total contributions an individual can give in an election cycle. In *Citizens United*, Justice Kennedy wrote:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

558 U.S. at 359 (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by Citizens United*, 558 U.S. 310). In his majority opinion for the Court in *McCutcheon*, Chief Justice Roberts wrote:

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. As Edmund Burke explained in his famous speech to the electors of Bristol, a representative owes constituents the exercise of his "mature judgment," but judgment informed by "the strictest union, the closest correspondence, and the most unreserved communication with his constituents." Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.

134 S. Ct. at 1461–62 (citation omitted).

Several of the defenders strongly disagreed with this understanding of representative government and the meaning of Burke's speech. One observed:

It was actually interesting that what they quoted was from Burke about how representatives . . . should feel beholden to their supporters. Well, he was talking about voters and constituents. He wasn't talking about donors! But the court conflated all of that and said basically that there's nothing wrong with an office holder feeling beholden to large donors. That's politics. Well, I think that was really dangerous, and that was really significant.

Confidential Interview 11.

116. Confidential Interviews 37, 43, 44.

117. Confidential Interview 19.

118. Confidential Interview 36.

Another claimed that the decision has “served to sharpen debate about campaign finance laws” but “generally at a very simplistic and almost cartoonish level. . . . People use [*Citizens United*] as a shorthand, and they don’t even know what they’re using it as a shorthand for.”<sup>119</sup> Another challenger remarked that “most of the on-the-ground criticism . . . on what’s happened as a result [of *Citizens United*] is inaccurate to the point of distortion.”<sup>120</sup>

#### V. DIVERGENT PERSPECTIVES ON THE LESSONS OF *CITIZENS UNITED*

The lawyers on the two sides do not disagree fundamentally about how *Citizens United* has affected the political process in the short-term. They agree that it has not (yet) unleashed a huge wave of direct corporate spending in elections but that it has channeled more corporate money into nonprofit groups, some of which do not disclose their sources. They agree that *Citizens United* led directly to the D.C. Circuit’s momentous ruling in *Speech-Now.org*. They agree that Super PACs have since multiplied and grown and that most of the money contributed to Super PACs and other types of outside groups has come from wealthy individuals. They also agree that the primary short-term consequences of *Citizens United* have been more psychological than legal, in that they have clarified the lines and emboldened those who wish to put money in politics to do so without fear of sanction.

But the lawyers offered very different perspectives on whether *Citizens United* has been good or bad for the political process and what lessons the public should learn. The defenders generally said that the Court’s holding that commercial corporations possess the same First Amendment rights as natural persons to spend money on elections is a dangerous turn and that the Court’s narrowing of the corruption rationale had contributed to disproportionate political influence by economically powerful institutions and individuals. The challengers applauded the decision as a victory for free speech and insisted that any adverse fallout from *Citizens United* was a price worth paying to protect the free flow of ideas.

Disagreement between the defenders and challengers on the larger lessons of *Citizens United* appear to reflect very different attitudes about government and the possibility of fairly regulating money in politics without stifling political association and dissent. The defenders envisioned an essential and positive role for government in ensuring fair elections and political equality. The challengers, on the other hand, were skeptical about government in general and especially about whether government can be trusted to

119. Confidential Interview 19.

120. Confidential Interview 31.



regulate money in politics. They viewed the regulation of political spending as an intrusion on individual liberty.

Many of the defenders asserted that government has a responsibility to ensure that inequalities in the economic sphere do not subvert democratic processes. One argued that “it’s the government’s duty to intervene, to try to retain some rough sense of political equality in the country. And to the extent that money becomes a mechanism by which one person can exercise outsized political power, then I think it is appropriate for the government to step in.”<sup>121</sup> Another said that government “has a role to ensure that our rights as Americans are protected in the political process,” so that “when it comes to money in politics, that means ensuring that our voices are not drowned out by big money interests, that we have a right to equal participation in the process, and that we’re not locked out of an exclusionary process that determines who shall govern in America.”<sup>122</sup> The same lawyer asserted that

what has happened with the campaign finance system is we have allowed those economic inequalities to spill over and dominate our political process, so much so that the vast majority of the public believes that our system is rigged. . . . And that undermines the faith in our elections but also in our government.<sup>123</sup>

