Public corruption Concerns and Counter-Majoritarian Democracy Definition in Citizens United v. Federal Election Commission

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PUBLIC CORRUPTION CONCERNS AND COUNTER-MAJORITARIAN DEMOCRACY DEFINITION IN CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

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Whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it?
- Jeremy Bentham 1

Second Decade of the 21st Century.
Corporations Rule.
- Opening lines of the bleak sci-fi film, Johnny Mnemonic 2

INTRODUCTION

In Citizens United v. Federal Election Commission, the U.S. Supreme Court overturned two of its own cases on a 5–4 vote, striking down parts of the 2002 Bipartisan Campaign Finance Reform Act to allow corporations to directly spend treasury funds on electioneering communications in the days leading up to federal elections.3 The Court actively swung the First Amendment as a sledgehammer against long-standing campaign finance regulations and previously settled precedent, and then fell back on the argument that its actions were demanded by the Constitution itself. The case features lengthy and widely divergent majority and dissenting opinions, and has sparked widespread, intense public debate and controversy in the legal community.

Professor Lori Ringhand coined the term “democracy-defining dilemma” in a 2004 article while critiquing the Supreme Court’s campaign

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2. JOHNNY MNEMONIC (TriStar Pictures 1995).

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finance jurisprudence. She argued that in determining the shape of the free speech rights and anti-corruption concerns that courts evaluate in these cases, judges are influenced by their own underlying understandings of what an ideal democracy should look like. This happens because judges must rely on some baseline definition of democracy to determine if a government attempt to shape democratic processes is constitutionally appropriate: one must know what “good” looks like to be able to determine what counts as “bad.” Campaign finance cases are somewhat unique in this respect because in these cases, the government is seeking to directly regulate the political process itself. Thus, for judges to decide whether the government is appropriately regulating the political process, the rules that allow all citizens to interact with and shape their democracy, judges must first decide what that democracy ought to look like.

This Note applies Professor Ringhand’s democracy definition framework to the *Citizens United* decision and argues that this case is a particularly bold judicial attempt to redefine the processes of American democracy. The majority effectively substituted its own political preferences for those of Congress by invoking First Amendment language as a proxy for an underlying argument on the structure of American democracy: that corporations should have many of the same political rights as people. But this shift will create some serious problems if the Court’s vision of democracy differs too much from the vision held by most everyone else.

Part I of this Note explains why campaign finance cases are uniquely relevant for the democracy definition problem and outlines two general theories of democracy that closely track the campaign finance debate: pluralism and civic republicanism. It then summarizes the Court’s historical balancing of anti-corruption and free speech concerns in campaign finance cases. It also lays out the democracy definition framework, showing how these concepts implicitly depend on the Justices’ underlying understanding of what an ideal democracy should look like,

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4. Lori Ringhand, *Defining Democracy: The Supreme Court’s Campaign Finance Dilemma*, 56 HASTINGS L.J. 77, 77 (2004). Lori Ringhand is a professor of law at the University of Georgia. She has written numerous articles on judicial activism, confirmation hearings, and constitutional law.

5. *Id.* at 90.

6. *Id.*

7. *Id.* at 87.

8. *Id.*

9. The scope of this Note does not include many of the practical implications of granting corporate personhood for political purposes under the First Amendment. See, e.g., Carol R. Goforth, “A Corporation has no Soul”—Modern Corporations, Corporate Governance, and Involvement in the Political Process, 47 HOUS. L. REV. 617 (2010).
which explains the wide swings in logic and outcomes between campaign finance cases over time. Justices have waged a hidden policy debate through these cases over how best to structure our society; this debate deserves to see the light of day, and properly belongs to the people’s elected representatives in Congress, not the Court.

Part II of this Note critiques the *Citizens United* decision as a particularly overt and heavy-handed exercise in defining democracy. The Court invoked difficult-to-define concepts like free speech and corruption in such an abstract and broad way as to render them almost meaningless, and then applied them as if by an exacting formula to achieve a desired result.10 The Court’s constitutional analysis stems not from clear, externally-established meanings for these general concepts, but from the majority Justices’ underlying vision of democracy. The Constitution does not necessarily prevent the legislature from experimenting with anti-corruption legislation like that struck down in *Citizens United*.11 Instead, the five majority Justices have acted on their own initiative,12 with a sweeping lack of deference to Congress and past Court decisions.

Finally, Part III of this Note contrasts the *Citizen United* majority’s narrow anti-corruption rationale with the public’s seemingly broader corruption concerns. Specifically, many Americans appear to lump together more things under the mantle of “corruption” than just classic issues of acute corruption like bribery. They also include democratic process issues, like whether the system has been captured by special influence money and control so that their own voices are excluded from effective democratic participation—a concern over institutional capture, or institutional “corruption.” This broader understanding of corruption conflicts with both the *Citizens United* majority’s jaundiced view of the corruption interest in its constitutional analysis and with the outcome that corporations should be able to spend unlimited amounts of money to influence elections.

This distinction may explain what appears to be the general unpopularity of the *Citizens United* case, which could signal both a popular disagreement with the Court over the holding and a more fundamental parting of ways over underlying values of democracy. Also, while campaign finance law after *Citizens United* has a dwindling ability to prevent these broader types of corruption from occurring in the first place, attempts to prosecute such abuses after the fact offer even less hope of

12. See id.
success;\textsuperscript{13} and in allowing corporations to spend unlimited funds to directly influence elections, the Court risks escalating problems of institutional integrity by further eroding public trust in representative government.

I. BACKGROUND

This part of the Note explains why campaign finance cases are uniquely relevant to democracy definition and lays out the general pluralist and civic republican theories of democracy. It then provides a thumbnail sketch of the relevant campaign finance cases leading up to \textit{Citizens United}. And it explains the basic framework of the democracy definition argument and argues that because of this underlying democracy-definition issue, courts should be more deferential to legislative attempts to experiment with campaign finance regulation.

A. Theories of Democracy and Unique Relevance of Campaign Finance Cases

In campaign finance cases, judges have the power not only to shape our society through the effect of their decisions, but also to change the ground rules by which all citizens are able to participate in and mold their democracy themselves.\textsuperscript{14} If popular sovereignty is to mean anything, the procedural rules by which a democracy operates and evolves over time must correspond to the will of the people at least as much as the substantive laws it produces.\textsuperscript{15} But in resolving conflicts in campaign finance cases, judges must implicitly rely on their own internal baseline visions of what an ideal democracy should look like, because “the rights the judiciary is charged with protecting cannot themselves be defined (and thereby protected) without judicial reliance on some underlying vision of what democracy itself should look like.”\textsuperscript{16} This creates a real dilemma, especially when these underlying—yet determinative—definitions of democracy remain hidden.\textsuperscript{17}

To assist in this analysis, it may be helpful to define two general theories of democracy up front. Although there are many theories of democracy, and many more internal divisions within them, pluralism and

\begin{itemize}
  \item[14.] See generally \textit{RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW} 116-17 (2003).
  \item[15.] See \textit{JUSTICE STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION} 33-34 (2005).
  \item[16.] Ringhand, \textit{supra} note 4, at 79.
  \item[17.] Id. at 80.
\end{itemize}
civic republicanism roughly match the democracy arguments on each side of the campaign finance debate.\textsuperscript{18} Pluralists argue that democracy is essentially one big, rough-and-tumble battle between interest groups.\textsuperscript{19} In their view, people band together and compete to elect sympathetic officials and lobby them to pass their legislation. Elected officials should listen to the chorus of voices and make decisions based on observing the tug-of-wars and compromises hashed out between different groups. Pluralists do not necessarily believe in "fairness" or consensus: policy is just whatever comes out of the messy political process. They are generally against campaign finance regulation because it makes it more difficult for interest groups to gain influence, though limited regulation may be acceptable to curb the worst abuses of the system.

