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BACK TO THE FUTURE? THE EFFECTS OF *CITIZENS UNITED V. FEC* IN THE 2010 ELECTION

PETER L. FRANCIA*

I. INTRODUCTION

On January 21, 2010, the U.S. Supreme Court handed down its decision in *Citizens United v. FEC*. In a controversial 5-4 ruling, the majority transformed campaign finance law by overturning longstanding prohibitions on corporations and labor unions[1] from using their general treasury funds in federal elections for independent expenditures[2] or "electioneering" communications.[3] Writing for the majority, Justice Anthony Kennedy, citing free-speech concerns, argued, "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[4] Less controversially, the Court also upheld federal disclaimer and disclosure requirements associated with

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The author wishes to thank R. Sam Garrett of the Congressional Research Service for his helpful comments on an earlier draft as well as Gina Colaluca for her careful editing of this Article.

1. The *Citizens United v. FEC* decision did not directly rule on whether unions can use their general treasury funds on independent expenditures in federal elections; however, there is near-unanimous legal agreement that the court's logic would apply to labor unions.

2. An independent expenditure is defined as an expenditure or communication that calls for the election or defeat of a clearly identified candidate that is not made in coordination with a candidate, a candidate's authorized committee, or a political party.

3. An electioneering communication is defined as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office within sixty days prior to a general election or thirty days prior to a primary election. For presidential and vice-presidential candidates, the communication must also be received by fifty thousand or more people in a state where a presidential primary election or caucus is being held, or anywhere in the United States during the period of thirty days before the nominating convention and the conclusion of that convention. For candidates running for a seat in the U.S. Congress, the communications must be received by fifty thousand or more people in a U.S. House candidate's district or fifty thousand or more people in a U.S. Senate candidate's state.

4. Citizens United v. FEC, 130 S. Ct. 876, 904 (2010).

independent expenditures and electioneering communications. According to Justice Kennedy, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[5]

The reactions to the *Citizens United* ruling broke mostly along ideological and partisan lines. Most conservatives praised the decision as a victory for free speech rights. Attorney Theodore Olson remarked that the decision "may be the most important case in history because what that decision said is that individuals, under the First Amendment, cannot be inhibited, cannot be restrained, cannot be threatened, cannot be censored by the government when they wish to speak about elections and the political process."[6] An op-ed in the *National Review* added that the "floodgates are now open . . . for free speech."[7]

Progressives and Democrats offered a much different response. President Barack Obama stated that the decision was a "major victory for big oil, Wall Street banks, health insurance companies and other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."[8] Fred Wertheimer of the pro-reform campaign finance organization, Democracy 21, declared that, "[t]he decision is the most radical and destructive campaign finance decision in Supreme Court history."[9] Perhaps no critic of the decision went as far as former MSNBC host, Keith Olbermann, who boldly proclaimed that the *Citizens United* decision "might actually have more dire implications than *Dred Scott v. Sandford*."[10]

With the 2010 election now in the past, this Article examines the claims that followed the *Citizens United* ruling. Although any conclusions are still preliminary, the data from the 2010 election, nevertheless, offer some early insights into the post-*Citizens*

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5. *Id.* at 916.

6. David N. Bossie, *Bossie and Olson Comment on the One-Year Anniversary of the* Citizens United *Supreme Court Victory* (Jan. 20, 2011, 5:15 PM), http://www.citizensunited.com/cu-in-the-news.aspx?article=71.

7. Robert Costa, *First Amendment 451*, NAT'L REV. ONLINE (Jan. 29, 2010, 4:00 PM), http://www.nationalreview.com/articles/229044/first-amendment-451/robert-costa?page=1.

8. David G. Savage, *Court Opens Up Election Spending*, BALT. SUN, Jan. 22, 2010, http://articles.baltimoresun.com/2010-01-22/news/bal-te.scotus22jan22_1_election-spending-corporations-and-unions-supreme-court.