Many of the challengers suggested that the concern about money in politics would disappear if conservatives succeeded in rolling back government. One libertarian stressed that “[t]he problem isn’t money in politics; the problem is the government has accumulated too much power that it doesn’t rightly possess, particularly at the federal level. . . . [If the government were much more limited] we wouldn’t have [the] massive concern that we have about money in politics.”<sup>124</sup> Another acknowledged “discomfort” with the amount of money in politics, but pointed out that “the conservative response is, ‘[I]ook, if you want money out of politics, get government out of our lives. And then, there’s no real impetus for the money to be there in the first place.’”<sup>125</sup> Another explained that

if access and influence are a problem, they are a problem because of the size and scope of government. What we’re concerned about is the government is going to hand out favors that it shouldn’t be handing out or it’s going to be doling out punishment to people who should not be punished.<sup>126</sup>

121. Confidential Interview 28.

122. Confidential Interview 49.

123. *Id.*

124. Confidential Interview 3.

125. Confidential Interview 14.

126. Confidential Interview 37.

Some challengers were skeptical about whether it's even possible to regulate campaign finance. One said, "[y]ou're never going to get money out of politics."<sup>127</sup> A lawyer who said that he shared some of defenders' concerns about money in politics nevertheless believed that "in the end . . . efforts to regulate them do not work."<sup>128</sup> Another challenger claimed that "realistically I think that money finds a way whatever the rules are,"<sup>129</sup> while another referred to this as the "hydraulic" theory of campaign finance<sup>130</sup>—that "when you clamp down on money[ ] in one place, it tends to pop up someplace else."<sup>131</sup> A libertarian stated,

I think we have more political speech now than we ever did, and if the billionaires have more to say, what else is new? And if you limit them, they're going to go buy a newspaper, and if you limit that, they're going to fund a cause organization. You know, you can't stop it without having the kind of total control that we usually associate with North Korea or places like that.<sup>132</sup>

Many challengers claimed that campaign finance regulations invariably advantage those writing the rules, typically incumbents, and tend to be used cynically for strategic political advantage. One said that

when you watch what happens at the FEC, you can't help but recognize that the vast majority of complaints have nothing to do with corruption or access or anything else. They have to do with "[t]his will hinder my opponent in this race." That's what these things are primarily used for.<sup>133</sup>

Another lawyer noted that the "accommodations and compromises" made as part of the process to achieve campaign finance regulation always "jigger[] the system . . . to the perceived benefit or detriment of certain participants."<sup>134</sup>

Most of the challengers supported only minimal campaign finance regulations, and some favored no regulation at all. One advocate said that he supported the goals articulated by defenders, including "fairness, . . . some measure of transparency, and . . . integrity," but that "reform proposals go

127. Confidential Interview 42.

128. Confidential Interview 44.

129. Confidential Interview 35.

130. For the origins of this term, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708, 1718 (1999) (arguing that "political money, like water, has to go somewhere. It never really disappears into thin air" and calling this the "hydraulic principle"); see also *McConnell v. FEC*, 540 U.S. 93, 224 (2003) ("Money, like water, will always find an outlet.").

131. Confidential Interview 37.

132. Confidential Interview 32.

133. Confidential Interview 44.

134. Confidential Interview 16.

way beyond that.”<sup>135</sup> Several challengers asserted that disclosure is *all* that is required to ensure the integrity of the process.<sup>136</sup> Even as to disclosure, some of the challengers expressed skepticism, because they thought that those drafting and enforcing disclosure rules would use them to punish political enemies. One lawyer suggested that some conservatives who had previously supported disclosure “now see how it’s being abused and potentially abused, in that it’s being used a weapon.”<sup>137</sup> Several challengers mentioned the Internal Revenue Service scandal involving increased scrutiny of tax-exempt status applications from groups with “Tea Party” or “Patriot” in their names as evidence that government could not be trusted to wield power responsibly.<sup>138</sup>