On the other hand, civic republicans reject this interest group focus and instead view democracy as a way for people to achieve consensus on important issues through open, reasoned debate.\textsuperscript{20} The political process should serve as a search for truth that results in the implementation of the best available policies. They see interest groups themselves as a corruption of the system, because by creating blocks of political power that may influence and consistently capture politicians' votes, such groups distort the ideal political process and distract from reasoned debate on the issues. As we shall see, aspects of these two theories of democracy appear throughout the Supreme Court's campaign finance cases.

\textbf{B. Corruption Concerns in Campaign Finance Cases}

The Supreme Court developed its current framework for evaluating the constitutionality of campaign finance legislation in its 1976 \textit{Buckley v. Valeo} decision.\textsuperscript{21} In evaluating a First Amendment challenge to the Federal Election Campaign Act of 1971, the \textit{Buckley} Court balanced free speech concerns on the one hand against the need to prevent "corruption or the appearance of corruption" caused by the pervasive effects of large amounts of money being injected into federal elections.\textsuperscript{22} As part of its finding that corruption extended beyond bribery to "undue influence on an officeholder's judgment," the Court noted that:

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  \item \textsuperscript{18} \textit{Id.} at 82 n.28.
  \item \textsuperscript{19} \textit{See generally} ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 34-44 (1956).
  \item \textsuperscript{20} \textit{See generally} Cass R. Sunstein, \textit{Beyond the Republican Revival}, 97 YALE L.J. 1539, 1548-56 (1988).
  \item \textsuperscript{21} 424 U.S. \textit{1} (1976) (per curiam).
  \item \textsuperscript{22} \textit{Id.} at 25.
\end{itemize}
Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse.... [T]he avoidance of the appearance of improper influence 'is also critical... if confidence in the system of representative Government is not to be eroded to a disastrous extent.23

The Court upheld the majority of the Federal Election Campaign Act’s regulations on the basis of these anti-corruption concerns, including restrictions on direct contributions to candidates and disclosure requirements.24 But the Court struck down a section regulating independent expenditures; in doing so it argued that these presented less of a risk for creating corruption or the appearance of corruption due to their likely uncoordinated nature.25 The Court would later narrow this somewhat by endorsing restrictions on “independent” expenditures that were explicitly coordinated with a candidate, noting that they are the “functional equivalent” of direct contributions to candidates.26

The Federal Election Campaign Act and the Buckley decision certainly ushered in a new era for campaign finance law in general in the 1970’s. But by that time Congress had already been banning corporations from participating in elections for many years. While FECA did include restrictions on corporate electioneering, these sections merely updated older laws: Congress had been banning corporations from making direct contributions in federal elections since 1907 under the Tillman Act,27 and from making independent expenditures since 1947 under the Taft-Hartley Act.28 The Supreme Court declined to overturn the Taft-Hartley corporate expenditure ban on First Amendment challenges in 194829 and again in 1957.30 The Court did not address these issues of corporate electioneering in the Buckley decision31 because this was all settled law by 1976. This is important to remember, because as we shall see, the Citizens United Court

24. Id. at 35–37.
25. Id. at 39.
26. Fed. Election Comm’n v. Colo. Republican Fed. Campaign Commn., 533 U.S. 431, 446, 447 (2001) [hereinafter Colorado II] (noting that “coordinated expenditures are as useful to the candidate as cash, and... such ‘disguised contributions’ might be given ‘as a quid pro quo for improper commitments from the candidate’” (quoting Buckley, 424 U.S. at 47)).
relied heavily on *Buckley* to overturn the longstanding ban on corporate electioneering.

Corruption looms large in campaign finance cases. But the concept of corruption is difficult to define in isolation, and the Court’s expression of its meaning has varied a great deal from case to case, depending on which Justices supported each opinion. Thankfully, a discernable pattern has emerged over time. There are three distinct standards of corruption that appear in the cases following *Buckley*, although they have sometimes blurred together. These types of corruption standards can be called the monetary influence, distortion, and quid pro quo rationales. While the quid pro quo rationale involves only explicit bribes of money for political acts, the monetary influence rationale goes beyond this to include more implicit ways in which money corrupts the political process. Finally, the distortion rationale specifically addresses the ability of corporations as artificial legal entities to amass and utilize large amounts of money to influence elections without any connection to popular support for targeted political goals.

1. The Monetary Interest Rationale

In *Buckley*, the Court discussed quid pro quo corruption on the one hand, but also held that the anti-corruption interest went beyond explicit acts of bribery to more general ideas of improper influence and the appearance of corruption. Then in *First National Bank of Boston v. Bellotti*, the Court referenced the monetary interest rationale more directly while creating an exception to the general rule against corporate electioneering to allow corporations to influence a state referendum. The Court distinguished referenda from elections by noting that unlike in an election, there is no candidate in a referendum to be corrupted by a corporation’s spending. The Court described this type of corruption as “the creation of political debts,” an explicit use of the monetary influence rationale. The Court further noted that this corporate spending exception for referenda should in no way detract from the general “importance of the

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34. Id.
35. Id.
36. Id.
37. 424 U.S. 1, 26–28 (1976) (per curiam).
39. Id. at 788 n.26.
governmental interest in preventing" the creation of political debts through corporate spending on candidate elections.\textsuperscript{40} As discussed in Part II of this Note, \textit{Citizens United} heavily relied on \textit{Bellotti} for the principle that corporations have broad First Amendment rights. This is a fairly ironic reading of the case because the Court was merely creating an exception to the rule, not arguing against the rule itself; the \textit{Bellotti} exception did not change underlying concerns about the ability of corporate money to corrupt political candidates.

The Court has described the monetary influence rationale as targeting "a subversion of the political process," where "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."\textsuperscript{41} In \textit{Nixon v. Shrink Missouri PAC}, the Court clarified that in talking about corruption, it was concerned with threats of "improper influence and opportunities for abuse in addition to quid pro quo arrangements."\textsuperscript{42} And later the Court reaffirmed that "corruption [is] understood not only as quid pro quo agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence."\textsuperscript{43}

2. The Distortion Rationale

The Court dealt specifically with the distortion rationale in \textit{Federal Election Commission v. Massachusetts Citizens for Life, Inc},\textsuperscript{44} holding that non-profit advocacy groups were exempt from the general ban on corporate electioneering.\textsuperscript{45} The Court distinguished these groups from normal corporations on the basis that profit-seeking corporations can distort the political process through their build-up of wealth because the method of acquiring wealth is normally unconnected to political goals.\textsuperscript{46}

On the other hand, the fact that non-profit advocacy groups fundraise expressly for political purposes minimizes any distortion effect in their political use of that money.\textsuperscript{47} For example, people do not generally buy coffee at Starbucks to support its political goals; however, they do donate money to the Southern Poverty Law Center to support its political agenda.

