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Saint Louis University School of Law Legal Studies Research Paper Series  
No. 2010 - 26

TOO MUCH OF A GOOD THING: CAMPAIGN SPEECH  
AFTER CITIZENS UNITED

31 Cardozo L. Rev. 2365, 2010

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TOO MUCH OF A GOOD THING:  
CAMPAIGN SPEECH AFTER *CITIZENS UNITED*

*Molly J. Walker Wilson\**

*If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any) . . . then I suppose the majority's premise [in *Citizen's United*] would be sound.*

—Associate Justice John Paul Stevens<sup>1</sup>

INTRODUCTION

In January 2010, the Supreme Court in *Citizens United v. Federal Election Commission*<sup>2</sup> overturned *Austin v. Michigan Chamber of Commerce*<sup>3</sup> and the portion of *McConnell v. Federal Election Commission*<sup>4</sup> that restricted independent corporate expenditures, as codified in section 203 of the Bipartisan Campaign Reform Act (BCRA).<sup>5</sup> Specifically, *Citizens United* invalidated laws forbidding corporations and unions from using general treasury funds for “electioneering communication,” political advocacy transmitted by broadcast, cable, or satellite communication in the period leading up to

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<sup>1</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 975 (2010) (Stevens, J., dissenting).

<sup>2</sup> *Id.* at 886.

<sup>3</sup> 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>4</sup> 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>5</sup> *See Citizens United*, 130 S. Ct. at 886 (“Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate . . . . Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm’n*.” (internal citations omitted)). Section 203 of BCRA, also known as the “McCain-Feingold Act,” prevents corporations and unions from using general treasury funds for “electioneering communications,” a term that refers to advocacy transmitted by broadcast, cable, or satellite communication where the message promotes or criticizes a candidate running for federal office in the thirty-day period leading up to a primary and sixty-day period prior to a general election. 2 U.S.C. § 434(f)(3)(A) (2006).

a federal election.<sup>6</sup> In reporting the decision, *The New York Times* called *Citizens United* “a sharp doctrinal shift [having] major political and practical consequences [that would] reshape the way elections were conducted.”<sup>7</sup> The opinion drew immediate attention at the highest level. President Barack Obama was highly critical of the result, calling it “a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.”<sup>8</sup>

Some were pleased by the ruling, lauding the lifting of a ban on corporate political spending as a victory for freedom of speech.<sup>9</sup> An amicus brief filed for the Chamber of Commerce stated that *Austin*’s ban on corporate spending was “impossible to reconcile with basic First Amendment principles.”<sup>10</sup> For advocates of stricter campaign finance regulations, the ruling was distressing. Former general counsel of the Federal Election Commission Lawrence M. Noble worried publicly that lobbyists would gain leverage with a simple threat aimed at lawmakers: “We have got a million we can spend advertising for you or against you—whichever one you want.”<sup>11</sup> Retired Supreme Court Justice Sandra Day O’Connor was tacitly critical of the ruling, responding to questions by referencing her own (coauthored) opinion in *McConnell*,<sup>12</sup>

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<sup>6</sup> Section 203 of BCRA amended 2 U.S.C. § 441b(b)(2) to prohibit any “electioneering communication,” which is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary or sixty days of a general election. *Citizens United*, 130 S. Ct. at 887 (citing 2 U.S.C. § 434(f)(3)(A)).

<sup>7</sup> See Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, at A1.

<sup>8</sup> *Id.* So profound was President Obama’s concern that he addressed the Justices directly during a portion of his State of the Union Address, predicting that the Court’s holding would “open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.” He went on to assert that American elections might now be “bankrolled by America’s most powerful interests, or worse, by foreign entities.” See Mary Hall, *State of the Union: Obama Walking in the Footsteps of FDR*, HUFFINGTON POST, Feb. 3, 2010, available at [http://www.huffingtonpost.com/mary-hall/state-of-the-union-obama\\_b\\_447056.html](http://www.huffingtonpost.com/mary-hall/state-of-the-union-obama_b_447056.html).

<sup>9</sup> According to Jan Witold Baran, “[t]he greatest benefit of *Citizens United* is that it will restrain Congress from flooding us with arcane, burdensome, convoluted campaign laws that discourage political participation.” Jan W. Baran, Op-Ed., *Stampede Toward Democracy*, N.Y. TIMES, Jan. 26, 2010, at A23. Baran is the author of the book, *The Election Law Primer for Corporations*, and filed an amicus brief on behalf of *Citizens United*. See *infra* note 10.

<sup>10</sup> See Supp. Brief for Chamber of Commerce of the U.S. as Amicus Curiae Supporting Appellant at 3, *Citizens United*, 130 S. Ct. 876 (No. 08-205). “Suppression has been imposed even when candidates have directly attacked business interests and when corporations have unique and valuable insight into the likely consequences of electing or defeating particular candidates. Although this Court has protected the ability of corporations to discuss ‘issues,’ that is no substitute for direct and explicit speech about candidates.” *Id.*

<sup>11</sup> See David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES, Jan. 22, 2010, at A1.

<sup>12</sup> See Posting of Adam Liptak to The Caucus, <http://thecaucus.blogs.nytimes.com> (Jan. 26, 2010, 14:05 EST). Justice O’Connor stated, “If you want my legal opinion, you can go read [McConnell].” *Id.* Speaking at a keynote address at a Georgetown Law School conference,

the decision that was struck down by *Citizens United*.<sup>13</sup> Current Justice John Paul Stevens had a less nuanced response, penning a scathing, ninety-page dissent—asserting, among other things, that “[o]ur lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.”<sup>14</sup>

Campaign finance jurisprudence is complex because the Court has incrementally modified congressional legislation in a piecemeal fashion,<sup>15</sup> and in sometimes contradictory and perplexing ways. Relatively speaking, the *Citizens United* opinion was refreshingly simple. Justice Kennedy, writing for the majority, reiterated several previously established principles, namely that money is protected speech, and campaign funding restrictions must be justified by a compelling governmental interest.<sup>16</sup> The opinion also reiterated the notion that corruption and the appearance of corruption are the only legitimate interests justifying interference with campaign spending.<sup>17</sup> The ruling did not disturb existing regulations on direct campaign contributions (as opposed to independent expenditures), which the Court has upheld based on the rationale that contributions may result in quid pro quo corruption or the appearance thereof. Against the backdrop of these principles, the Court directly confronted the question of whether corporate independent campaign expenditures may be regulated.<sup>18</sup> The majority answered in the negative, and in doing so, established a new rule that no “person”—even when that “person” is a legal fiction—may be subject to independent campaign spending restrictions.<sup>19</sup>

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Justice O’Connor offered predictions about a post-*Citizens United* election: “I think today we can anticipate that labor unions and trial lawyers, for instance, might have the financial means to win one particular state judicial election. And maybe tobacco firms and energy companies have enough to win the next one. And if both sides unleash their campaign spending monies without restrictions, then I think mutually assured destruction is the most likely outcome.” *Id.*

<sup>13</sup> *Citizens United*, 130 S. Ct. at 975.

<sup>14</sup> *Id.* at 930 (Stevens, J., dissenting).

<sup>15</sup> The lack of comprehensiveness may result from the Court’s practice of deciding cases on the narrowest possible of grounds.

<sup>16</sup> *Citizens United*, 130 S. Ct. at 896-900. Statutory classifications impinging upon First Amendment rights must be narrowly tailored to serve a compelling governmental interest. *Id.* at 898.

<sup>17</sup> *Citizens United*, 130 S. Ct. at 908.

<sup>18</sup> Given the Court’s charge to address questions as narrowly as possible, significant commentary has focused on the appropriateness of the majority’s decision to treat the issue before the Court as a facial as opposed to an as-applied challenge. Although this is an interesting and important question, it is beyond the scope of this Article.