Several of the libertarians and lawyers associated with Tea Party groups maintained that government should play no role whatsoever with respect to campaign finance. One said that the proper role of government with respect to money in politics is “essentially none.”<sup>139</sup> Another advocated giving campaign contributions the same constitutional protection as expenditures and lifting all other campaign finance restrictions: we “should criminalize bribery, purchasing of favors, that sort of thing, and that’s it. I don’t think political speech should be regulated.”<sup>140</sup> One lawyer proudly noted that he is so committed to deregulating campaign finance that he filed an amicus brief in *Bluman v. Federal Election Commission*<sup>141</sup> to argue that non-citizens who

135. *Id.*

136. *See, e.g.*, Confidential Interview 2 (“Ultimately the voters decide who will be running the government, and if they want a government that is corrupt then they’ll vote for that and if they want a government that is not corrupt then they’ll vote for that.”); Confidential Interview 39 (“The view I take is all the regulations should be removed and all that should be required is public reporting. As long as there’s public reporting that’s required then it’s up to the voters to decide. Okay, so you have a candidate and he takes money from the tobacco industry or he takes money from the oil industry or he takes money from the crypto-Marxist groups or he takes money from foreign countries, alright, so you just report it. . . . So, now, it’s up to you. You’re the voter, you decide. This guy is taking money from whoever it is, billionaires, industry, labor unions, Marxist groups, so whichever it is. You know where he gets his money, it’s up to you to decide. It’s not up to the government to say, ‘[y]ou can’t take money to present your views to the public.’”).

137. Confidential Interview 16.

138. *See* Emily Cochrane, *Justice Department Settles with Tea Party Groups After I.R.S. Scrutiny*, N.Y. TIMES (Oct. 26, 2017), [https://www.nytimes.com/2017/10/26/us/politics/irs-tea-party-lawsuit-settlement.html?\\_r=0](https://www.nytimes.com/2017/10/26/us/politics/irs-tea-party-lawsuit-settlement.html?_r=0) [<http://perma.cc/4ANG-DJLV>]. The Inspector General’s report of cases between 2004 and 2013 found that the IRS had targeted not only conservative groups but also liberal organizations whose names included terms such as “Association of Community Organizations for Reform Now (ACORN),” “Progressive,” “Green Energy,” “Medical Marijuana,” and “Occupy.” TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP’T OF TREASURY, REF. NO. 2017-10-054, REVIEW OF SELECTED CRITERIA USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2017), <https://www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf> [<https://perma.cc/4MUN-JLRC>].

139. Confidential Interview 3.

140. Confidential Interview 13.

141. 565 U.S. 1104 (2012) (mem.).

are lawfully within the United States should be allowed to spend money or make contributions in U.S. elections.

The language used by the defenders and challengers in interviews differed in some easily quantifiable ways. Defenders used “equal” and “equality” almost four times as often as challengers and “democracy” six times as often. Challengers used variations on “speech” and “speaker” twice as often as defenders and “freedom” and “liberty” three times as frequently.

Differences in the commentary of the defenders and challengers appear to reflect not just contrasting policy positions and the conscious manipulation of language and precedent, but also variation in underlying conceptual metaphors. As George Lakoff and Mark Johnson have shown, metaphor is pervasive in everyday language and thought and in the way we view and experience the world, although its influence is often invisible to us.<sup>142</sup> Lakoff has also argued that conservatives and progressives hold conflicting and typically unconscious worldviews structured through metaphor.<sup>143</sup> Conceptual metaphor also pervades legal thought and reasoning,<sup>144</sup> and it plays an important role in campaign finance jurisprudence. The “marketplace of ideas” concept elaborated by Justice Oliver Wendell Holmes, Jr. in *Abrams v. United States*<sup>145</sup> imagines ideas as commodities that are bought, sold and traded in a competitive market.<sup>146</sup> That frame looms large in the Supreme Court Justices’ disagreements about the boundaries of permissible campaign