9. Fred Wertheimer, *Pro & Con: Is the Supreme Court's Ruling on Campaigns Bad for Democracy? Yes, Turning Clock Back 100 Years, Decision will Corrupt Government*, ATLANTA J. CONST., Jan. 27, 2010, http://www.ajc.com/opinion/pro-s-ruling-on-285259.html.

10. Keith Olbermann, *Olbermann: U.S. Government for Sale*, MSNBC (Jan. 21, 2010), http://www.msnbc.msn.com/id/34981476/ns/msnbc_tv-countdown_with_keith_olbermann/print/0/displaymode/1098/.

United world. However, before discussing the effects of the *Citizens United* ruling, this Article begins with a review of the laws that previously governed the campaign finance system and how the *Citizens United* decision altered these laws.

II. THE CAMPAIGN FINANCE SYSTEM BEFORE *CITIZENS UNITED*

The origins of the modern campaign finance system began in 1971 with the enactment of the Federal Election Campaign Act (FECA). The law, while somewhat modest in scope, required more stringent financial disclosure requirements for candidates, political parties, and political action committees (PACs), but lacked a central administrative authority to enforce the new regulations. Shortly after the law took effect, however, the Watergate scandal and its subsequent investigation revealed that President Richard Nixon's Committee for the Re-Election of the President (CRP or what some referred to as "CREEP") laundered unreported campaign funds to pay for the silence and perjury of those whom the campaign hired to break into Democratic National Committee headquarters at the Watergate Hotel in Washington, D.C. The details of the Watergate burglary and the subsequent attempts to cover-up the crime led not only to the resignation of President Nixon, but also to further changes in federal campaign finance law.

In 1974, Congress amended FECA in four significant ways. First, the amendments sought to limit the potential corruption of federal officeholders by setting limits on campaign contributions. The 1974 law established a ceiling on the amount of money that individuals, political parties, and interest groups could donate to candidates and other political committees in federal elections. Second, to lower the cost of campaigning for office and to reduce the demand for campaign contributions, the 1974 amendments placed limits on the amounts that individuals, candidates, political parties, and interest groups could spend in elections. Third, to make it easier for voters, journalists, and political watchdogs to expose possible corruption, the revised law strengthened disclosure requirements for campaign contributions and spending, and created the Federal Election Commission to enforce and regulate the new rules and restrictions. Fourth, to encourage candidates to raise money in small donations and to be less dependent on money from wealthy interests, the 1974 amendments provided government matching funds up to $250 of an individual's total contributions to an eligible presidential candidate competing in a primary election.[11]

11. The 1974 amendments completed the presidential public finance system that began with the Revenue Act of 1971, which established federal financing of presidential elections.

A legal challenge on the constitutionality of the 1974 amendments followed not long after the new system took effect. In 1976, the U.S. Supreme Court scaled back some provisions of the 1974 law. In its now famous *Buckley v. Valeo* decision, the majority invalidated most of the limits on campaign expenditures because it reasoned that money is speech. It found no governmental interest was sufficient to justify the expenditure restrictions. The Court declared:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates, and collectively, as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[12]

Nearly all restrictions on campaign expenditures, with the exceptions of those coordinated with federal candidates and those instances in which presidential candidates voluntarily agreed to spending limits in exchange for public funds, were thereby deemed to be unconstitutional limits on free speech. Interest groups were thus free to operate a PAC that could spend unlimited amounts of money on "independent expenditures" that expressly advocated for the election or defeat of a candidate in federal elections.

The Court, however, upheld some portions of the 1974 law. Most notably, the Court ruled that contribution limits were constitutional on the grounds that the government had a compelling interest to protect against the potential or appearance of corruption. In the words of the majority, "Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed."[13]

The Court also upheld the constitutionality of the law's disclosure requirements on the grounds that there was a sufficient governmental interest in trying to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[14] This, according to the Court, outweighed the right to privacy of association and belief. Finally, the Court determined that spending limits in presidential elections were constitutional only if presidential candidates volunteered to give up their free speech rights in exchange for public funds. The law, therefore, could not limit spending on

12. Buckley v. Valeo, 424 U.S. 1, 57 (1976).
13. *Id.* at 28.
14. *Id.* at 67.

candidates who refused public funds nor could it limit the amount they spent on campaigns from their own funds.