\textsuperscript{40} \textit{Id.}
\textsuperscript{42} 528 U.S. 377, 389 (2000) [hereinafter \textit{Shrink Mo.}] (emphasis and internal quotation marks omitted).
\textsuperscript{43} \textit{Colorado II}, 533 U.S. 431, 441 (2001).
\textsuperscript{44} 479 U.S. 238 (1986).
\textsuperscript{45} \textit{Id.} at 259.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
The corporation is a legal fiction created by state power, a fiction that allows for the rapid accumulation of capital. The state may choose to limit some of its political rights because individuals are not putting capital into a corporation for political purposes. 48

The Court then invoked the distortion rationale even more strongly in *Austin v. Michigan Chamber of Commerce*, where it upheld a state law banning independent expenditures by for-profit corporations. 49 Writing the majority opinion, Justice Marshall described this type of corruption as “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” 50 *Austin* is one of the two cases that the Court overturned in *Citizens United*. 51

3. The Quid Pro Quo Rationale

In the other such case, *McConnell v. Federal Election Commission*, a fragmented Court upheld the constitutionality of most of the 2002 Bipartisan Campaign Finance Reform Act. 52 Congress passed this legislation to restrict the burgeoning influence of “soft” money (unlimited contributions made to political parties to avoid limits on direct candidate contributions) in federal elections and to require candidate-specific political advertising to be paid for by “hard” money (direct contributions to candidates) in the days before a primary or election. 53 The Court split several ways in this case, with Justices Stevens and O’Connor invoking the monetary interest rationale in their plurality decision while delivering the opinion of the Court. 54

On the contrary, the dissent argued that the corruption rationale was limited only to explicit bribery-like quid pro quo arrangements. The plurality noted that the *Buckley* Court had explicitly rejected the dissenting justices’ argument that the corruption rationale was limited to bribery-like

48. *Id.*
52. 540 U.S. 93, 188–89 (2003), overruled in part by *Citizens United*, 130 S. Ct. at 886.
53. *McConnell*, 540 U.S. at 122–26. Use of the unregulated “soft” money loophole sprang up in response to FECA’s restrictions on the amount of “hard” money that could be directly donated to candidates, and thus was not yet an issue at the time of the *Buckley* Court’s review of that statute. Congress attempted to close this loophole by passing BCRA.
54. *Id.* at 143.
quid pro quo arrangements.55 Instead, *Buckley* stated that anti-bribery laws “deal[t] with only the most blatant and specific attempts of those with money to influence government action.”56 And the plurality argued that if the Court prevented Congress from acting on the undue influence rationale, “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”57 The *McConnell* plurality showed a great deal of deference to both Congress’s judgment in identifying the most corrupting types of political spending and its ability to experiment with creative solutions to eliminate that corruption.58

C. Underlying Democracy Definition Issues

The power of judicial review is an awesome one, and courts must wield it carefully and deliberately, for their decisions can have drastic long-term effects on our society.59 Courts should be especially careful in evaluating campaign finance issues because their decisions help set the rules by which everyone is able to participate in and shape our democracy.60 In campaign finance cases, important definitions of speech rights and corruption in campaign finance cases are inextricably connected. Through their decisions in these cases over the years, judges have actually been carrying on an implicit debate over the proper dimensions of our democracy.

1. Speech Rights and Anti-Corruption Concerns are Dependent Variables

Before engaging in a balancing test between speech rights and corruption concerns to decide a campaign finance issue under the *Buckley* framework, judges must first define the contours of these two vague ideas.61 The very nature of this process, however, requiring them to balance a vague speech concept against a vague corruption concept, allows judges an enormous amount of leeway to make a decision.62 Further complicating matters, the ideas of speech and corruption are inextricably linked with one

55. *Id.*
56. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (per curiam) (internal quotation marks omitted)). Although the holding of *McConnell* is no longer good law after *Citizens United*, the words of Justices Stevens and O’Connor here are still useful in interpreting other surviving case law.
57. *Id.* at 144 (quoting *Shrink Mo.*, 528 U.S. 377, 290 (2000) (emphasis omitted)).
58. *Id.* at 154–58.
60. See *id.* at 46–47.
another by definition: *Buckley* essentially asks judges to draw a line on a continuum at which acts that would be speech become corrupt non-speech, and thus speech is bounded as non-corruption and corruption as non-speech.63

Determining the scope of such rights and countervailing restrictions requires a judge to rely on an underlying vision of what democracy should look like in order to figure out where to draw the line.64 After all, “the right to free speech derives from the nature of democracy itself.”65 The nature of the judge’s view of an ideal democracy can account for wildly different outcomes in this process. Because a judge must both define the concepts of speech and corruption and weigh them against one another at the same time, this “mak[es] for tricky weighing and tricky defining.”66 But it is the judge’s underlying view of democracy that drives each of these choices, which allows the judge a great deal of discretion to arrive at a preferred outcome.

2. Judges Have Held an Implicit Democracy Debate in Campaign Finance Law

An ongoing democracy debate has long simmered beneath the surface of the Supreme Court’s campaign finance cases. As Professor Ringhand noted, the *Buckley* corruption-based campaign finance framework has allowed Supreme Court Justices to contest fundamental democratic process issues by proxy. The debate shifts to a rights protection issue, even though the true arguments are about democracy.67 This is problematic because while American society has conducted an open and ongoing debate over the details of our democracy since the Founding—and a healthy, functional democracy should always include such a debate—the underlying democracy arguments in campaign finance law have been hidden away.68 Instead of conducting an open debate on these important issues, “judges . . .

63. *Id.* at 324.
64. Ringhand, *supra* note 4, at 90; see Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 802–04 (1985) (discussing the difficulties of defining “corruption” without resorting to some contextual baseline comparison); Burke, *supra* note 33, at 128 (“When corruption is proclaimed in political life it presumes some ideal state. Corruption is thus a loaded term: you cannot call something corrupt without an implicit reference to some ideal. In order to employ the concept of corruption in the context of a political controversy, such as that over campaign finance, one must have some underlying notion of the pure, original or natural state of the body politic.”).
68. *Id.*
have been able to rest important decisions on unchallenged definitions of democracy that in fact are deeply contested and controversial.™ By using such techniques judges may be able to force their own democratic prejudices onto society through judicial fiat, even though legislators may have never before debated those ideas or debated and rejected them outright.

For example, the logic of Buckley itself seems to be based on a rather pluralistic, interest group-focused vision of democracy. The Court’s decisions on two questions in Buckley demonstrate this pluralistic tilt: (1) determining the validity of the proposed government interests; and (2) setting the standard of review and weighing the interest against competing First Amendment concerns for each specific restriction.™ The Court rejected the Government’s asserted interest in promoting political equality—which accords more closely with republican ideals of fairness, reasoned debate, and consensus building—as insufficient to offset speech concerns.™ But it upheld the Government’s asserted interest in preventing political corruption.™ In applying the corruption interest, the Court found that regulation of direct contributions merited a lower standard of review because such contributions carry a significant risk of corruption.™ Then, in evaluating the regulation of independent expenditures, the Court found that the highest standard of review was required; in the Court’s view in 1976, independent expenditures simply did not present much of a risk of corruption because the threat at that time came from direct contributions.™ The Court then struck down the restriction on independent expenditures while upholding the one on direct contributions.™

So the Court’s decision of which standard of review to apply to a regulation—and thus whether it would likely survive review—was based on both how it defined corruption and how it applied that definition to the factual circumstances at hand. But this choice also illuminates the Court’s underlying view of democracy as a pluralist theory.™ Pluralists support upholding contribution limits because they serve to prevent the worst abuses and keep the system running, and they oppose restrictions on independent expenditures because they restrict more robust interest group

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69. Id.
71. Id. at 39.
72. Id. at 29.
73. Id. at 35-39.
74. Id.
75. Id.
76. Ringhand, supra note 4, at 82.
competition. Similarly, the Court’s first decision in Buckley—upholding the corruption interest but not the equality interest—also resolved a debate between pluralist and civic republican arguments in favor of a pluralist outcome. And in making an odd constitutional distinction between Congress’s ability to regulate contributions and expenditures, the Court defied the original logic and goals of Congress in creating the Federal Election Campaign Act and has created a seemingly arbitrary regulatory system that commentators have long ridiculed. Although majorities of Justices have since supported overturning Buckley’s illogical framework of review, they have consistently been divided by the question of what should take its place.

The result has been a fractured and sometimes inconsistent body of campaign finance cases, with a host of different definitions of corruption and free speech. However, there is a deeper problem at work here. As Professor Ringhand argued, “judicial reliance on unstated, disputed and often shifting assumptions about democracy” has been the real source of the messiness and unpredictability of the Supreme Court’s campaign finance jurisprudence.