142. See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

143. See generally GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (3d ed. 2016).

144. See, e.g., STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW LIFE, AND MIND*, at xiii (2001) (explaining that the book’s purpose is to explore the social constructs that “animate thinking and decisionmaking among lawyers, judges, and laypersons alike”); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 68 (1992) (asserting that legal metaphors are the products of “history and usage,” which shape their “deepest meanings and applications,” and arguing that “the rise of a natural entity theory of the corporation was a major factor in legitimating big business”); GORDON, *supra* note 11, at 128 (noting that judicial reasoning is “primarily doctrinal, categorical, and analogical”); *id.* at 261 (observing that “our views [of the past’s relationship to the present] are mediated by familiar narrative story-lines that are so deeply entrenched in our consciousness that we are often unaware of their rule over our conception of reality. These story-lines, like other mentalities, have a history filled with ideological purposes, and there always exist—and so we always may draw upon—competing stories that impress the same historical experience with radically divergent meanings”).

145. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

146. See WINTER, *supra* note 144, at 18–19, 20, 271–73.

finance regulation.<sup>147</sup> Metaphorical thinking also underlies *Buckley*'s holding that spending money to sway an election is speech,<sup>148</sup> as well as *Citizens United*'s ruling that corporations enjoy the same First Amendment protections as natural persons with respect to campaign spending and that singling out corporations for special treatment constitutes a type of impermissible discrimination.<sup>149</sup>

Commentary by the interviewed lawyers shows both sides using the same metaphors. But, while many of the challengers found these metaphors dispositive, defenders emphasized their limitations and argued that, even if useful, they must be tweaked to make sense of the First Amendment's broader purposes.

Defenders focused on the need to regulate markets to ensure their integrity and correct for market failure. One observed that the marketplace of ideas metaphor as it applies to money in elections is "powerful" but that "the question is, like any marketplace, is there no role for regulation within that

147. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) ("*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment") (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)); *Randall v. Sorrell*, 548 U.S. 230, 279–80 (2006) (Stevens, J., dissenting) ("[A] legislative judgment that 'enough is enough' should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas."); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809–10 (1978) (White, J., dissenting) ("Massachusetts could permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas."); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) ("Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented 'marketplace of ideas' seeks to form a public opinion that can and will influence elected representatives.")

148. For key language in *Buckley* suggesting that spending money on elections is protected speech, see *supra* note 25 and accompanying text. The *Buckley* Court also analogized a political campaign to an automobile and election spending to gas in the tank. 424 U.S. 1, 19 n.18 (1976) ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.")

The argument that election spending is speech gained currency when Justice Potter Stewart articulated the now widely used shorthand for the challengers' position—money is speech—in oral argument: "We are talking about speech, money is speech and speech is money, whether it is buying television or radio time or newspaper advertising, or even buying pencils and paper and microphones." ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 55 (1988).

149. See *Citizens United*, 558 U.S. at 343 (stating that corporations should not "be treated differently under the First Amendment simply because [they] are not 'natural persons'" (quoting *Belotti*, 435 U.S. at 776)); *id.* at 347 ("[T]he First Amendment does not allow political speech restrictions based on the speaker's corporate identity.")

For examples of scholarship discussing the significance (or insignificance) of the Court's use of the corporate personhood metaphor in *Citizens United*, see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014), and Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361 (2015).

marketplace?”<sup>150</sup> Another mused that “[t]here is no real, unregulated marketplace of free ideas, right? . . . You’re not gonna compete with folks with millions of dollars who buy the instrumentalities to get their opinions across if you’re a guy standing on the street corner.”<sup>151</sup> Another contended that “[l]ike in capitalism, you can’t leave it—the use of money in politics—unfettered because I think it just leads to real abuses.”<sup>152</sup>

The defenders also argued that the First Amendment is about more than free speech—that it also protects the conditions necessary for citizens to govern themselves in a representative democracy. These comments were typical:

I’ve always thought that the First Amendment serves a larger purpose in preserving our democracy than simply guaranteeing free speech for everybody. . . I think it also serves, was intended to serve, as a sort of fundamental building block of the democratic process. And so I’m not a First Amendment absolutist who believes that any government regulation of speech even through the proxy of money is necessarily inconsistent with the First Amendment values. If, in fact, there’s enough of a demonstration that government regulation is needed in order to maintain a democratic structure, that certain voices don’t overwhelm other voices and don’t discourage participation . . . I think that that can constitute a compelling interest to allow the government to regulate . . . in a modest way and limited fashion . . . And in particular, I think government can take affirmative actions, as long as they’re done on a non-discriminatory basis, and without impinging on other people’s freedoms, to encourage people to participate in the process, and to level the playing field in a way that wouldn’t otherwise exist if we just relied upon pure money as the end-all-be-all of who could speak and how much.<sup>153</sup>

There’s a tendency to apply the First Amendment as a literal statement that you take out of context and you give an open-ended pass to anybody who’s purportedly speaking. And that’s not necessarily the way that the Constitution was designed to work. It was a total document and that document is supposed to preserve integrity. And if the speech is out of control, and of course calling money speech is a huge step, but if it’s out of control, then that’s not consistent with the Constitution taken as a whole.<sup>154</sup>

The Court is just turning the Constitution on its head when it’s saying, “[w]ell, it’s only that individual corruption you can get at but a more systemic corruption that threatens the system’s dependence on the people is beyond review. . . . History shows the majority’s reinterpreting the First Amendment and ignoring the really important powers that Congress and

150. Confidential Interview 28.

151. Confidential Interview 48.

152. Confidential Interview 11.

153. Confidential Interview 27.

154. Confidential Interview 33.

state legislatures have to root out corruption to ensure electoral integrity.<sup>155</sup>

The challengers, on the other hand, generally endorsed the equation of political spending and speech, and many of them characterized campaign finance regulation as censorship. One, for example, warned about the dangers of the reasoning that leads defenders to favor regulation:

Some of the campaign finance reform groups . . . [argue] that the First Amendment imposes almost an obligation on the government to limit speech so that the speech of the powerful does not drown out the speech of the not powerful—in other words, leveling the playing field by lowering the volume of debate . . . I find that a very troubling prospect. It's troubling not only because it does limit free and open debate, but it also has to vest someone with the authority to determine what level of debate we want and that someone who determines the level of debate we want is also going to be in a position presumably to determine how much criticism people can venture about where that volume has been set.<sup>156</sup>

Another said of efforts to regulate access, influence and systemic corruption, “[they] pose tremendous dangers . . . to open democratic debate, when you're giving government this power.”<sup>157</sup> Another challenger explained that his organization's position in *Citizens United* was simple: “Look, this is an issue of free speech versus government control and ultimately censorship.”<sup>158</sup>

Several lawyers associated with conservative and libertarian organizations claimed that campaign finance regulation reflected a desire by liberals, the media, and even some in the Republican establishment, to stifle dissent and keep elites in charge. One lawyer described the deregulation of campaign finance as a “free market” solution to money in politics and contrasted that approach with the “socialist solution,” which is that “government must be in our lives and regulate every corner of it and . . . prevent people from speaking out about the government and regulation in our lives.”<sup>159</sup> He chalked up campaign finance restrictions to elites' disdain for conservatives:

The liberal thinks you're stupid because you're not voting the right way because if you were, if you were smart, you'd vote for them. And because you're not voting for them, clearly, you're stupid and you don't know what you're doing, and we have to prevent you from voting just because you saw a TV ad. Clearly you're dumb, you're voting the way of the last TV ad you saw. We have to stop this, we have to protect you from these bad

155. Confidential Interview 7.

156. Confidential Interview 20.

157. Confidential Interview 44.

158. Confidential Interview 25.

159. Confidential Interview 14.

ideas, so that you vote the right way, which is our way, and so we're going to institute all these protections to make it really hard for you to get bad ideas in your head that will keep you from voting with us, which is the right way to vote. That's the liberal model.