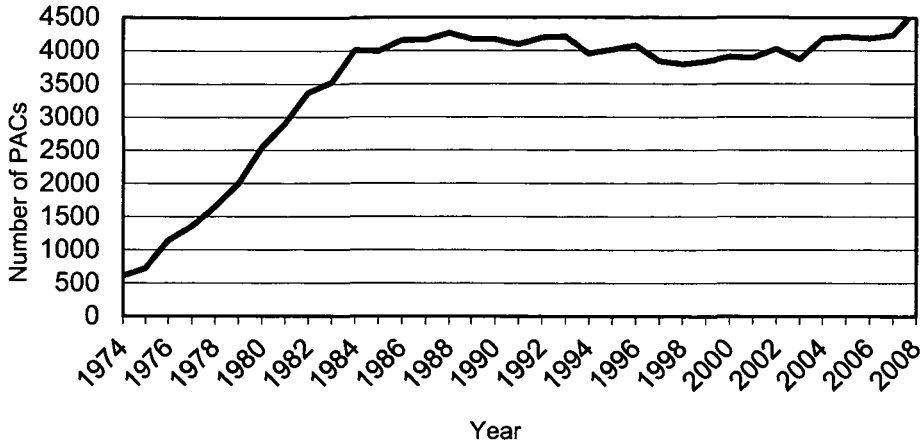
Following the amendments to FECA in 1974, the subsequent *Buckley v. Valeo* ruling, and several important advisory opinions from the FEC,[15] many interest groups formed PACs. Under the law, corporations and labor unions, which had long been banned from contributing money directly to candidates for federal office,[16] could form a "separate segregated fund" (i.e., a PAC) through donations raised from a restricted class of donors (stockholders and employees of the corporation for corporate PACs and union members for labor PACs). PACs were permitted to give up to $5,000 to a candidate in both the primary and general election and could accept up to $5,000 per year from an individual donor. As the *Buckley v. Valeo* ruling established, PACs could also make unlimited independent expenditures to advocate the election or defeat of candidates for federal office. These expenditures, as well as any donations to the PAC, were reported to the FEC and publicly disclosed.

In the first years after the enactment of FECA and the *Buckley* ruling, PACs grew significantly in number from just more than six hundred in 1974 to more than four thousand just a decade later (a number that has remained constant for more than two and a half decades; see Figure 1). This growth was especially pronounced for corporate PACs, which numbered just eighty-nine in 1974, but increased to more than 1,600 by 1984. The number of labor PACs also grew, although at a much slower rate, increasing from 201 in 1974 to 394 in 1984. PACs served as the main vehicle and independent expenditures as the primary means for interest groups to participate in federal elections throughout the second half of the 1970s through the first half of the 1990s.

15. Important in the formation of PACs was a 1975 FEC advisory opinion that ruled Sun Oil could pay overhead expenses for its PAC, control the operation of its PAC, and solicit funds for its PAC from its employees. For more information, see ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988).

16. *See, e.g.*, Tillman Act, 34 Stat. 864 (1907) (using novel legislation to restrict political contributions by corporations); Labor-Management Relations Act, 1947, 29 U.S.C.A. § 144 (West) (monitoring the power of labor unions).

FIGURE 1. NUMBER OF POLITICAL ACTION COMMITTEES, 1974-2008[17]



Note: All PAC counts reflect year-end totals.

During this time, however, some interest groups tested the limits of FECA. In September 1978, the nonprofit corporation, Massachusetts Citizens for Life, Inc. (MCFL), printed one hundred thousand copies of a special election flyer that listed the position of state and federal candidates on abortion-related issues using its general treasury funds (as opposed to funds from a segregated PAC). The flyer also instructed its readers to "vote pro-life" and issued the statement that "[n]o pro-life candidate can win in November without your vote in September."[18] After receiving a complaint against the flyer, the FEC ruled that the MCFL had violated FECA's ban on corporate spending (using general treasury funds) in federal elections. After unsuccessful attempts to resolve the matter, the FEC ultimately filed suit against the MCFL in 1982. The district court ruled against the FEC in 1984 as did the appeals court, although on different grounds, in 1985. The case reached the U.S. Supreme Court a year later.