<sup>19</sup> In his scathing dissent, Justice Stevens summarizes the majority opinion this way:

First, the Court claims that *Austin* and *McConnell* have ‘banned’ corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker’s identity as a corporation. Third, it claims that

The effect of *Citizens United* was to protect the right of corporations, no less than individual American citizens, to fund and distribute political advocacy. It would appear that this right is also preserved for unions, although the opinion specifically addressed corporations. The *Citizens United* holding is controversial for many reasons, not the least of which is that it takes a hard-line approach that unapologetically privileges speech, even while tacitly acknowledging the potential for negative effects. For example, Justice Kennedy cites with approval a concurrence from an earlier campaign finance case arguing that “any ‘undue influence’ generated by a speaker’s ‘large expenditures’ was outweighed ‘by the loss for democratic processes resulting from the restrictions upon free and full public discussion.’”<sup>20</sup>

Almost simultaneously with the issuance of the *Citizens United* opinion, *Cardozo Law Review* published *Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence* (hereinafter *Behavioral Campaigns*),<sup>21</sup> in which I applied behavioral science to examine the effects of strategic campaign messaging on voter behavior.<sup>22</sup> The article highlighted empirical findings illustrating the potential for independent spending not only to change voters’ choices, but also to alter the manner in which they form judgments. I argued that there is a nexus between campaign spending, manipulative communication, and distorted (sub-optimal) voting decisions.<sup>23</sup> I proposed a new definition of “corruption,” which encompasses an understanding of the vital governmental interest in limiting campaign spending in order to minimize large-scale coordinated efforts to manipulate voters’ choices.<sup>24</sup> The *Citizens United* opinion purports to settle a question that is far from settled—in fact, behavioral science casts serious doubt upon the correctness of the majority’s conclusions. I rearticulate my earlier argument here, with a fresh sense of urgency. The majority’s reasoning in *Citizens United*, as explained below, provides an additional rationale for my claim.

This Article challenges the *Citizens United* decision on several grounds. First, I dispute the majority’s claim that corporate spending does not result in “corruption.” Second, I assert that the potential for

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*Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.  
*Citizens United*, 130 S. Ct. at 975 (Stevens, J., dissenting).

<sup>20</sup> *Id.* at 901 (citing *United States v. CIO*, 335 U.S. 106, 143 (1948)).

<sup>21</sup> Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence*, 31 *CARDOZO L. REV.* 679 (2010) [hereinafter *Behavioral Campaigns*].

<sup>22</sup> By “strategic,” I mean communication that is designed to capitalize upon some identified feature of human choice-formation. Strategic communication goes beyond straightforward attempts at persuasion through exchange of information and ideas. *See, e.g., id.* at 680.

<sup>23</sup> *Id.* at 679.

<sup>24</sup> *Id.* at 683-84.

corruption poses a real and serious threat to democratic elections and that preventing this corruption is therefore a vital governmental interest justifying restraints on “speech.” Finally, I adopt the majority’s free speech priority and propose that even if the First Amendment is the *only* legitimate consideration, corporate spending is harmful because it chills speech in a manner not contemplated by the Court. My claim relies on evidence from behavioral science and accepts all of the precepts adopted by the majority—that corporations are persons for campaign speech purposes,<sup>25</sup> that corporations are entitled to strong First Amendment protection, and that the only legitimate interest justifying interference is corruption or the appearance of corruption.<sup>26</sup> Without discounting any of these suppositions, I make the case that the Court wrongly decided *Citizens United*. In doing so, I advance an understanding of “corruption” and free speech that is enlightened by conclusions of behavioral science on the interplay between campaign spending and human judgment.

Before getting to the heart of the interest at stake in *Citizens United*, it may prove helpful to dispense with several ancillary but critical issues. These include how corporations are treated, how campaign spending is treated, and relatedly, the level of analysis to which restrictions on campaign spending are subject. Although the analogy “money is speech” is not without controversy, the Court long ago established the expressive function of funds.<sup>27</sup> Because campaign spending is viewed as a means of expressing support and communicating ideas, this activity is granted First Amendment protection.<sup>28</sup> As a form of political communication, campaign spending is subject to close examination, although there has been some question of whether such communication is subject to strict scrutiny.<sup>29</sup> In order to justify interference with spending for political advocacy, the Court must be satisfied that any proposed limitation serves an important governmental interest and that the limitation is narrowly tailored to effectuate that interest.<sup>30</sup>

Of course, in order to be entitled to protection under the First

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<sup>25</sup> While I accept this precept generally, I also agree with Justice Stevens’ assessment that “the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity.” *Citizens United*, 130 S. Ct. at 948 (Stevens, J., dissenting).

<sup>26</sup> The interest of preventing the “appearance of corruption” is not directly relevant to my claim; therefore, it is not discussed further in this Article.

<sup>27</sup> In *Buckley v. Valeo*, the Court noted that contribution and expenditure limitations “operate in an area of the most fundamental First Amendment activities” in that “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.” 424 U.S. 1, 14 (1976).

<sup>28</sup> *Id.*

<sup>29</sup> See *infra* note 52 and accompanying text.

<sup>30</sup> See *Buckley*, 424 U.S. at 25.

Amendment, the speaker must be a “person” entitled to protection.<sup>31</sup> The majority in *Citizens United* held that when it comes to campaign spending, corporations should have the same rights as individual citizens.<sup>32</sup> Kennedy defended this extension of the campaign speech right on the ground that corporations are “persons.”<sup>33</sup> While it is true that a variety of legal contexts have treated corporations as persons,<sup>34</sup> corporations have a long history of being disadvantaged in the campaign finance realm.<sup>35</sup> Restrictions on corporate spending have been justified on the grounds that corporations have special characteristics and are entitled to fewer rights than natural persons, points that Justice Stevens made during the oral arguments of *Citizens United*.<sup>36</sup> Both the scope of protection appropriate for corporate

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<sup>31</sup> The Fourteenth Amendment of the U.S. Constitution reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>32</sup> “The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).” *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., dissenting).

<sup>33</sup> Kennedy repeatedly refers to corporations as persons in making the point that no “person” should be deprived of the right to speak and advocate for a political candidate. *Citizens United*, 130 S. Ct. at 928-29.

<sup>34</sup> Treatment of the corporate form as a “person” is famously attributed to a reporter’s note in *County of Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), in which Chief Justice Waite was quoted prior to oral argument as stating: “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of [the] opinion that it does.” Corporations have also been treated as persons for purposes of the Fourteenth Amendment in *Chicago, M. & St. P. Ry. Co. v. Minnesota ex rel. Railroad and Warehouse Commission*, 134 U.S. 418, 456-57 (1890).

<sup>35</sup> At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that “[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.” *Citizens United*, 130 S. Ct. at 952-53 (Stevens, J., dissenting) (citing S. REP. NO. 59-3056, at 2 (1906)).

<sup>36</sup> Stevens inquired, “[b]ut if there is a compelling government—can there be any case in which there is a different treatment of corporations and individuals in your judgment?” Mr. Olson replied, “I would not rule that out, Justice Stevens. I mean, there may be. I can’t imagine all of the infinite varieties of potential problems that might exist, but—but we would eventually come back to the narrow tailoring problem anyway.” Transcript of Oral Argument at 7, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf) (referring to the strict scrutiny notion that the government must have a compelling interest and must have a narrowly tailored rule that effectuates that interest).



campaign spending and the potential for harm due to the particular characteristics of corporations relate to the governmental interest at stake: Preventing corruption in the context of democratic elections.

The prevention of corruption is not the only interest advanced to justify restrictions on campaign spending, but it is the single interest (along with a corresponding prevention of the appearance of such corruption) consistently upheld by the Court as sufficient to justify restrictions on campaign funding. “Quid pro quo” corruption, defined as “the buying of political influence,” has been most persuasive; the Court has upheld restrictions on campaign contributions under this rationale.<sup>37</sup> Independent expenditure limits, on the other hand, have been struck down because they “restrict the quantity of campaign speech by individuals, groups, and candidates,” and expenditures are ostensibly less likely to give rise to corruption.<sup>38</sup>

Two Supreme Court cases dealing with corporate spending have reached seemingly different results. The first is *First National Bank of Boston v. Bellotti*,<sup>39</sup> in which the Court found unconstitutional a Massachusetts law limiting corporations’ participation in ballot measure campaigns. In determining that the law improperly abridged the First Amendment right to free speech, the Court claimed that “the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”<sup>40</sup> However, a footnote in *Bellotti* read, “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.”<sup>41</sup> This footnote left the door open for a closer look, suggesting that corporate independent expenditures potentially could be shown to cause corruption.

Twelve years after *Bellotti* was decided, the Court heard *Austin v. Michigan Chamber of Commerce*,<sup>42</sup> a case in which the plaintiffs were challenging a Michigan law that prohibited non-media corporations from spending general treasury funds on advocacy related to state election campaigns. The *Austin* Court envisioned a different brand of corruption in elections: “[T]he 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

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<sup>37</sup> The Court first articulated its acceptance of contribution limits in *Buckley v. Valeo*, noting that “the integrity of our system of representative democracy is undermined” when large contributions are given to secure “political quid pro quo from current and potential office holders,” as shown by the examples that surfaced after the 1972 election. 424 U.S. 1, 26-27 (1976).