3. Need for Deference to Congress on Campaign Finance Issues

Judges should be more deferential to Congress on campaign finance issues, and not just in cases where they agree with the policies that have been enacted. In light of the instability and arbitrary outcomes inherent in submerging this democracy definition problem in rights-based language, judges should be more explicit in discussing their underlying assumptions on these issues. As Professor Ringhand recommended, judges should simply delve down to the core problem in campaign finance cases by asking whether “the definition of democracy the Court is relying on in defining the constitutional right at issue mandated by the Constitution . . . .” Where this is not the case, courts should be more deferential to congressional experimentation—and not simply in cases where the majority of justices agree with the legislative outcome, because that is no real solution. It is important that judges recognize their limits in

77. Id.
78. Id.
80. Id. at 120.
81. Persily & Lammie, supra note 32, at 127.
82. Ringhand, supra note 4, at 80.
83. Id.
84. Id.

this area of law so that it is the people’s representatives who are deliberating over the details of their democratic processes, with more transparency and accountability.85

But Congress and state legislatures need more freedom to experiment on campaign finance issues. The open messiness of a democracy is also one of its great strength, but people need to believe in the overall system for it to work correctly.86 Congress can more fully distill and respond to the will of the people on these issues than can the courts.87 In part this is because democratic governments provide “institutional conduits for distrust,” allowing for open public deliberation of issues and ongoing accountability of elected officials so that people may trust the system even if they do not necessarily trust individual actors.88

In addition, congressional representatives are themselves substantive experts on campaign finance law—it’s something they must understand well to continue winning elections.89 They are intimately familiar with the risks of campaign corruption and the effectiveness and need for different types of regulations in ways others will never understand.90 In this vein, Justice Breyer argued in Shrink Missouri that “the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we” members of the Court.91 Therefore, as Professor Ringhand argued, we should strive to “ensure that a judge will not lightly or without justification substitute his or her own preferred vision of democracy for that preferred by the legislature,” so long as “the definition of democracy pursued by the legislature is not [itself] constitutionally prohibited.”92

II. CITIZENS UNITED: DEMOCRACY DEFINITION RUN AMOK

This part provides a nuts-and-bolts summary of the Citizens United decision and analyzes it under the democracy definition framework outlined above. It argues that in Citizens United, the Court made a dramatic, internally inconsistent attempt to change the rules of campaign finance law—thus reshaping our democracy—and that this should be cause

85. Id. at 112.
86. Mark E. Warren, Is Low Trust in Democratic Institutions a Problem of Corruption?, in CORRUPTION AND AMERICAN POLITICS 37, 53 (Michael A. Genovese et al., eds., 2010).
88. Warren, supra note 86, at 53.
90. Id. at 318.
91. Shrink Mo., 528 U.S. at 403 (Breyer & Ginsburg, JJ., concurring).
92. Ringhand, supra note 4, at 113.
for concern. Beyond the immediate impact of *Citizens United* in overturning the ban on corporate independent expenditures in elections, courts are already struggling to reconcile the decision with surviving campaign finance law; if courts follow the spirit of this decision to its logical conclusion, more changes may be on the way.

### A. Overview of the Decision

The *Citizens United* Court held that corporations and unions are free to engage in unlimited electioneering communications in the days leading up to a primary or general election with funds taken directly from their general treasuries. In doing so, the majority explicitly overturned its own precedent in *Austin* and *McConnell*. In overturning *McConnell* and invalidating a portion of the Bipartisan Campaign Finance Reform Act, the majority disregarded the monetary interest rationale, stating that the government’s recognized valid interest in preventing corruption or the appearance of corruption only extends to explicit quid pro quo corruption. It then held that this narrow anti-corruption interest was insufficient to overcome the speech rights at stake. In overturning *Austin*, the Court also dismissed the distortion rationale and argued that due to its reliance on “ancient First Amendment principles, . . . *stare decisis* does not compel the continued acceptance of *Austin*.”

The majority mostly relied on two cases to reach this result. The Court used selected passages from *Bellotti* to trumpet the broad First Amendment rights of corporations to engage in electioneering practices. This is strange, considering that the explicit logic of that case was that corporate influence in a referendum could be distinguished from influence in an election simply because there is no candidate to be corrupted in a referendum. The *Bellotti* Court even said outright that preventing corporations from exerting monetary influence over normal elections was a valid government interest.

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94. *Id.*
95. *Id.* at 909–10.
96. *Id.* at 908–09.
97. *Id.* at 886.
98. *Id.* at 904.
100. *Id.; Citizens United*, 130 S. Ct. at 958 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (“The case on which the majority places even greater weight than *Buckley*, however, is *Bellotti*, claiming it ‘could not have been clearer’ that *Bellotti*’s holding forbade distinctions between corporate and individual expenditures. . . . The Court’s reliance is odd. The only thing about *Bellotti* that could not have been clearer is that it declined to adopt the majority’s
The *Citizens United* majority also argued that when the landmark 1976 *Buckley* decision “identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.”\(^{101}\) It stated that the Court had never upheld limits on independent expenditures, unlike contribution limits.\(^{102}\) The majority went so far as to cite as proof of the harmlessness of independent expenditures that *McConnell’s* extensive 10,000 page congressional record “does not have any direct examples of votes being exchanged for . . . expenditures,”\(^ {103}\) even though corporate expenditures had been banned since 1947, making any such evidence quite hard to come by.\(^ {104}\) And the majority boldly stated that even if independent expenditures lead to greater influence over politicians, “[i]ngratiation and access, in any event, are not corruption.”\(^ {105}\) This phrase provides a good illustration of the majority’s absolutism here: there is no sliding scale for corruption, no context involved whatsoever. For these Justices, more implicit issues of privileged access and institutional capture simply do not qualify as corruption.

Furthermore, the dissent expressed concern that people will lose faith in the system.\(^ {106}\) The majority argued in response that because the people “have the ultimate influence over elected officials,” it makes no sense that people will lose interest in engaging with “democratic governance” once corporations can begin directly influencing elections.\(^ {107}\) This sort of brazen, cavalier statement succinctly captures the majority’s disconnect from the reality of American politics. In the end, the majority decided that its narrowly-drawn corruption interest did not outweigh its broadly-created corporate speech right.\(^ {108}\) The majority Justices flatly stated that “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of

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102. *Id.* at 909.
103. *Id.* at 910.
106. *Id.* at 931, 962–63 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).
107. *Id.* at 910 (majority).
108. *Id.* at 909.
corruption.”109 This is another great example of the majority’s sense of absolutism in defining the corruption interest narrowly.

Writing for the four-Justice minority in a lengthy dissent, Justice Stevens offered a passionate rebuke of the majority opinion:

In the end, the Court’s rejection of Austin and McConnell comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since Austin and McConnell is the composition of this Court.110

Justice Stevens argued in defense of the monetary influence and distortion rationales, noting that the Court had repeatedly “recognized Congress’ [sic] legitimate interest in preventing the money that is spent on elections from exerting an ‘undue influence on an officeholder’s judgment’ and from creating ‘the appearance of such influence,’ beyond the sphere of quid pro quo relationships.”111

The dissent went on to argue that “[c]orruption can take many forms . . . and operates along a spectrum,”112 noting that some other types of corruption can do much more damage to society than the occasional, explicit bribe.113 And while bribery may be the ultimate example of corruption, it is not so functionally different from more implicit abuses like buying access.114 Sadly, the understanding of corruption adopted by the Court will “leave lawmakers impotent to address all but the most discrete abuses.”115 The dissent attempted to ground its discussion of the corruption rationales in terms of political realities, while noting that in contrast, “the majority’s apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.”116 Furthermore, the dissent argued that where free-spending corporations appear to have gained undue influence over elected officials, voters lose faith in the electoral system, as shown “both in opinion polls, and in the laws . . . representatives have passed, and [judges] have no basis for elevating their own optimism into a tenet of constitutional law.”117

109. Id. (majority).
110. Id. at 941–42 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).
111. Id. at 961.
112. Id.
113. Id. at 962.
114. Id. at 961.
115. Id. at 962
116. Id. at 961.
117. Id. at 963 n.64.
B. Blatant Democracy Definition by The Citizens United Majority

This section applies Professor Ringhand’s democracy definition framework to the Citizens United decision. First, the majority outlined speech rights and corruption concerns at the most abstract level possible and then applied its own fuzzy rules with seemingly formulaic precision to achieve its desired result. In addition, the majority’s relies on “ancient First Amendment principles” to do much of the heavy lifting in the opinion, in part to distract from its own role in forcing this outcome. Finally, the majority showed an extreme lack of deference to both Congress and the Court’s own institutional history.