In *FEC v. Massachusetts Citizens for Life, Inc.*, the Court ruled against the FEC. The ruling held that a narrowly defined type of nonprofit corporation—one that was created for the purpose of promoting political ideas that did not accept contributions from a business corporation or labor union and that had no shareholders or other persons with a claim on its assets or

17. Press Release, FEC, Number of Federal PACs Increases (Mar. 9, 2009), *available at* http://www.fec.gov/press/press2009/20090309PACcount.shtml.

18. Quotations from the Federal Election Commission can be found at: http://www.fec.gov/ law/litigation_CCA_FEC_K.shtml.

earnings—did not need to establish a PAC to engage in express advocacy that was done independently of a candidate or political party. This so-called "MCFL exemption" played only a minor role in federal elections in the immediate years after the ruling; however, as noted later in this Article, the consequences of the ruling would be significant in the years following the passage of the Bipartisan Campaign Reform Act of 2002.

A second significant case involving the use of corporate treasury funds occurred in Michigan when the state's Chamber of Commerce filed suit in district court against Michigan's Sectary of State, Richard Austin, in 1985. The Michigan State Chamber of Commerce sought to overturn a state law, specifically section 54(1) of the Michigan Campaign Finance Act, which prohibited the use of corporate treasury funds to finance independent expenditures. The Chamber argued that it was a "nonprofit ideological corporation" and, as such, was entitled to an MCFL exemption, thereby giving it the right to make an independent expenditure on a newspaper advertisement supporting a state legislative candidate even though the money for the ad came from its general treasury.

The district court ruled against the Chamber and upheld the law, but this ruling was overturned by the appeals court. In 1990, the U.S. Supreme Court in *Austin v. Michigan Chamber of Commerce* ruled that the Chamber was, in fact, a business group that did not meet the criteria for an MCFL exemption. It ruled further that the Michigan law prohibiting independent expenditures from the general treasury funds of corporations was constitutional on the grounds that there was a compelling government interest to protect the integrity of the electoral process by regulating against the "potential for distortion."[19]

While the *Austin* ruling set down some clear boundaries for corporate political activities, interest groups, including those with business and labor interests, continued to look for ways to influence U.S. elections. By the second half of the 1990s, interest groups began to exploit a significant loophole in the law. In the aforementioned *Buckley v. Valeo* decision, the Court held that federal campaign finance law applied only to communications that used explicit or express words, or language advocating the election or defeat of a specifically identified candidate for federal office. This condition allowed interest groups to channel large donations that escaped federal regulations (known as "soft money") for so-called "issue ads" that did not explicitly endorse a candidate. Advertisements that avoided phrases such as "vote for," "re-elect," or "help defeat" escaped federal restrictions even though they often

19. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 689 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

appeared to most viewers to look and sound very similar to most campaign commercials. Because these "issue ads" were not "campaign ads," their sponsors did not have to disclose them as expenditures to the FEC.

Despite the advantages of using issue ads, groups did not begin to employ them widely until the American Health Insurance Association's now-famous "Harry and Louise" ads that featured a married couple criticizing President Bill Clinton's health care plan in 1993. The ad campaign's success in defeating Clinton's health care initiative encouraged other groups to create their own such ads. During the 1996 election, thirty-one groups spent a combined $150 million on issue ads, including $35 million by the AFL-CIO and $17 million by the pro-business organization, Coalition: Americans Working for Real Change.[20]

Issue ads not only allowed interest groups to channel unlimited amounts of soft money into the electoral arena, but also allowed interest groups to avoid the strict disclosure requirements under FECA. Interest groups could establish new innocuous-sounding organizations (e.g., Citizens for Reform) that made it near impossible for the public to know which interests were behind the ads. The ability of interest groups to funnel unlimited amounts of soft money into the electoral arena, and to do so by escaping meaningful disclosure requirements, led some lawmakers, foundations, scholars, and journalists to call for significant reforms to FECA and the modern campaign finance system.[21]