Another lawyer active with libertarian groups said:

I don't really understand the arguments against [*Citizens United*]. I don't understand what they're afraid of. They're not getting shouted down . . . They're the ones that have the dominant social positions. And I do have a big problem with the state of America's media, which I don't think is performing their original function. It just tends to be completely party controlled—controlled primarily by the Democrat party, in my opinion. So for any of these people on the Left to say, “[o]h we're getting shouted down by the billionaires.” You're not getting shouted down by the billionaires; you're shouting down everyone else!<sup>160</sup>

A lawyer associated with Tea Party groups answered my question about the government's proper role with respect to money in politics with “What is hard to understand about the first five words of the First Amendment: ‘Congress shall make no law’? I mean, I don't think the government should have a role. And I think what we've seen is an entire regulatory apparatus that is bent upon silencing certain voices.”<sup>161</sup>

Several defenders expressed frustration that the money-is-speech and free market frames have worked so well in mobilizing opposition to campaign finance regulation. One said that “framing has been hugely important, *hugely* important.” He argued that “the McCarthy experience” has “shaped this generation and the generations after” and has fueled “mistrust over any government regulatory power at all, but certainly government regulatory power over communication.” That, in turn, “led to a framing of this as a white hat/black hat problem, where the speaker always wore the white hat and the regulator always wore the black hat.”<sup>162</sup> Another lawyer bemoaned the challengers' success in arguing that what's at stake campaign finance regulation is “not just a question of money; it's a question of our ability to criticize, our ability to speak out.”<sup>163</sup> Another defender drew a connection between the speech metaphor's power and defenders' inability to persuade the Republican base that deregulating campaign finance was not in their interests. He said that he wished that he could convince them that “nobody's trying to take away your right to stand on a street corner and scream, and do all that!” but

160. Confidential Interview 39.

161. Confidential Interview 36.

162. Confidential Interview 28.

163. *Id.*



all your screaming and yelling about an issue, or discussing, or debating, or going to town hall meetings [will not matter]; the reason that you don't get a real debate is because, frankly, corporate lobbyists generally don't feel the need to go to those meetings because that's not where the decisions are being made.<sup>164</sup>

Several defenders lamented the rise and prevalence of the view that regulation is generally ineffective and fraught with unintended negative consequences and that rent-seeking inevitably corrupts policymaking.<sup>165</sup> One argued that such profound mistrust of government explains how some opponents could advocate the complete deregulation of campaign finance; “if you allow any regulation of it, it's going to be abused—it's going to be used to suppress speech—and so, nope, you just can't have any of it.”<sup>166</sup>

Defenders acknowledged that they were at a disadvantage in mobilizing a simple frame that can withstand constitutional challenge. The keywords that arose most frequently in their responses to questions about the issues at stake in campaign finance litigation—democracy, equality, voice, and integrity—do not add up to a winning legal theory given the Court's recent precedents and current composition. One lawyer said, “[o]ne of the fundamental problems that we are facing on the reform side is that, especially under the Roberts Court, but also before that, starting with *Buckley v. Valeo*, the Court has essentially ruled out some of the most compelling justifications for regulating campaign finance.”<sup>167</sup> Another asserted that it is “not simply a question of whether the money can corrupt an office holder, it's a question of whether it small c corrupts and undermines the integrity of the political system, of the government, and of course it does.”<sup>168</sup> Another insisted that “we need a new jurisprudence that allows us to voice the goals of political equality and equal voice beyond just the interest in deterring corruption.”<sup>169</sup> Arguing that more could be done within the speech metaphor underlying forty years of campaign finance doctrine by emphasizing the importance of “voice”, another lawyer said, “[a]nd so, to me, the frames are about voice and power, not about clean governance, not about anti-corruption, and less

164. Confidential Interview 11.

165. See BRINK LINDSEY & STEVEN M. TELES, *THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY* 10 (2017) (criticizing conservatives and libertarians who argue that “once government assumes any responsibility to regulate in a given area . . . it is inevitable that rent-seeking will corrupt policymaking”); cf. Miguel A. Centeno & Joseph N. Cohen, *The Arc of Neoliberalism*, 38 ANN. REV. SOC. 317, 318, 327–32 (2012) (exploring the historical development of neoliberalism and shifts in the assumptions that framed how changing economic structural conditions and redistributions of political power were perceived and acted upon).