1. Concepts Defined in the Abstract and Applied as if by an Exacting Formula

When analyzing a constitutional challenge to a law through the Buckley corruption framework, judges enjoy an enormous amount of discretion to put a thumb on the scales of justice both in defining the speech and corruption concepts and in weighing them against one another. The best way to abuse this process then, is to define the terms in the abstract as much as possible, providing little context to ground your definitions in reality. And once a judge has defined one concept more broadly than the other, the weighing step becomes relatively simple. But taking this approach too far hurts the court’s credibility and creates difficult precedent for other courts to follow.

The Citizens United majority dealt with the concepts of corruption and corporate speech rights at their most abstract level. This technique of abstract generalization made it easier for the Court to limit the meaning of anti-corruption concerns while broadening speech rights for corporations. It also reduced the complexity of asserting a straightforward outcome from the constitutional balancing test: such broad speech rights easily trump narrowly-drawn anti-corruption concerns. But this imagined clear division between speech and corruption does not correspond with reality.

In treating corruption concerns so generally, the majority seems to think that context and real world explanations are irrelevant because

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118. Teachout, supra note 10, at 298.
119. See Ringhand, supra note 4, at 90–91.
120. See id. at 91.
121. Teachout, supra note 10, at 324.
suddenly "the categories of corruption and not corruption, and quid pro quo corruption and not quid pro quo corruption, are relatively clear." Yet to achieve meaningful constitutional analysis, courts must embrace and explain the context and detailed facts supporting their decisions. In fact, the *Citizens United* majority opinion reads very much like Justice Scalia’s dissent in *McConnell*, where he flatly stated that given the "premises of democracy, . . . there is no such thing as too much speech." But this sort of extreme abstraction is so general that it becomes essentially meaningless for any judge attempting to decide a case. Indeed, the *Citizens United* majority could probably have taken a more fact-intensive approach, at least attempting to define the important concepts it worked with, and still reached the same end result. This more reasonable approach would at least have provided more guidance for lower courts going forward. Instead, such an empty effort to describe the real-life bounds of corruption, an important policy issue to the American public, hurts the Court’s credibility and creates an amorphous precedent for lower courts to follow.

Additionally, Justice Scalia’s and Justice Kennedy’s shared belief in the maxim that there can never be too much speech is also inconsistent; both summarily agree that speech can be regulated, as it was in *Buckley*, to prevent certain types of corruption or the appearance of corruption. And yet that distinction makes no sense as constitutional logic. Why can speech ever be regulated as corruption, ever become non-speech, if there can never be such a thing as too much speech? This is what happens when courts endow essentially political arguments with the power of constitutional interpretation.

Besides the fact that the majority wanted it that way, there appears to be no answer as to why *McConnell*, *Austin*, and one set of congressional regulations must fall under the weight of this generality and yet *Buckley* and another set of congressional regulations should remain standing.

This logical inconsistency is the product of invoking such abstract concepts so broadly, without providing any context in which to place them,
so that they break down in application. The majority never explained "the constitutionally significant distinction" it created between different types of campaign finance regulations. Instead, Justice Kennedy merely picked his friends out of the crowd, invoking Buckley as gospel-like binding precedent, while sweeping aside disfavored precedents, Austin and McConnell, under the power of these seemingly indiscriminate generalizations. Justice Kennedy operated in the Citizens United majority just as Justice Scalia did before him in the McConnell dissent. As Professor Ringhand noted in critiquing that Scalia opinion:

[H]e simply uses his baseline assumptions about the nature of democracy to define the scope of the First Amendment, and then argues that the First Amendment itself therefore requires his definition of democracy. At no point does he explain why his preferred definition of democracy is constitutionally compelled but other visions—including the vision preferred by Congress in enacting BCRA—are constitutionally prohibited.

In Citizens United, the majority’s underlying viewpoint on the nature of an ideal democracy similarly drives the opinion and First Amendment language gives useful cover to what would otherwise be naked political preferences.

Furthermore, the majority’s decision to formalize political questions as if they were easy-to-manipulate math equations turns the whole opinion into a theoretical game. But this treatment of the issues is too easy, too simple; and because it cuts so many logical corners in refusing to define corruption in real-world terms, it seems insincere. In fact, “[c]orruption is a concept that is similar to other concepts we hold very close—e.g., liberty, democracy, or equality—that are extremely difficult to demarcate.” These types of concepts can neither be understood in the abstract, nor applied like mathematical equations, and yet the Citizens United majority does both with its treatment of speech rights and the anti-corruption interest.

2. The Constitution Compels This: “Ancient First Amendment Principles”

The majority actively invoked the First Amendment to overrule certain long-standing campaign finance regulations and previously settled cases, and then fell back on the argument that its actions were demanded by

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131. See Ringhand, supra note 4, at 107.
132. Id.
134. Ringhand, supra note 4, at 107.
135. Teachout, supra note 10, at 311.
136. Id. at 326.
the Constitution itself. In fact, the argument Justice Kennedy invokes for
the majority has become common sentiment for those opposed to campaign
finance regulations: it is the Constitution itself that compels striking down
regulations on corporate electioneering as unconstitutional, not underlying
assumptions about the proper nature of democracy. The argument often
continues that courts should only be considered activist when they strike
down statutes “without a firm constitutional basis for doing so.” Put
another way, “it [is]n’t activism if one [is] striking down the right laws.”

But this argument is inherently circular in nature, allowing
conservative activists to pretend that their preferred understanding of the
First Amendment is demanded by the Constitution, while still bemoaning liberal opinions as judicial activism. Thus, conservative activist judges
can force their political views on the rest of society despite signs from the
democratic process that much of society holds a different view on both the
First Amendment and the nature of an ideal democracy. Perhaps this type
of logic would make more sense and not merely provide cover for
underlying democracy arguments “if the Constitution itself somehow
‘chooses’ a substantive vision of democracy.” But of course the
Constitution was created with a wise balance of pluralist and civic
republican theories, and neither side has been able to gain an advantage in
claiming otherwise.

Moreover, it is important to see that it is the process of how we shape
our democracy that matters, not the end result that is achieved. The broader
point is not that one theory of democracy is superior to another; instead the
key is to understand “that defining democracy is what the entire debate is
about.” Continuing to allow one side or the other to constitutionalize
their democratic prejudices in deciding campaign finance cases would
simply put off the reckoning that judges are not working with fixed,
quantifiable rules to arrive at predestined outcomes, but are instead

137. See Ringhand, supra note 4, at 89.
139. Id.
140. Id. at 345 (“The problem with this definition of judicial activism [is] that it [is] entirely contingent on one’s point of view[,] . . . [o]ne person’s judicial activist is another person’s faithful interpreter.” (internal quotation marks omitted)).
141. Ringhand, supra note 4, at 91.
142. Id. at 92.
143. Id.
allowing their own beliefs on democracy to determine issues that should properly be decided by open societal debate.\textsuperscript{144}

The \textit{Citizens United} decision has generated a great deal of popular criticism.\textsuperscript{145} In response to ongoing attacks on the decision, some of those coming to the Court’s defense have fallen back on the familiar argument of compelled constitutional agency.\textsuperscript{146} They argue that in confronting the First Amendment basis of the ruling, some critics “dealt with that uncomfortable reality by simply ignoring what the opinion said.”\textsuperscript{147} However, while there is a great deal to debate with respect to what the First Amendment itself means in practice,\textsuperscript{148} that is not the relevant issue at stake here. Instead, as Professor Ringhand noted in discussing earlier campaign finance cases, “[t]he relevant question,” is simply “how aggressively judges should use their power of judicial review to give substance to . . . abstractions in the face of legislative disagreement about what democracy requires.”\textsuperscript{149}

Unfortunately the \textit{Citizens United} majority has taken exactly the wrong approach; instead, “judges should exercise their awesome power of judicial review modestly, and without assuming, especially without overt analysis, that their particular views of democracy are constitutionally compelled.”\textsuperscript{150} It is only when we evaluate the majority’s approach under the democracy-definition framework that this underlying pattern in the decision becomes clear. But as we shall see, the decision also appears to be out of line with what may be a societal majority’s understanding of what makes up an ideal democracy.