<sup>38</sup> *See id.* at 39.

<sup>39</sup> 435 U.S. 765 (1978).

<sup>40</sup> *Id.* at 790.

<sup>41</sup> *Id.* at 788 n.26.

<sup>42</sup> 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).



support for the corporation's political ideas."<sup>43</sup> The *Austin* Court upheld spending limits for corporations and unions. The holding in *Austin* was reaffirmed in *McConnell v. Federal Election Commission*,<sup>44</sup> a case that challenged the constitutionality of BCRA.<sup>45</sup> The *McConnell* Court found a governmental interest in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."<sup>46</sup> In *McConnell*, the Court held that section 323 of BCRA "does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders."<sup>47</sup> In upholding this portion of BCRA, the *McConnell* Court relied on the antidistortion interest articulated in *Austin*.<sup>48</sup>

### I. POST-CITIZENS UNITED ANALYSIS

Justice Kennedy, writing for the Court in *Citizens United*, explicitly rejected *Austin*'s distortion rationale, finding this interest "unconvincing and insufficient."<sup>49</sup> Kennedy's single-minded focus on the potential for "chilling" speech left the precise objection to the distortion rationale unarticulated. In fact, the *Citizens United* Court declined to provide specific information about what type of rationale, if any, would justify restrictions on campaign spending. What is clear from the majority opinion is that the interest on the other side of the equation—protection of speech—tipped the balance in favor of full corporate participation.

Two related questions become important, one a question of law and the other a question of fact. The question of law is whether there is an articulable governmental interest of sufficient importance to compete with the interest of corporate campaign advocacy (in the form of campaign spending). The question of fact is whether there is adequate evidence that corporate campaign spending threatens that governmental interest. In the past, the Court has asserted that in the context of

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<sup>43</sup> *Id.* at 660.

<sup>44</sup> See *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>45</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended at 2 U.S.C. §§ 431, 434, 437g, 437h, 438a, 439a, 441a, 441b, 441d, 441e, 441h, 441i, 441k, 454, 455 (2006)).

<sup>46</sup> See *McConnell*, 540 U.S. at 136 (quoting *FEC v. Nat'l Right to Work Comm.*, 495 U.S. 197 (1982)).

<sup>47</sup> *Id.* at 138.

<sup>48</sup> See *Citizens United*, 130 S. Ct. at 930 ("The *McConnell* Court relied on the antidistortion interest recognized in *Austin* . . .").

<sup>49</sup> *Id.* at 913.

campaign finance, “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>50</sup> The Court has also called campaign spending “a case where constitutionally protected interests lie on both sides of the legal equation;” accordingly, “there is no place for a strong presumption against constitutionality.”<sup>51</sup> However, in *Citizens United*, Kennedy unhesitatingly applied strict scrutiny to the question of whether Congress could restrict corporate spending, making it clear that the current Court will require an interest that is “compelling.”<sup>52</sup>

Many argue that when a financially powerful source helps a candidate win an election through independent spending, this action curries favor with the candidate. Others worry that the simple threat of corporations unleashing their resources against candidates will influence candidates’ policy positions.<sup>53</sup> Kennedy appears unconcerned, quoting his own partial dissent from *McConnell*:

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.<sup>54</sup>

He concludes that “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”<sup>55</sup> Ultimately, Kennedy seems convinced that “influence” is tantamount to healthy political pressure and not financial control.

“Corruption” is therefore relegated to strict quid pro quo vote-

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<sup>50</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000).

<sup>51</sup> *Id.* at 400 (Breyer, J., concurring).

<sup>52</sup> Laws that burden political speech are “subject to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *Citizens United*, 130 S. Ct. at 882 (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

<sup>53</sup> For example, Monica Youn of the Brennan Center at New York University articulated: I think there’s going to be a threat of corporate funded attack ads against elected officials who dare to stand up to corporate interests. Corporations have basically been handed a weapon. And when you walk into a negotiation, and you know that one person is armed and is able to use a weapon against you, they don’t have to take out that weapon. They don’t have to even brandish it. You know that they have it. Interview by Bill Moyers with Monica Youn, *The Journal* (PBS television broadcast Jan. 29, 2010) (transcript available at <http://www.pbs.org/moyers/journal/01292010/watch.html>).

<sup>54</sup> See *McConnell v. FEC*, 540 U.S. 93, 297 (2003), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010) (Kennedy, J., concurring in part and dissenting in part).

<sup>55</sup> *Citizens United*, 130 S. Ct. at 910.



buying, in which money is literally exchanged for political influence. This narrow characterization of corruption seems dangerous and naïve to Justice Stevens, who points out that “[c]orruption operates along a spectrum, and 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.”<sup>56</sup> Justice Stevens is also concerned that the majority does not understand the distortion rationale from *Austin*. He complains that “[t]he majority fails to appreciate that *Austin*’s antidistortion rationale is itself an anticorruption rationale . . . tied to the special concerns raised by corporations. Understood properly, ‘antidistortion’ is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process.”<sup>57</sup>

Although Justice Kennedy himself does not share this view, he acknowledges that “Congress believed that ‘differing structures and purposes’ of corporations and unions ‘may require different forms of regulation in order to protect the integrity of the electoral process.’”<sup>58</sup> This congressional rationale is at the heart of *Austin* and is reaffirmed as a vital interest meriting protection in *McConnell*.<sup>59</sup> The majority in *Citizens United* “acknowledges the validity of the interest in preventing corruption,” but Justice Stevens protests that it is not an interest the majority understands or protects, for “it effectively discounts the value of that interest to zero.”<sup>60</sup> Perhaps the majority either fails to see adequate evidence of corruption, or it cares so deeply about First Amendment protection that it cannot appreciate how any interest can truly compete.

## II. EVIDENCE OF FUNDING-RELATED HARM

Justice Kennedy believes that voters control the market. He argues that “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”<sup>61</sup> His logic is sound if—and only if—*either* campaign money is spent only to convey accurate information and honest ideas, *or* if money is spent to manipulate voters, the attempts to manipulate are ineffective. Justice Kennedy’s logic

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<sup>56</sup> *Id.* at 961 (Stevens, J., dissenting).

<sup>57</sup> *Id.* at 970 (Stevens, J., dissenting).

<sup>58</sup> *Id.* at 903 (citing *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981)).

<sup>59</sup> *Id.* (“[T]he *Austin* Court expressly declined to rely on a speech-equalization rationale . . . and we have never understood *Austin* to stand for such a rationale.” (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990))).

<sup>60</sup> *Citizens United*, 130 S. Ct. at 903.

<sup>61</sup> *Id.* at 910.

breaks down in the face of evidence that campaign money pays for the strategic use of psychological tactics and evidence that voters *are* swayed by such strategies. In *Behavioral Campaigns*, I wrote that “psychological research and theory provide insight regarding the potential for manipulative communication to distort vote choice.”<sup>62</sup> For decades, social scientists in psychology, sociology, anthropology, and political science have conducted empirical studies and gathered historical data in an attempt to glean what information they could about how voters make decisions. The overwhelming evidence is that targeted communication strategies can profoundly influence voter decision-making.

A. *The Nature of Political Appeals*

The central role of the political consultant reveals a great deal about the nature of campaign communication.<sup>63</sup> As is true in other “markets,” polling research and campaign strategists dominate the political landscape.<sup>64</sup> Political consultants are extremely costly, yet candidates consistently demonstrate a willingness to commit campaign funds to retain these professionals.<sup>65</sup> The logic is clear: Political consultants supply a critical knowledge of the cognitive mechanisms that have been successfully exploited by marketing strategists in other forums.<sup>66</sup> Campaign communication is the product of careful strategic planning and road testing. Information is reduced to “sound bites” and is framed and disseminated in such a fashion so as to maximize impact. Events external to the political race are harnessed or downplayed, depending upon the predicted impact on public opinion of a candidate or issue. As has been noted, “[p]olitics and campaigns are structured around how, where, and to whom a candidate or issue should be presented.”<sup>67</sup> Political strategy is exceptionally costly.<sup>68</sup> However, the

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<sup>62</sup> *Behavioral Campaigns*, *supra* note 21, at 687.

<sup>63</sup> See CAMPAIGN WARRIORS: POLITICAL CONSULTANTS IN ELECTIONS 2 (James A. Thurber & Candice J. Nelson eds., 2000) (discussing the importance of consultants for political campaigns).

<sup>64</sup> See LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS (2000) (describing the considerable resources invested in crafting persuasive messages).

<sup>65</sup> See LARRY J. SABATO, THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS 49-53 (1981).