166. Confidential Interview 27.

167. Confidential Interview 23.

168. Confidential Interview 18.

169. *Id.*

about integrity of our democracy.”<sup>170</sup> This approach “buys into the speech frame a little bit,” but flips it to ask, “but what kind of voice do I have over the decisions that affect my life, and should I be drowned out and should that be equal?”<sup>171</sup> Another suggested that the challenge was even more fundamental:

We really need to reexamine the whole idea that money is speech. People like Larry Tribe . . . get [ ] really mad when you say that: “That’s an oversimplification, that’s a bumper sticker, that’s not . . .” But the truth is that *has* been kind of the guiding star for the Supreme Court since *Buckley*—is that money is speech and that that’s the end of the analysis. And I think they’ve got to go back to looking at, “[y]es, money can facilitate speech, just like loud speakers can facilitate speech or newspaper delivery trucks facilitate speech,” but we don’t just say you can’t regulate newspaper delivery trucks, because they are speech. That’s kind of what we do with money. So I think that’s just totally wrongheaded.<sup>172</sup>

Another defender asserted that “*Citizens United* is just not gonna stand” and that when the Court eventually overturns the decision “it’s going to be with a broader rationale than came out of the *Buckley* decision.”<sup>173</sup>

Several lawyers observed that activists on opposing sides of this issue see the world very differently and tend to talk past each other. One defender said that conceptual frames affect not only how people convey ideas to others but also “the way that people perceive things” and that “something that I may perceive as being a reasonable effort to force somebody to come clean and disclose, limit in some manner, the conservatives generally see as big bad government coming in and stifling speech. And it’s like everything is really viewed through that lens.”<sup>174</sup> A challenger explained that issues that “are really complicated” “tend to be reduced to slogans and little snippets of ‘reform’ or ‘freedom’ or ‘liberty.’ All of those values are implicated here, but how it’s all implemented and how it operates is complex.”<sup>175</sup> A lawyer on the challengers’ side who described himself as a rare moderate Republican who believed that “*Buckley* largely got it right” asserted that “[t]he national debate is insipid and stupid on both sides.” He spoke of the difficulty of “policing the line between contributions and expenditures” and ensuring that

170. Confidential Interview 51.

171. *Id.*

172. Confidential Interview 46.

173. Confidential Interview 18.

174. Confidential Interview 27.

175. Confidential Interview 16.

campaign finance regulations are “predictable and understood and not subject to political gamesmanship” in a “political environment where everyone’s just screaming at each other.”<sup>176</sup>

## VI. CONCLUSION

This Essay shows that lawyers on opposing sides of *Citizens United* bring very different views to questions about money in politics in general and to the consequences of the ruling in particular. They largely agree about the decision’s direct consequences, but they offer wildly divergent conclusions about its lessons. Both sets of lawyers characterize the other side’s position as a danger to the future of representative democracy, and both sides use populist rhetoric to explain their positions. But they identify different sets of conditions as essential for democracy to thrive, and they identify different sets of elites as the primary threat. Defenders assert that campaign finance regulation is necessary to ensure that citizens hold equal political power corresponding with the one person one vote principle, and they see those who oppose the restrictions at issue in *Citizens United* as too willing to allow economic inequality to translate into political inequality. The challengers characterize themselves as the guardians of liberty and the First Amendment, and they regard defenders as apologists for incumbents, the liberal media, censorship, and government overreach. Like the divided Justices on the Roberts Court, the lawyers profiled in this Essay assert that the stakes involved in campaign finance regulation are enormous, but they embrace incompatible visions of how the issues should be resolved. Their competing visions appear to show not only differences in how the lawyers deploy language and frames to advance their clients’ positions but also a deep divide between their worldviews, reflecting the contrasting perspectives of the polarized elites of which the lawyers (and Justices) are a part.<sup>177</sup>

176. Confidential Interview 9.

177. See generally Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301; Mark A. Graber, *The Coming Constitutional Yo-Yo?: Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661 (2013).