3. Lack of Deference to Congress and the Court’s Own Institutional Integrity

The majority in \textit{Citizens United} went to great lengths to reach a desired outcome, sweeping aside years of settled case law, statutes, and some of the Court’s own general rules of procedure in the process.\textsuperscript{151} And yet there were a long list of more narrow holdings the Court could have adopted instead to avoid so much legal carnage, while still granting the

\textsuperscript{144} Id.


\textsuperscript{147} Id.

\textsuperscript{148} Calabria, supra note 65, at 841.

\textsuperscript{149} Ringhand, supra note 4, at 114.

\textsuperscript{150} Id.

exact same result to the parties in the case.152 Instead the Court overturned part of Congress’s laboriously considered work in the Bipartisan Campaign Finance Reform Act—to which the Court had previously shown great deference—as well as overturning its own precedent in McConnell and Austin.153 To do so, the majority mostly relied on two cases: Buckley and Bellotti.154

Starting from a blanket “more speech is good” argument, the majority took Buckley’s animating logic that independent expenditures in 1976 seemed less likely to lead to corruption, and applied it as a legal maxim: independent expenditures never create corruption.155 More ironic is the majority’s distorted use of Bellotti, which held that corporations should be allowed to participate in referenda due to the absence of candidates to corrupt, even though they should still be banned from influencing candidate elections.156 The Citizens United majority lifted a few isolated passages from Bellotti to argue that the decision instead stood for the idea that corporations have broad First Amendment rights to engage in the political process.157 The majority felt that this shaky ground provided sufficient footing for it to overturn decades of legislative and judicial precedent.

Justice Stevens argued in dissent that the Court’s decision in Citizens United was “backwards in many senses.”158 He noted that it “elevates the majority’s agenda over the litigants’ submissions, facial attacks over as-

152. Burt Neuborne, Corporations Aren’t People, THE NATION, Jan 31, 2011, http://www.thenation.com/article/157720/debating-citizens-united?page=full (“The video didn’t fall under the campaign laws because it was necessary to take the affirmative step of downloading it, the equivalent of taking a book off a library shelf. The need for active collaboration by willing viewers should have ended the Citizens United case before it got started. In addition, the campaign statute applied only if 50,000 eligible voters were likely to view the video. How likely was it that 50,000 Democrats would have affirmatively downloaded a hatchet job on Hillary Clinton just before the primary? Moreover, lower court precedent had already recognized an exemption for electioneering communications with only tiny amounts of corporate funding, such as the less than 1 percent in Citizens United. Finally, the Supreme Court had already carved out a First Amendment safe harbor for nonprofit grassroots groups with de minimis corporate funding.”).
154. Id. at 958 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).
155. Id. at 901–03 (majority).
156. Id. at 958–59 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (“The majority attempts to explain away the distinction Bellotti drew—between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office—as inconsistent with the rest of the opinion and with Buckley... Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporation participation in candidate elections... do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation’s retaliation... Bellotti, apparently, is both the font of all wisdom and internally incoherent.”).
157. Id. at 958.
158. Id. at 979.
applied claims, broad constitutional theories over narrow statutory grounds, individual opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality.” But the majority got five votes.

C. Triggering the Next Round of Campaign Finance Cases

Unfortunately, it appears that the momentum of the Citizens United decision as precedent may well carry over to help topple other longstanding campaign finance laws. The Court invoked Buckley to grant de facto political personhood to corporations for purposes of political electioneering; thus corporations now may not be barred from directly paying for independent political expenditures in the days leading up to primaries and general elections. But this then begs the question of whether corporations must also be allowed to make direct contributions to candidates.

Although Buckley upheld restrictions on direct candidate contributions as necessary to prevent corruption or the appearance of corruption, this simply means that there is a cap on the amount of money a person can donate to a candidate’s campaign. On the other hand, corporations have been banned from making any direct contributions to electoral candidates since 1907 under the Tillman Act. In the wake of Citizens United, a U.S. District Court has now held that this distinction is also unconstitutional. Even though several other courts have refused to expand on the spirit of Citizens United to overturn additional campaign finance laws in recent months, it appears that these issues will be litigated in the courts for years to come, with the sweeping statements in Citizens United serving as a

159. Id.
163. See In re Cao, 619 F.3d 410, 413–14, 422–23 (5th Cir. 2010) (en banc) (upholding dismissal of challenges to FECA caps on direct contributions as well as caps on coordinated expenditures), cert. denied, 131 S.Ct. 1718 (2011); Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304, 316–20 (8th Cir. 2011) (upholding denial of preliminary injunction on state laws banning corporations from making coordinated expenditures or direct contributions) rel’g en banc granted and holding vacated (July 12, 2011); Iowa Right to Life Committee, Inc. v. Smithson, 750 F. Supp. 2d 1020, 1042–46 (S.D. Iowa 2010) (denying preliminary injunction on state law prohibiting registered lobbyists from making direct contributions); Preston v. Leake, 743 F. Supp. 2d 501, 506–09 (E.D. N.C. 2010) (denying summary judgment for plaintiff in challenge to state law prohibiting registered lobbyists from making direct contributions to candidates for state offices).
springboard for those attempting to overturn even more campaign finance regulations. Courts should resist these attempts.

III. PROBLEMS GOING FORWARD

The Court’s sweeping logic in *Citizens United* may cause a few additional problems going forward. Opinion polls seem to show that much of the public cares about broader types of institutional corruption, signaling a disconnect with the Court over its vision of an ideal democracy. Also, even as the Court has made it more difficult to prevent broader types of corruption from occurring by overturning campaign finance laws, it has also made it more difficult to prosecute incidents of the same types of corruption once they do occur. And polls showing a strong negative reaction to the opinion and its consequences may foreshadow growing public discontent on campaign finance issues.

A. Public Concern Over Preventing a Broader Concept of “Corruption” Signals a Disconnect from the Court’s Vision of Democracy

As difficult as it is to generalize about singular public “opinions” and “beliefs,” polls on corruption issues in America generate some strong conclusions, including what appears to be widespread public concern over broader types of corruption issues. This may illustrate a disconnect between society and the Court over what our democracy should look like. Indeed, public opinion polls reveal very high levels of concern over governmental corruption. In fact, “[l]arge percentages of the public state that corruption in government is either an ‘extremely important’ or ‘very important’ issue to them personally . . . [and] polls show that concern about political corruption remains remarkably stable” over time. However, while the public seems to be very concerned about corruption in the abstract, the issue does not score well when pollsters ask respondents to prioritize their domestic concerns with respect to choosing specific candidates for office. Some commentators have argued that this type of finding undermines the idea that the public really cares about corruption at

165. *Id.* at 286–88 (“A 2006 USA Today/Gallup survey found that 83 percent of adults believed ‘corruption in Congress’ was either a very (39 percent) or somewhat (44 percent) serious issue. Only 17 percent said it was either not too serious (15 percent) or not serious at all (2 percent). . . . [And] attitudes on this issue have been fairly stable over the past three decades.”).
166. *Id.*
all. But it more likely reflects a lack of alternatives—the feeling that a vote one way or the other will not change anything at all. This reinforces the idea that Americans are worried about institutionalized types of corruption because “the public sees corruption as being endemic in government.”