<sup>66</sup> See Mary J. Culnan & Priscilla M. Regan, *Privacy Issues and the Creation of Campaign Mailing Lists*, 11 INFO. SOC'Y 2, 85-87 (1995).

<sup>67</sup> *Id.* (discussing the importance of the use of experts in product development and advertising for political campaigning).

<sup>68</sup> See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 684 (1997) (“Where does all this political money go? The biggest expense is the cost of purchasing advertising time on television (though increasingly, political consultants take a hefty

value of effective techniques is indisputable.<sup>69</sup>

### B. *Psychological Impacts*

Voters, like decisionmakers in other contexts, must make choices with limited information and under time constraints. An inability to collect, sort, and analyze all relevant data leads voters to rely on cognitive and informational shortcuts, or heuristics, which allow voters to “keep the information processing demands of the task within bounds.”<sup>70</sup> Individuals often also rely on social sources for both facts and opinions.<sup>71</sup> As a result, voters rely on imperfect and incomplete information and tend to process that information haphazardly, leaving them vulnerable to manipulation by politically motivated actors. A vote based upon incomplete information can be considered “accurate.” The test is whether the vote cast is the same vote that would have been cast if complete information had been available. To the extent that a citizen’s reliance on erroneous or misleading information and cognitive shortcuts results in a vote that is different from that which he or she would have cast with full information, the voter is deemed not fully competent, and the vote is “incorrect.”<sup>72</sup>

In summary, voters hold “inaccurate and stereotyped factual beliefs,” and they hold these beliefs “overconfidently [and] resist correct information, prefer easy arguments, interpret elite statements according to racial or other biases, and rely heavily on scanty information about a candidate’s policy positions.”<sup>73</sup> A closer look at some of the specific cognitive traps relevant to voter decision-making can provide a glimpse into the potential for psychological manipulation.

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share.”); *see also* Linda L. Fowler, *The Best Congress Money Can Buy?*, 6 ELECTION L.J. 417, 420 (2007) (discussing the rising costs of campaigning and the prominent role of consultants in crafting election communications).

<sup>69</sup> *See* James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 153, 181-82 (Arthur Lupia et al. eds., 2000) (“We have cautioned against overly optimistic accounts of a politically competent, rational public. Not only are citizens minimally informed, as nearly all scholars agree, but they are also prone to bias and error in using the limited information they receive.”).

<sup>70</sup> *See* Robert P. Abelson & Ariel Levi, *Decision Making and Decision Theory*, in 1(3) THE HANDBOOK OF SOCIAL PSYCHOLOGY 231-309 (Gardner Lindzey & Elliot Aronson eds., 1985).

<sup>71</sup> *See generally* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955) (for the proposition that decision-makers use shortcuts); *see also* BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000); CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000) (discussing empirical investigations of how human beings process information and make choices).

<sup>72</sup> *See* Kuklinski & Quirk, *supra* note 69, at 156-57 (finding that the voting public is error prone); Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 966 (2001).

<sup>73</sup> *See* Kuklinski & Quirk, *supra* note 69, at 156.



For example, individuals can be manipulated by framing, availability, and emotional appeals. These three areas are a small subset of a larger constellation of relevant cognitive and behavioral phenomena that can result in suboptimal decision-making.

### 1. Framing

A simple change in how choices are presented, or “framed,” can influence a decision-maker’s preference for one option over another.<sup>74</sup> In the framing context, syntax is a tool employed by clever communicators to craft listeners’ perceptions. In fact, the potential for strategic use of this cognitive trick has been cited as a hallmark characteristic of framing.<sup>75</sup> So powerful is the effect of the strategic use of frames that some have cautioned framing strategies “can become freewheeling exercises in pure manipulation.”<sup>76</sup> Political scientists and historians have linked issue framing to successful attempts at shaping public support for everything from a particular political party<sup>77</sup> to a specific military engagement.<sup>78</sup>

One of the most common types of framing used to persuade the public to endorse a candidate or issue is “valence framing,” which occurs when options are (misleadingly) depicted as diametrically opposed; one option is promoted as advantageous, while the other is intolerable.<sup>79</sup> Another common tactic is to pair words or phrases that have certain established meanings with other concepts in order to create new understandings and associations. A prime example is “clean coal.”

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<sup>74</sup> See Eldar Shafir, *Prospect Theory and Political Analysis: A Psychological Perspective*, 13 POL. PSYCHOL. 311, 313-14 (1992) (“Framing refers to the tendency of normatively inconsequential changes in the formulation of a choice problem to affect the ways people represent the problem and, consequently, their preferences.”); see also generally, Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981). The effects of framing can be seen when two “logically equivalent (but not transparently equivalent) statements of a problem lead decision makers to choose different options.” Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 36 (1998).

<sup>75</sup> See Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 317 (2006) (calling framing “the ability of someone who is propounding an option to present the option . . . in such a way as to . . . make the option seem more or less desirable”).

<sup>76</sup> See Donald R. Kinder & Don Herzog, *Democratic Discussion*, in RECONSIDERING THE DEMOCRATIC PUBLIC 347, 363 (George E. Marcus & Russell L. Hanson eds., 1993).

<sup>77</sup> For an account of the framing effect at work in a presidential election, see Matt Bai, *The Framing Wars*, N.Y. TIMES MAGAZINE, July 17, 2005, available at <http://www.nytimes.com/2005/07/17/magazine/17DEMOCRATS.html>.

<sup>78</sup> See JEFFREY FELDMAN, FRAMING THE DEBATE: FAMOUS PRESIDENTIAL SPEECHES AND HOW PROGRESSIVES CAN USE THEM TO CHANGE THE CONVERSATION (AND WIN ELECTIONS) (2007) (discussing George W. Bush’s reference to “axis of evil” in speeches).

<sup>79</sup> See Irwin P. Levin, Sandra L. Schneider, & Gary J. Gaeth, *All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 ORGL. BEHAV. & HUM. DECISION PROCESSES 149, 150 (1998).

In other instances, framing is achieved by altering the presentation of numbers or percentages. For instance, an advertising campaign might refer to a product as ninety-nine percent pure, as opposed to one percent impure.<sup>80</sup> Responses to framing changes are so robust in human beings that some researchers have looked at the physiological basis for these responses and have discovered that the framing effect is associated with the amygdale, an area of the brain responsible for processing emotions.<sup>81</sup>

## 2. The Availability Heuristic

Ideas, events, and characterizations that are easily brought to mind are said to be “available.” Empirical investigations of the availability heuristic reveal that subjects change their estimates about the likelihood of a danger materializing based upon the recency, frequency, and vividness of information about the danger.<sup>82</sup> In particular, the perceived likelihood of events—particularly risky events or bad outcomes—increases if the language used to describe these dangers is emotionally loaded.<sup>83</sup> For example, prior to the terrorist attack on the World Trade Center on September 11, 2001, Americans ranked terrorism low on their list of priorities meriting governmental attention.<sup>84</sup> More than a year after the attack of September 11, public polls indicated that Americans deemed the threat of terrorism to be the single most important problem facing the United States. Even more interestingly, “fluctuations [in Americans’ concern about terrorism] closely track[ed] the frequency of television news stories concerning terrorism.”<sup>85</sup>

Campaign tactics often involve efforts to increase the cognitive availability of ideas that are advantageous to the candidate. For example, advertising campaigns develop themes and use repetition to

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<sup>80</sup> The classic slogan of Ivory Soap was “99 44/100 Per Cent. Pure.” A 1907 advertisement using this slogan can be viewed at [http://www.americanhistory.si.edu/archives/Ivory/detail.asp?index=0207910005.jpg&startCount=5&skipNo=yes&skip\\_num=1&key=&subject=&output=text&dates=&coll=&form\\_genre=](http://www.americanhistory.si.edu/archives/Ivory/detail.asp?index=0207910005.jpg&startCount=5&skipNo=yes&skip_num=1&key=&subject=&output=text&dates=&coll=&form_genre=)

<sup>81</sup> Benedetto De Martino et al., *Frames, Biases, and Rational Decision-Making in the Human Brain*, 313 *SCIENCE* 684 (2006).

<sup>82</sup> See Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 *CARDOZO L. REV.* 2147, 2149 (2009) (“The availability heuristic is a widely-used mental shortcut that leads people to assign a higher likelihood to events that are readily ‘available’—events that are particularly likely to come to mind due to their vividness, recency, or frequency.”).