The American fixation on corruption in government appears to involve a much broader understanding of corruption than the Court’s quid pro quo conception allows. In this view, corruption can mean institutional capture by powerful interests, to the point that government actors may largely ignore other voices in the political process. This corruption concern has been described as “‘duplicitious exclusion: . . . the secretive or deceptive exclusion of those affected by decisions from influence over those decisions.’” Conceptualizing corruption in this way makes better sense of what appears to be a pervasive loss of public trust in government, as well as the seemingly contradictory polling on corruption concerns.

Under this interpretation, many Americans seem to consider institutional exclusion as a broader type of corruption. They may feel that most people have no real voice in the political process because the “corrupt” system only caters to powerful interests. This understanding of corruption aligns much better with the two longstanding corruption interests the Court dismissed in *Citizens United*—the monetary interest and distortion rationales—than it does with the narrow quid pro quo rationale that the Court upheld as a valid government interest. This dissonance may further undermine public faith in the government’s democratic institutions.

169. Streb & Clark, supra note 164, at 294 (In one long-term poll, “[r]oughly half of the respondents say the country is losing ground compared to only about 10 percent who believe that government is making progress; these percentages have held remarkably steady since the early 1990s.”).
171. Warren, supra note 86, at 40.
172. *Id.* at 39.
173. Id.
174. *Id.* at 44 (“[L]arge portions of the public seem to be judging the legal conduct of politics as ‘corrupt’ in a different sense: norms of democratic inclusion are systematically violated owing to the capture of the political process by organized interests and sectarian agendas at the expense of public goods and interests and those who are unorganized, less educated, and less wealthy.”).
175. *Id.*
176. See 130 S. Ct. 876, 910 (2010). See also Burke, supra note 33, at 131.
processes. As Justice Stevens noted in the Citizens United dissent, a "democracy cannot function effectively when its constituent members believe laws are being bought and sold."\textsuperscript{178}

The Court's narrow understanding of corruption also has little in common with current political realities. Politicians take advantage of this broad view of corruption all the time, labeling their opponents as insiders who have already been captured by the corrupt system. These same politicians will also constantly refer to themselves as outsiders, even after some have spent decades in the supposedly corrupt Washington culture.\textsuperscript{179} Furthermore, the Court's lack of interest in making any effort to describe the real world dimensions of corruption is troubling, and its choice to deal with such an important public concern so abstractly ultimately hurts its own credibility.\textsuperscript{180}

Opinion polls have also revealed increased public concern over corrupt linkages between corporations and government, especially since the beginning of the financial crisis in late 2008. Although part of the crisis may be blamed on incompetence in both the financial sector and government, people may see this calamity as a more fundamental betrayal "if the failures of oversight were a consequence not simply of incompetence but also because the institutions of Wall Street exercised an improper influence over the regulatory structures of government."\textsuperscript{181} The timing of the Citizens United decision then, coming so soon after the financial meltdown, and granting even more political access to corporations, probably could not have been worse.\textsuperscript{182} Some commentators have wondered aloud whether the majority simply got in over its head early on in the process and then was unable or unwilling to overcome its own momentum when the full extent of this bad timing became clear.\textsuperscript{183}

\textsuperscript{177} See Rose-Ackerman, supra note 168, at 135; Streb & Clark, supra note 164, at 299 ("Political corruption could lead to lower political efficacy, which in turn could make people less likely to participate politically, an essential component to any democracy.").

\textsuperscript{178} 130 S. Ct. at 964 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).

\textsuperscript{179} Teachout, supra note 10, at 297.

\textsuperscript{180} Warren, supra note 86, at 41.

\textsuperscript{181} Teachout, supra note 10, at 298–99.

\textsuperscript{182} Warren, supra note 86, at 37.

\textsuperscript{183} Id. at 41.


B. New Difficulties in Prosecuting Broader Corruption Concerns After the Fact

Now that *Citizens United* is the law of the land, the government must decide how to deal with what seem to be broad public corruption concerns in an environment in which the Supreme Court may be unsympathetic to new campaign finance laws. Although the government has many punitive corruption regulations, in addition to preventative measures like campaign finance laws, individual corruption prosecutions can only do so much. And recently in *Skilling v. United States*, the Supreme Court overturned one of a prosecutor’s most useful punitive corruption statutes on vagueness concerns. Although the areas of law at issue in *Skilling* and *Citizens United* are different, the same basic story plays out in both cases: legislators attempt to target more implicit corruption issues, and the Supreme Court strikes the law down over constitutional concerns based on a narrow view of corruption.

But punishing only the worst examples of acute corruption while allowing systematic issues of undue influence to simmer under the radar is not a real solution to these concerns. And reform measures that target the appearance of corruption while avoiding underlying causes of corruption can paradoxically raise perceptions of corruption. In addition, it is often extremely difficult to prosecute more nebulous types of corruption after the fact because of the burden of proving corruption has occurred, as well as the difficulty in creating statutes to target broader corruption concerns in the first place. The 10,000-page record in *McConnell* explains the first issue, noting that in spite of widespread monetary interest concerns in Congress, actual proof of corruption only surfaces in the most extreme cases because more implicit types of corruption are easy to hide. And the result in *Skilling* illustrates the second problem well.

The Court held in *Skilling* that the “honest services” wire fraud statute, a popular tool among prosecutors targeting a broad array of political and

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188. 130 S. Ct. 2896 (2010).
190. Warren, *supra* note 86, at 55 (“[W]hile Blagojevich-style corruption is an ever-present danger in democracies, we should not allow such cases to distract from more pervasive forms of the corruption of democratic processes that work via exclusion . . . . Although the old-fashioned corruption certainly does not help democracies, it is likely that corruption as duplicitous exclusion produces the generalized public judgments that ‘the system’ is corrupt.”).
corporate corruption, only applies to explicit bribery and kickback schemes. The statute, 18 U.S.C. § 1346, criminalized acts of a public or quasi-public official that serve to “deprive another of the intangible right of honest services.” The Court imposed a limiting restriction to avoid vagueness concerns, interpreting the statute to cover only a core category of corruption crimes—which it found to consist of explicit bribery and kickback schemes—while excluding issues of undue influence and non-disclosure.

The doctrine of prohibiting the deprivation of the public’s intangible rights had grown out of an earlier version of the mail fraud statute. In cases where a public official abused governmental power for private gain, there may not be any party that suffered a corresponding loss; the loss in such cases may only be the intangible right of the public to be honestly represented. Though all Circuits of the Court of Appeals had embraced this broader theory of fraud, the Supreme Court held in *McNally v. U.S.* that the original mail fraud statute was instead “limited in scope to the protection of property rights.” Congress quickly reversed the *McNally* decision by passing legislation “specifically to cover one of the ‘intangible rights’ that lower courts had protected . . . prior to *McNally*: ‘the intangible right of honest services.’” A circuit split then developed over how to interpret the new “honest services” statute.

The *Skilling* Court reasoned that because most honest-services cases after *McNally* dealt with explicit bribes and kickbacks, those categories of corruption formed the core focus of the statute. By limiting the statute to this core set of crimes, the Court held that it avoided vagueness concerns by establishing clear notice to potential defendants, because those core crimes are unambiguously illegal. In noting that the statute had sometimes been applied to more “amorphous” wrongdoing, the Court reiterated that “[i]f Congress desires to go further, . . . it must speak more clearly than it has.”