<sup>83</sup> *Id.*

<sup>84</sup> See Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 *COLUM. L. REV.* 503, 532 (2007) (“[O]n September 10, 2001, terrorism was far from a high priority item for Americans—and . . . the year before the attacks, literally 0% of the public counted terrorism as the nation’s leading problem!”).

<sup>85</sup> See *id.* (internal citations omitted).



build a particular understanding of an issue.<sup>86</sup> Campaign funds are first spent developing and testing advertisements that communicate simple messages in memorable ways. Funds are then used to distribute the communication widely, preferably in a variety of formats. Political psychologists have noted the effectiveness of such a strategy, finding that “information that is widely and repeatedly disseminated to the public stands a good chance of being absorbed (and retrieved later).”<sup>87</sup>

### 3. The Role of Emotions

Emotional appeals are a hallmark of political campaigns.<sup>88</sup> Negative emotions such as fear, anger, and outrage are particularly prominent in political advertising, primarily because these emotions tend to influence choice.<sup>89</sup> In the political marketplace, “negative” campaigning is commonplace, making this type of political communication one of the most prominent examples of an effort to harness the power of emotions.<sup>90</sup> Political advertisements are particularly infamous for triggering fear in constituents. One prominent example is the 1964 Lyndon B. Johnson advertisement entitled “Peace, Little Girl,” in which the reflection of an atomic mushroom cloud was portrayed as a reflection in the eyes of a small child.<sup>91</sup> Because lawmakers have control over the exposure of citizens to various risks, the role of emotions in perceptions about risk becomes a central feature of political choice.<sup>92</sup> As Dan Kahan notes:

<sup>86</sup> See Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the “Magic Words” Doctrine?*, 10 STAN. L. & POL’Y REV. 33, 37 (1998). For further scholarship on informational and reputational cascades, see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 708-09 (1999).

<sup>87</sup> Daron R. Shaw, *A Study of Presidential Campaign Event Effects from 1952 to 1992*, 61 J. POL. 387, 393 (1999).

<sup>88</sup> See generally TED BRADER, *CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK* (2006).

<sup>89</sup> See Mary Frances Luce, *Choosing to Avoid: Coping with Negatively Emotion-Laden Consumer Decisions*, 24 J. CONSUMER RES. 409 (1998).

<sup>90</sup> See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE* (1995); see also Lynda Lee Kaid & Anne Johnston, *Negative Versus Positive Television Advertising in U.S. Presidential Campaigns, 1960-1988*, 41 J. COMM. 53, 53 (1991); see also generally Thomas J. Rudolph, Amy Gangl, & Dan Stevens, *The Effects of Efficacy and Emotions on Campaign Involvement*, 62 J. POL. 1189 (2000) (noting that negative emotions can influence political involvement); Chris Weber, *Exploring the Role of Discrete Emotions in Political Campaigns*, available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/0/8/8/5/pages208851/p208851-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/2/0/8/8/5/pages208851/p208851-1.php).

<sup>91</sup> This advertisement can be viewed at: <http://www.history.com/videos/campaign-spot-peace-little-girl-1964#campaign-spot-peace-little-girl-1964> (last visited June 25, 2010).

<sup>92</sup> See Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 744-45 (2008) (footnotes omitted). Much of the current work in this area is based upon that of Mary Douglas and Aaron Wildavsky, who were pioneers in the movement to use emotion and

Distinct emotional states—from fear to dread to anger to disgust—and distinct emotional phenomena—from affective orientations to symbolic associations and imagery—have been found to explain perceptions of the dangerousness of all manner of activities and things—from pesticides to mobile phones, from red meat consumption to cigarette smoking.<sup>93</sup>

While triggering fear in connection with specific political candidates may prove to be an effective political strategy, it is likely to result in suboptimal voter decisions by distorting or skewing voter perceptions.<sup>94</sup>

### III. THE CASE FOR AN IMPORTANT GOVERNMENTAL INTEREST

#### A. *The Special Nature of Corporations*

Without question, political candidates already exploit various features of human judgment and choice.<sup>95</sup> However, candidate spending is different from corporate spending in a number of important ways. First, the politician is directly answerable to the electorate for his or her political campaign communication because candidates are required to explicitly identify their sponsorship of an advertisement. If the public objects to a candidate's campaign message, voters can clearly identify the source of the message and can take whatever action they deem appropriate by expressing objections publicly or withholding financial and other support. Second, due to the cap on contributions, the financial wherewithal of a candidate bears at least some relationship to his or her popularity.<sup>96</sup> Third, a candidate's spending is tied to the candidate's ability to communicate positions and policy preferences to the American public.<sup>97</sup>

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culture to explain responses to risk and decision-making more generally. *See, e.g.*, MARY DOUGLAS, *RISK AND BLAME: ESSAYS IN CULTURAL THEORY* (1992); MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS* (1982); Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 4 (1987).

<sup>93</sup> *See* Kahan, *supra* note 92, at 744-45.

<sup>94</sup> *See generally* KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* (1992).

<sup>95</sup> *See Behavioral Campaigns, supra* note 21, at Section I.D (discussing historical examples of the use of psychological tactics during political campaigns).

<sup>96</sup> In *Behavioral Campaigns*, I argue that there are reasons to be concerned about unchecked spending, even if the spending is on the part of the candidate or political party. *Behavioral Campaigns, supra* note 21. However, the same social science based arguments pertaining to unchecked spending apply with more force when the spending is “under the table”—as is current independent spending—where there is virtually no accountability for the message. *Id.*

<sup>97</sup> In *Buckley v. Valeo*, the Court stated that “it is of particular importance that candidates

While independent spending by corporations and unions may superficially appear to be similar to candidate spending, it lacks many of the safeguards that exist in the case of candidate spending. After *Citizens United*, candidates who are particularly pro-corporation or pro-Industry X will likely enjoy a considerable financial advantage over other candidates and the advantage will be unrelated to public support for that candidate. Moreover, as empirical research has demonstrated, corporate financial muscle may in fact *alter* public preferences. After all, successful corporations are experts when it comes to investing capital in a way that achieves maximum effectiveness.<sup>98</sup>

Corporations differ not only from candidates, but also from wealthy individuals. While some individual citizens have tremendous financial resources to spend on political advocacy, they lack the special legal identity of the corporation. Moreover, their interests are more diverse and are driven—at least in part—by *human* rather than *business* concerns.<sup>99</sup> The special purpose and legal protections granted corporations raise particular concerns in the political sphere. It is therefore difficult to understand Justice Kennedy’s claim that “by taking the right to speak from some and giving it to others, the Government deprives the *disadvantaged person or class* of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”<sup>100</sup> Similarly perplexing is the majority’s assertion that it finds “no basis for the proposition that, in the context of political speech, the Government may impose restrictions on *certain disfavored speakers*.”<sup>101</sup>

It is difficult to conceive of a way in which corporations can be characterized as “disadvantaged” or “disfavored.” In fact, corporations enjoy numerous benefits that are not available to other persons. As the

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have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.” 424 U.S. 1, 52-53 (1976). There is no concomitant need for a corporation to communicate its views to the electorate in order for citizens to understand candidates’ positions on issues.

<sup>98</sup> See Brief for Am. Indep. Bus. Alliance as Amicus Curiae Supporting Appellee at 3, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) (“The governance system of such corporations is highly successful for the pursuit of profit . . .”) (on file with *Cardozo Law Review*).

<sup>99</sup> Hence, while corporations have a certain, specific, narrow set of concerns related to productivity and profits, wealthy individuals may be philanthropic, humanitarian, pro-environment, pro-arts, or religious—values that corporations and unions are unlikely to espouse through support for political candidates.

<sup>100</sup> There are other issues germane to the treatment of corporations. Justice Stevens points out that if “the identity of a speaker has *no* relevance to the Government’s ability to regulate political speech, [it] would lead to some remarkable conclusions, [for example] it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could ‘enhance the relative voice’ of some (*i.e.*, humans) over others (*i.e.*, nonhumans).” *Citizens United v. FEC*, 130 S. Ct. 876, 947-48 (2010) (Stevens, J., dissenting) (quoting *Buckley*, 424 U.S. at 49).

<sup>101</sup> *Id.* at 899 (emphasis added).