194. *Id.* at 2908 n.1.
195. *Id.* at 2931–34.
196. *Id.* at 2926.
197. *Id.* at 2926–28.
198. *Id.* at 2927.
199. *Id.*
200. *Id.*
201. *Id.* at 2928 n.36.
202. *Id.* at 2928.
203. *Id.*
204. *Id.* at 2933 (internal quotation marks omitted).
The government had asked the Court to adopt a wider undue influence standard, but the Court noted that too many questions remained unanswered for it to adopt such a broad standard, and that a new round of careful legislative action would instead be required to answer them. Since *Skilling*, some have called for legislatures to work to find a way to close “the gap created by this decision,” and Senator Patrick Leahy introduced legislation to address some of these concerns. However, it is unlikely that any such bill could pass in the current political climate.

In the meantime, “*Skilling* has had a ‘significant’ impact on pending cases and criminal investigations, and . . . [t]he Department of Justice (DOJ) already has dropped several active cases.” Thus, in looking at the *Citizens United* and *Skilling* decisions together, the Court has recently disabled portions of both preventative and punitive corruption regulations that target broader types of corruption concerns.

**C. Public Grumblings of Discontent**

Soon after the *Citizens United* ruling came the public opinion polling, finding that “Americans of both parties overwhelmingly oppose” the decision. A February 2010 Washington Post/ABC News poll showed eight out of ten respondents disapproved of the outcome, with 65 percent “strongly opposed,” and 72 percent in favor of restoring the previous limits. As some have noted, it is difficult to make too strong of a conclusion based on a few polls on such a complex issue, and more data are needed. However, Justice Stevens’s closing argument in dissent appears to ring true: “[w]hile American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”

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205. *Id.* at 2933 n.44.
208. *Id.*
209. *Id.*
211. *Id.*
Since *Citizens United* was decided, many have proposed new campaign finance legislation or constitutional amendments to reign in or overturn the decision outright.\(^{214}\) However, such changes looked unlikely after even modest disclosure requirements were defeated in the Senate by a Republican filibuster,\(^{215}\) and now appear out of the question after significant Republican gains in the 2010 midterm elections.\(^{216}\) Others have argued that *Citizens United* will continue to cause a great deal of uncertainty for courts to interpret as precedent.\(^{217}\) President Obama’s public criticism of the decision in his January 2010 State of the Union address may even be part of a broader strategy to “run against the Court” in the 2012 presidential election.\(^{218}\) Nixon similarly positioned himself against the Warren Court as part of his successful presidential campaign following the Supreme Court’s then-controversial *Miranda* decision.\(^{219}\) It seems unlikely that adverse popular opinion will cause the current Court to simply change its mind anytime soon, and the Court’s high levels of popularity as an institution may make it effectively immune against any sudden drop in support.\(^{220}\)

In the short term, the path forward is unclear. In the long term, the issue will be whether the American people can sustain high levels of disapproval against the ruling, and organize concerted social pressure against the Court and the political branches to change it. This is because “[i]t is through the process of judicial responsiveness to public opinion that the meaning of the Constitution takes shape. The Court rules. The public responds. Over time . . . the Court comes into line with the considered views of the American public.”\(^{221}\) Throughout its history of constitutional interpretation, the Court has generally moved in broad channels of popular support, and when decisions have strayed too far from that support it has often adjusted course over time in response.\(^{222}\)

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219. *Id.*
221. *Friedman, supra* note 138, at 383.
222. *Id.* at 382 (“What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another over time.”).
end, the Court must mind decisive, long-term public sentiment because it requires public confidence to function effectively.\textsuperscript{223}

The late Justice Rehnquist’s answer to the question of whether justices could “isolate themselves from the pressure of public opinion . . . was that ‘we are not able to do so and it would probably be unwise to try.’”\textsuperscript{224} And Justice O’Connor has noted that the Court “rel[ies] on the confidence of the public in the correctness of [its] decisions. That’s why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.”\textsuperscript{225} There certainly needs to be space for principled legal decisions on the meaning of the Constitution. But while day-to-day public passions should not decide cases, the Court’s decisions historically do not stand the test of time without popular support.\textsuperscript{226}

\textbf{CONCLUSION}

In \textit{Citizens United}, the Supreme Court engaged in its latest, perhaps most blatant act of democracy definition in a long history of such behavior in campaign finance cases. The majority’s pluralist, interest group-focused viewpoint on democracy pervades its entire opinion, informing its abstract conceptualization of broad corporate speech rights and narrow understanding of the corruption interest as confined to only the quid pro quo rationale. Corporations now have the right to spend freely to influence elections, as they did in the 2010 state and congressional elections, and as they are gearing up to do in the 2012 elections.

Although everyone may have noticed the new influx of attack ads during the 2010 elections,\textsuperscript{227} because of the lack of disclosure laws, it is difficult to tell just how much corporate and union money was spent to influence the elections, or how much the inclusion of this new source of

\textsuperscript{223} Id. at 370 (“‘No institution . . . can survive the loss of public confidence, particularly when the people’s faith is its only support.’ For this reason, the Court has, ‘with but few exceptions, adjusted itself in the long run to the dominant currents of public sentiment.’” (quoting DEAN ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL ix, 40, 235 (1937))).

\textsuperscript{224} Id. at 371 (quoted in Jeffrey Rosen, \textit{Rehnquist the Great?: Even Liberals May Come to Regard William Rehnquist as One of the Most Successful Chief Justices of the Century}, ATLANTIC MONTHLY 84–86 (Apr. 2005)) (internal quotation marks omitted).

\textsuperscript{225} Id. at 371 (quoting Sandra Day O’Conner, \textit{Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust}, 36 CT. REV. 13 (1999)) (internal quotation marks omitted).

\textsuperscript{226} Id. at 380–81.

\textsuperscript{227} Robert Weissman, \textit{Citizens United Impact Worse than Anticipated}, WICHITA EAGLE, Jan. 26, 2011, (“Most of the groups were funded by a small number of corporations and superwealthy individuals . . . . As completely unaccountable entities, they also were free to run vicious attack ads without even the reputational harm that attaches to candidates who run negative ads. Virtually everyone hates attack ads, but they work.”).
money affected the outcomes of those races.228 By some accounts, Republicans benefited disproportionately and handsomely reaped the rewards.229 And although the congressional failure to pass disclosure laws is not directly the fault of the Citizens United decision,230 the waves of representatives voted in with the help of corporate influence make it even less likely that Congress will approve disclosure laws going forward.231

What is clear is that income disparities are dramatically on the rise in America232—with a vast number of Americans now living below the poverty line233—while at the same time, the rich have increasingly come to dominate the political process.234 Now the Supreme Court has allowed corporations to join in as well. But in the end, “[t]he decisions of the justices on the meaning of the Constitution must be ratified by the American people.”235 The question is what the people will choose to do about all of this.

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228. Neuborne, supra note 152.
229. Weissman, supra note 227 (“With inadequate reporting and disclosure rules, we don’t know exactly who spent what in the election. We do know that 150 organizations outside of the political parties reported spending nearly $300 million to influence federal elections, and that the actual number is much higher. Outside groups’ spending favored Republicans by about 2-to-1.”).
230. Abrams, supra note 146 (“Congress has never required such disclosure. It could still do so, but if it doesn’t, don’t blame Citizens United.”).
231. See Neuborne, supra note 215.
232. The Rich and the Rest, THE ECONOMIST 13, Jan. 22, 2011 (“The gap between rich and poor has risen . . . especially [in] America[,] . . . the shift has been overwhelmingly due to a rise in the share of income going to the very top—the highest 1% of earners and above—particularly those working in the financial sector. Many Americans are seeing their living standards stagnate, but the gap between most of them has not changed all that much.”).
234. Teachout, supra note 10, at 321 (“The [Court] . . . has rendered the richest people in the country the first-level ‘gatekeepers’ in deciding who can run for public office.”).
235. FRIEDMAN, supra note 138, at 381 (“What matters most about judicial review, however, is not the Supreme Court’s role in the process, but how the public reacts to those decisions. This is the most important lesson that history teaches. Almost everything consequential about judicial review occurs after the judges rule, not when they do.”).