*Austin* majority pointed out, “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.”<sup>102</sup> Not only do corporations enjoy special treatment, but the corporation also must aim “to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.”<sup>103</sup>

Without doubt, the financial power of large corporations is breathtaking. To provide some context: The total amount spent on all federal elections in the 2008 election cycle was just shy of \$5.3 billion (for congressional and presidential races combined).<sup>104</sup> Over roughly the same time period (2007-08), the profits for Exxon totaled \$85 billion.<sup>105</sup> This means that in just two years, a single—albeit very large—corporation with clear policy preferences earns profits in excess of sixteen times the total expenditures of all federal elections for a single election cycle. In an Op-Ed published by the *Washington Post*, Senator Russ Feingold wrote, “[the *Citizens United*] decision gives a green light to corporations to unleash their massive coffers on the political system. The profits of Fortune 500 companies in 2008 alone were 350 times the entire amount spent on the last presidential election.”<sup>106</sup> As one commentator has remarked, “[this] illustrates how easy it will be for one company, one industry, or the corporate class overall, to dominate the electoral discourse in the wake of *Citizens United*.”<sup>107</sup>

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<sup>102</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010). Justice Stevens foresees a special potential for corporate dominance because corporations “are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is ‘far more destructive’ than what noncorporations are capable of. It is for reasons such as these that our campaign finance jurisprudence has long appreciated that ‘the ‘differing structures and purposes’ of different entities ‘may require different forms of regulation in order to protect the integrity of the electoral process.’” *Citizens United*, 130 S. Ct. at 975 (Stevens, J., dissenting) (quoting *FEC v. Nat’l Right To Work Comm.*, 459 U.S. 197, 210 (1982) (internal citations omitted)).

<sup>103</sup> Brief for Am. Indep. Bus. Alliance as Amicus Curiae Supporting Appellee on Supp. Question at 11, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

<sup>104</sup> *The Money Behind the Elections*, OpenSecrets.org: Center for Responsive Politics, <http://www.opensecrets.org/bigpicture/index.php> (last visited June 25, 2010).

<sup>105</sup> Steve Hargreaves, *Exxon 2008 Profit: A Record \$45 Billion*, CNNMoney.com, Jan. 30, 2009, [http://money.cnn.com/2009/01/30/news/companies/exxon\\_earnings/index.htm](http://money.cnn.com/2009/01/30/news/companies/exxon_earnings/index.htm) (last visited June 25, 2010).

<sup>106</sup> Russ Feingold, Op-Ed., *Democracy Hurt by Citizens United Decision*, WASH. POST, Jan. 24, 2010, available at <http://feingold.senate.gov/opinion/10/20100124.htm>.

<sup>107</sup> Robert Weissman, *A Disadvantaged Class? The Corporate Speech Index*, CommonDreams.org, Feb. 12, 2010, <http://www.commondreams.org/view/2010/02/12-8> (last visited June 25, 2010).

B. *A Fresh Look at Corruption*

The Court's history of focusing on prevention of corruption or appearance of corruption as *the only* legitimate state interests justifying campaign funding regulation should elicit a thorough examination of the definition of corruption. "Corruption" is in the eye of the beholder, and many varied and nuanced definitions of corruption have been offered. In the earlier *Behavioral Campaigns* article, I argued for a new conceptualization of "corruption," applying social science research and theory to reveal the potential for campaign communication to manipulate—rather than inform—the electorate. I noted:

Political advertising and other forms of propaganda are entrenched and vital aspects of the American political process, and political candidates inevitably tout their experience, promote their policies, and attack their opponents. However, while vigorous debate and self-promotion are vital elements of the American political process, temperance and egalitarianism are crucial as well. In order for a government to operationalize democratic principles, it must place reasonable constraints upon a variety of institutions . . . that might otherwise undermine objectives of self-governance.<sup>108</sup>

In articulating an appropriate place for governmental oversight in this area, it may be instructive to consider the role of courts in contract law. Just as parties to a contract must understand the terms and enter freely into the agreement, there should be at least a modicum of protection for citizens who are shopping for a political candidate empowered to create laws that profoundly affect those citizens. After all, "[t]he legitimacy of a government rests upon the inclusion and *informed consent* of its members of society."<sup>109</sup>

Ironically, in advancing his anti-regulation position, Justice Kennedy lays claim to the informed public argument. Kennedy takes a page from *Buckley*, asserting that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." This claim has rhetorical power because few would contest it. However, Justice Kennedy's reliance on the informed citizenry rationale ignores the fact that proponents of corporation spending restrictions have precisely the same concern. Like Justice Kennedy, advocates of reasonable corporate restraints are concerned about vesting ultimate power over elections to the *people*.<sup>110</sup>

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<sup>108</sup> *Behavioral Campaigns*, *supra* note 21, at 742.

<sup>109</sup> See J. Locke, *Two Treatises of Government* ii, 4; viii, 95, reprinted in READINGS IN POLITICAL PHILOSOPHY 530, 551 (Francis W. Coker ed., 1938).

<sup>110</sup> Admittedly, pro-restraint advocates are less concerned about protecting corporations than the *Citizens United* majority.

Hence, this is not a dispute concerning the value of democratic elections or whether the American citizenry should be free to choose their representatives. Instead, the controversy lies in how to best create and maintain a political environment that *maximizes the ability of the citizenry to make informed decisions*.

In order to maintain a knowledgeable electorate, it is vital to examine social science data illustrating the potential for strategic communication to influence citizens to vote against their self interest.<sup>111</sup> The data suggests that political communication can frustrate voter understanding. This evidence should be in the record before the Court and should be given careful attention. After considering the empirical evidence, the Court may find that under some circumstances, countervailing forces adequately neutralize manipulative communication. Campaign discourse and debate may reveal misleading, biased, or skewed information. Even when the bulk of resources favor a particular candidate, alternative perspectives and a range of opposing interests may adequately protect voters from the most egregious forms of hoodwinking.<sup>112</sup>

Unfortunately, however, the majority in *Citizens United* does not appear to have conducted an analysis of the realities of independent spending advocacy, and the implications of opening the door to corporate involvement in this activity. Justice Stevens writes:

The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expenditures based on 'nothing more' than a fear that corporations have a special 'ability to persuade,' as if corporations were our society's ablest debaters and viewpoint-neutral laws such as § 203 were created to suppress their best arguments. In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like § 203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process.<sup>113</sup>

In light of the growing mountain of evidence that voters can be and are misled, misinformed, and misdirected by certain types of prevalent communication, it behooves the Court to listen to Congress and to think carefully about what it is unleashing on the American public in the

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<sup>111</sup> To the degree that a voter's reliance on limited information and cognitive heuristics results in a vote that is different from that which he or she would have cast with full information, the voter is not competent, and the vote is "incorrect." Lau & Redlawsk, *supra* note 72, at 966 ("In fact, heavy reliance on political heuristics actually made decision making less accurate among those low in political sophistication.")

<sup>112</sup> The Court has held that equalizing speech opportunities is not an interest that is sufficient to merit restraints on political speech.

<sup>113</sup> *Citizens United*, 130 S. Ct. at 977 (Stevens, J., dissenting) (internal citation omitted).

name of “informed” decision-making.

### C. *Speech Concerns*

Although Justice Kennedy argued briefly that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,”<sup>114</sup> he spent most of his opinion extolling the virtues of unencumbered speech. The *Citizens United* majority opinion left open the question of what type of interest might ever give rise to constitutionally defensible limitations. Nevertheless, it is clear that the right of free speech is not inviolate. After all, speech is limited in any number of circumstances where a compelling governmental interest has been shown.<sup>115</sup> Perhaps in spite of the empirical evidence, the majority will remain unconvinced that these cognitive and behavioral patterns are present in the voting context and that funding influences them. Alternatively, the majority might believe that protecting speech is so important that no other rationale would justify campaign spending limits. This still leaves the possibility that the *Citizens United* majority would allow restrictions on the political speech of some, *if and only if* such an imposition was necessary to protect the First Amendment right of others. Assuming without deciding that only the most narrow of rationale will suffice, we are left with a question of fact: Does lifting the corporate expenditure restriction for electioneering communications threaten the right of free speech for non-corporate citizens?

In *Citizens United*, Justice Kennedy writes that voters are adults who “must be free to obtain information from diverse sources . . . .”<sup>116</sup> This implicates two assumptions. The first assumption is that corporations are “diverse;” the second is that restricting corporate political speech is harmful to the recipient of the speech. With respect to the issue of corporate diversity, clearly there are aspects of

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<sup>114</sup> *Id.* at 909.

<sup>115</sup> In fact, Justice Kennedy’s opinion lists cases in which the Court has upheld restraints on speech where it found a compelling governmental rationale. *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (protecting the “function of public school education”); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817 (1974)) (furthering “the legitimate penological objectives of the corrections system”); *Parker v. Levy*, 417 U.S. 733, 759 (1974) (quoting *United States v. Priest*, 45 C.M.R. 338, 344 (1971)) (ensuring “the capacity of the Government to discharge its [military] responsibilities”). Not to be outdone, Justice Stevens also points out that the government “routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.” *Citizens United*, 130 S. Ct. at 945 (Stevens, J., dissenting) (footnotes omitted).

<sup>116</sup> *Citizens United*, 130 S. Ct. at 898.

corporations that are diverse. They vary in size, in resources, and in what they produce. However, it is not their diversity that has caused lawmakers at the state and federal level to repeatedly pass legislation to regulate their political spending, nor is it their varied character that persuaded the majority in *Austin* and again in *McConnell* to uphold these regulations. Rather, it is the particular features common to corporations that cause unease. Concerns include the fact that corporations exist for the singular purpose of generating revenue, and they do not have values and ideals. Corporations lack compassion and the desire to protect and nurture today's world for the benefit of future generations.<sup>117</sup> In addition, corporations enjoy special protections not shared by individual members of society, as mentioned above.<sup>118</sup>

The second implication of Justice Kennedy's quote, and a theme of the majority opinion, is that the threatened right belongs not only (and perhaps not primarily) to corporations, but also to *voting adults* who otherwise would be "free to *obtain*"<sup>119</sup> information from corporations. In this vision of the voter, he or she actively seeks information from corporations and suffers when regulations interfere with these efforts. Justice Kennedy is relying on a dual-protection notion of the First Amendment right of free speech: The right of the speaker to express views and to be heard, and the right of the recipient to gain access to the speakers' communication. Justice Kennedy's rationale in *Citizens United* is based in large part on protecting the recipients of political advocacy. Other members of the majority in *Citizens United* have expressed similar concern for protecting recipients of campaign speech.<sup>120</sup>

While some have characterized the *Citizens United* opinion as a debate between a pro-corporate majority and an anti-corporate dissent, this is an unfair characterization of both sides. In fact, much of the dispute centers on how best to protect the public. Justice Kennedy writes: "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."<sup>121</sup> Justice Stevens counters: "The Court's blinkered and aphoristic approach to the First

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<sup>117</sup> Individual citizens who own, manage, and are employed by corporations do possess these qualities, but they *are* free to spend without restriction.

<sup>118</sup> See *supra* Part III.A.

<sup>119</sup> *Citizens United*, 130 S. Ct. at 899 (emphasis added).

<sup>120</sup> Scalia, who voted with the majority, expressed a similar concern for protecting the recipient of communication when, during oral argument, he asked, "Mr. Stewart, do you think that there's a possibility that the First Amendment interest is greater when what the government is trying to stifle is not just a speaker who wants to say something but also a hearer who wants to hear what the speaker has to say?" Transcript of Oral Argument at 46, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf).

<sup>121</sup> *Citizens United*, 130 S. Ct. at 898.



Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve.”<sup>122</sup> Justice Kennedy retorts that, in the words of Stanley Fish, voters “are not to be schooled by a government that would protect them from sources it distrusts.”<sup>123</sup> Justice Stevens’ rejects the majority’s notion that it is impossible to have too much speech, classifying the majority’s viewpoint as a “proposition with undeniable surface appeal but little grounding in evidence or experience,” because “[i]n the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener’s exposure to relevant viewpoints, and it may diminish citizens’ willingness and capacity to participate in the democratic process.”<sup>124</sup>

The Justices who make up the *Citizens United* majority have the power and the purpose to shape campaign funding in monumental ways over the next several decades. Their belief that unfettered corporate campaign speech benefits the electorate will drive future campaign finance Court decisions. The accuracy of this supposition is amenable to empirical analysis. Careful questions should be asked about the effects of speech on the recipients in light of available data.<sup>125</sup> If more speech consistently results in a greater variety of viewpoints and increased access to accurate information and honest debate, the interests of listeners are best served by fewer restrictions on speech. If, however, Stevens is correct that “flooding the airwaves with slogans and sound-bites may well do more to obscure the issues than to enlighten listeners,”<sup>126</sup> and if financial giants with deep pockets and interests of limited value to the public at large<sup>127</sup> will interfere with the public’s ability to hear all viewpoints and get accurate information, then restrictions might well be appropriate.

*Citizens United* might also interfere with speech by privileging

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<sup>122</sup> *Id.* at 977 (Stevens, J., dissenting). Commentator Stanley Fish characterizes Stevens’ concern this way: “Stevens is worried—no, he is certain—that the form of speech Kennedy celebrates will corrupt the free flow of information so crucial to the health of a democratic society.” Posting of Stanley Fish to Opinionator, <http://opinionator.blogs.nytimes.com> (Feb. 1, 2010, 19:30 EST) [hereinafter Posting of Stanley Fish].

<sup>123</sup> Posting of Stanley Fish, *supra* note 108 (interpreting *Citizens United*, 130 S. Ct. at 899 (“[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”)).

<sup>124</sup> *Citizens United*, 130 S. Ct. at 975 (Stevens, J., dissenting).

<sup>125</sup> “The majority seems oblivious to the simple truth that laws such as § 203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other.” *Id.* at 976 (Stevens, J., dissenting).

<sup>126</sup> *Davis v. FEC*, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., concurring in part and dissenting in part).

<sup>127</sup> “Existing rules already give corporations the ability to speak on the issues that matter to them. Thus, the primary effect of overruling *Austin* or *McConnell* would be to promote political rent-seeking, not genuine expression of ideas.” Supp. Brief for Comm. for Econ. Dev. as Amicus Curiae Supporting Appellee, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

certain types of speech at the expense of other types of speech. If some voices speak so “loudly” that others are effectively rendered silent, this should trouble a majority obsessed with preventing the “chill” of political speech.<sup>128</sup> Large corporations have the financial advantage necessary to gain a competitive edge over other voices in the months leading up to an election.<sup>129</sup> The *Austin* Court’s unease with “corporate domination” of political elections relates to the goal of safeguarding First Amendment values by preserving some space in the political “marketplace.” The numerous advantages enjoyed by corporations “not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”<sup>130</sup>

Empirical evidence provides support for this aspect of the pro-speech rationale. The resources spent on advocacy do more to create vast quantities of speech; a substantial portion of funding goes directly to developing communication that obscures and disables conflicting messages. Evidence that voters rely heavily on cognitive shortcuts suggests that they only actually consider a subset of all relevant speech.<sup>131</sup> The most influential communication is most likely characterized as crafty rhetoric and strategically targeted messages. As one scholar has noted, “the tendency of voters to rely on less than perfect information and to process that information in a relatively cursory way means that the decision-making process is particularly vulnerable to manipulation . . . .”<sup>132</sup> As a result, “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”<sup>133</sup>

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<sup>128</sup> The notion that certain types of particularly manipulative speech can interfere with other speech is different from the idea that all voices should have access to precisely the same resources. Concerns about the special character and advantages of corporations should not be confused with a general equalizing rationale, which was rejected in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>129</sup> That corporations can overwhelm other speakers is of particular concern if one agrees with the premise that “within the realm of [campaign spending] generally,” corporate spending is “furthest from the core of political expression . . . .” *FEC v. Beaumont*, 539 U.S. 146, 161 n.8 (2003).

<sup>130</sup> See *Austin*, 494 U.S. at 659 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

<sup>131</sup> See Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194 (1996); Thomas E. Nelson & Zoe M. Oxley, *Issue Framing Effects on Belief Importance and Opinion*, 61 J. POL. 1040 (1999); Thomas E. Nelson et al., *Toward a Psychology of Framing Effects*, 19 POL. BEHAV. 221, 226 (1997).

<sup>132</sup> *Behavioral Campaigns*, *supra* note 21, at 689.

<sup>133</sup> See *Austin*, 494 U.S. at 660.

D. *Small Corporations Are Not the Panacea  
to Political Campaign Ills*

Justice Kennedy argued that lifting the ban on corporate spending would give small corporations the power to push back against large corporate interests. He asserted that “when [lobbying] is coupled with § 441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government.”<sup>134</sup> Without question, large corporations lobby elected officials tirelessly.<sup>135</sup> Small corporations lack the financial wherewithal and political connections to exert the same kind of pressure. It is difficult to see how supplying an additional way for corporations to gain an advantage by spending money will give small corporations more power vis-à-vis large corporations. Opening the door for an additional avenue to exert influence over politics—which, like lobbying, selectively favors the most prosperous corporations—is likely to do just the opposite.

Importantly, while the prevalence of the small business in the United States makes this type of enterprise important and deserving of protection, it does not make it financially or politically powerful. During the *Citizens United* oral argument, Justice Ginsburg made the point that while ninety-seven percent of corporations in the United States are small businesses, small businesses do not correspondingly contribute ninety-seven percent of the existent corporate campaign spending. In the reargument of *Citizens United*, Justice Ginsburg noted that the expenditures that “count are the ones from the corporations that can amass these huge sums in their treasuries.”<sup>136</sup> Even if small corporations can afford to devote resources to create campaign messages, they will lack sufficient funds for the strategy groundwork. It would be an unusual “mom-and-pop” business that could afford to pay for consultants, marketing research, and broadcasting.

This leads to the primary concern: Large corporations often have specific agendas of questionable public value, tremendous resources with which to craft and deliver their messages, and a lack of opponents with similar political clout and financial resources. Without credible opposition to reveal their machinations and launch counterattacks, large corporations operate unchecked. Large corporate interests include, *inter alia*, less stringent environmental protection laws, caps on products

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<sup>134</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010).

<sup>135</sup> Brief for State of Montana et al. as Amici Curiae Addressing June 29, 2009 Order for Supp. Briefing and Supporting Neither Party at 19, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

<sup>136</sup> Transcript of Oral Argument at 15, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205\[Reargued\].pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf).

liability awards, tax breaks for businesses, and fewer employee protection laws. To the extent that small businesses do not share those goals with big businesses (in spite of membership in a common industry), they are unlikely to be able to launch an effective propaganda effort to counteract those of large corporations. Small corporations are relatively powerless against large corporations not only because they are at a significant disadvantage financially, but also because they face various obstacles to effectively organizing and consolidating resources to achieve a common goal. The position of the small business in politics is somewhat similar to that of the individual voter, because “[w]hen large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position.”<sup>137</sup>

#### CONCLUSION

In 1905, Theodore Roosevelt wrote, “[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law.”<sup>138</sup> The American public appears to share this sentiment. In a recent poll, an overwhelming majority of respondents indicated approval of restrictions on spending for corporations and unions.<sup>139</sup> These same respondents place a higher priority on regulating corporate and union spending than on protecting the right to free speech.<sup>140</sup> In contrast to the *Citizens United* majority, the American public supports limitations on free speech in the interest of combating dangers posed by unchecked corporate election spending. Rather than wanting to “be free to obtain information” from corporations, the public appears to be deeply distrustful of specific sources of communication—so much so that voters would prefer

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<sup>137</sup> *Citizens United*, 130 S. Ct. at 975 (Stevens, J., dissenting).

<sup>138</sup> *United States v. UAW-CIO*, 352 U.S. 567, 572 (1957).

<sup>139</sup> One poll revealed that “Americans of both parties overwhelmingly oppose a Supreme Court ruling that allows corporations and unions to spend as much as they want on political campaigns . . . . Eight in ten poll respondents say they oppose the high court’s Jan. 21 decision to allow unfettered corporate political spending, with sixty-five percent ‘strongly’ opposed. Nearly as many backed congressional action to curb the ruling, with seventy-two percent in favor of reinstating limits.” Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>. Another poll revealed that sixty-one percent of Americans think the government should be able to limit the amount of money individuals can contribute to candidates, while seventy-six percent think the government should be able to limit the amount corporations or unions can give.” Lydia Saad, *Public Agrees With Court: Campaign Money is “Free Speech,”* GALLUP, Jan. 22, 2010, <http://www.gallup.com/poll/125333/Public-Agrees-Court-Campaign-Money-Free-Speech.aspx?CSTS=alert>.

<sup>140</sup> Saad, *supra* note 139.

governmental interference.<sup>141</sup> Citizens may perceive that they already are exposed to much of the corporate speech that is specifically protected and promoted by *Citizens United*, and they may want less, not more of this type of communication.<sup>142</sup>

Some congressional leaders seem to understand the public sentiment and are moving quickly to limit the impact of *Citizens United*.<sup>143</sup> On February 11, 2010, Senator Charles E. Schumer of New York and Representative Chris Van Hollen of Maryland introduced a bill that would increase disclosure requirements and compel companies to inform shareholders about political spending, requiring corporate chief executives to appear in any political advertising funded by their companies.<sup>144</sup> Lawmakers would also ban companies with more than twenty percent foreign ownership from participating in U.S. elections. The bill would exclude government contractors and bank bailout recipients as well as corporations having a board of directors with a majority of foreign nationals. Additionally, the new law would require corporations to set up political funding accounts and to report political spending to the FEC.<sup>145</sup>

Whether voters are informed or misinformed depends largely upon how they get their information and from what types of sources. When information originates from a variety of sources, and when the communication represents a range of interests and perspectives, voters

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<sup>141</sup> A poll taken after the *Citizens United* opinion asked: “Do you approve or disapprove of the Supreme Court’s decision that allows corporations to spend on behalf of candidates in elections?” Respondents indicated general disapproval of the decision: seventeen percent approved, sixty-eight percent disapproved, and fifteen percent were unsure. Even the group most supportive of the decision—the Republicans—were overwhelmingly against corporate spending: twenty-two percent in favor and sixty-five percent against. Pew Research Center Poll, <http://www.pollingreport.com/politics.htm> (last visited June 25, 2010).

<sup>142</sup> One law scholar recently described the “reality” in these terms:

The truth is that large corporate entities already dominate the conversation. They are our employers, our suppliers and our service providers. Through the revolving door of government, their leaders take up key positions in administrative agencies. They tirelessly lobby elected and appointed officials. They hire legions of attorneys to bring lawsuits to overturn statutes and regulations that cut into their profits. And, of course, they spend hundreds of billions of dollars each year on advertising and marketing to make sure that everyone gets the message.

Adam Benforado, Letter to the Editor, *The Power of Money in Elections*, N.Y. TIMES, Feb. 1, 2010, at A18.

<sup>143</sup> “If we don’t act quickly, the court’s ruling will have an immediate and disastrous impact on the 2010 elections,” said Senator Charles E. Schumer, shortly after the *Citizens United* opinion was issued. Dan Eggen, *Democrats Suggest Ways to Curb Companies’ Campaign Spending*, WASH. POST, Feb. 11, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/11/AR2010021102678.html>.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*; see also Jess Bravin & Brody Mullins, *New Rules Proposed On Campaign Donors*, WALL. ST. J., Feb. 12, 2010, [http://online.wsj.com/article/SB10001424052748703382904575059941933737002.html?mod=WSJ\\_latestheadlines](http://online.wsj.com/article/SB10001424052748703382904575059941933737002.html?mod=WSJ_latestheadlines); Kenneth P. Vogel, *Dems Try to Blunt SCOTUS Decision*, POLITICO, Feb. 11, 2010, <http://www.politico.com/news/stories/0210/32839.html>.

not only are exposed to different viewpoints, but they are also aware that there are alternative positions. As the Justices are well aware, diversity of opinion is vital to truly democratic elections. Justice Kennedy writes, “it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”<sup>146</sup> Where Justice Kennedy and his colleagues in the majority err is with respect to their vision of *how* to achieve diversity of voice and perspective.<sup>147</sup>

In a concurring opinion in *Nixon v. Shrink Missouri Government PAC*, Justice Breyer determined that the campaign finance context is “a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’”<sup>148</sup> The interest referenced is the protection of a neutral voting environment in which there is reasonable (if not equal) room for those with viewpoints, but not financial fortunes to speak and to be heard. Justice Kennedy’s point in *Citizens United* that “[s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle”<sup>149</sup> is difficult to reconcile with a firm anti-regulation approach. The fact that wealthy entities are already versed in the use of manipulative messaging highlights our need to increase governmental efforts to counteract this harmful influence. Unfortunately, the *Citizens United* decision does more than to give corporate interests a place at the table.<sup>150</sup> It gives them a place at the head of the table and a bullhorn.

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<sup>146</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

<sup>147</sup> Justice Stevens notes, “[a]s we have unanimously observed, legislatures are entitled to decide ‘that the special characteristics of the corporate structure require particularly careful regulation’ in an electoral context. Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also ‘furthest from the core of political expression, since corporations’ First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information.’” *Id.* at 947 (Stevens, J., dissenting) (citing *FEC v. Nat’l Right To Work Comm.*, 459 U.S. 197, 209–10 (1982) and *FEC v. Beaumont*, 539 U.S. 146, 161 n.8 (2003)) (citation and footnote omitted).

<sup>148</sup> 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

<sup>149</sup> *Citizens United*, 130 S. Ct. at 912.

<sup>150</sup> Prior to *Citizens United*, corporations already had many opportunities to communicate and influence elections in profound and substantial ways.