THE BIPARTISAN CAMPAIGN REFORM ACT

In 2002, Congress amended FECA with passage of the Bipartisan Campaign Reform Act (BCRA). To curb the increases in soft money, BCRA prohibited unregulated contributions to political parties and barred candidates for federal office from soliciting soft money for interest groups. BCRA continued to allow interest groups to use soft money for issue ads, but with one notable change in the law. Under BCRA, any broadcast, cable, or satellite communication received by fifty thousand or more people that referred to a clearly identified candidate for federal office within sixty days prior to a general election or thirty days prior to a primary election were now considered "electioneering

20. DEBORAH BECK, PAUL TAYLOR, JEFFREY STRANGER & DOUGLAS RIVLIN, ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3, 5 (Annenberg Pub. Pol'y Ctr. Univ. of Penn. ed., 1997).

21. Reformers were not only alarmed by the use of soft money for issue advocacy advertisements by interest groups, but also by the soft-money fundraising of political parties. For additional discussion on this development, see Peter L. Francia, Wesley Y. Joe & Clyde Wilcox, *Campaign Finance Reform – Present and Future*, *in* CAMPAIGNS ON THE CUTTING EDGE 155 (Richard J. Semiatin ed., 2008).

communications." The law barred interest groups from using their general treasury funds to finance these electioneering communications even if the ads avoided the explicit endorsement of a candidate (i.e., "vote for," "re-elect," "help defeat"). Instead, interest groups would need to return to using their segregated funds (i.e., PACs) to pay for these ads as independent expenditures.

Almost immediately after BCRA became law, legal challenges followed. In 2003, the U.S. Supreme Court upheld two of BCRA's core provisions in *McConnell v. FEC*. First, the Court ruled that the ban on the use of soft money by national party committees was constitutional because there was sufficient governmental interest in "preventing the actual or apparent corruption of federal candidates and officeholders" to justify the restriction.[22] Second, the Court upheld BCRA's regulations on electioneering communications. Because corporations and unions could still finance electioneering communications through their segregated PAC funds, the Court reasoned that BCRA did not result in an outright ban on expression. The Court added that issue ads in the final days of the election were the "functional equivalent of express advocacy."[23] Regulations on electioneering communications were thereby justified as constitutional for the same reasons that applied to express advocacy communications. Additionally, the Court upheld disclosure requirements of the names of individuals who contributed $1,000 or more to the group paying for the communication, arguing that the public's interest outweighed the plaintiff's concerns of harm that might result from revealing the donors' identities.

While the *McConnell v. FEC* ruling left BCRA relatively intact,[24] legal challenges continued over the next several years. In June of 2007, the U.S. Supreme Court, now under Chief Justice John Roberts, significantly altered BCRA with its ruling in FEC v. *Wisconsin Right to Life, Inc.* The Court struck down BCRA's electioneering communications restrictions as applied to groups such as Wisconsin Right to Life, finding that issue ads that did not contain express advocacy (or its functional equivalent) were not sufficiently corruptive to justify restricting free speech.[25] The

22. McConnell v. FEC, 540 U.S. 93, 95 (2003), *overruled by Citizens United*, 130 S. Ct. 876.

23. *Id.* at 105.

24. For information on *McConnell*, *see* L. PAIGE WHITAKER, CONG. RESEARCH SERV., CAMPAIGN FINANCE LAW: A LEGAL ANALYSIS OF THE SUPREME COURT RULING IN *MCCONNELL V. FEDERAL ELECTION COMMISSION*, Feb. 24, 2004, *available at* http://assets.opencrs.com/rpts/RL32245_20040224.pdf (providing a legal summary of *McConnell* and exploring future legal implications).

25. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007) (holding that issue ads cannot be banned in the months before an election).

prevailing interpretation of the ruling was that it gave interest groups the ability to use general treasury funds again to finance issue ads in the final thirty days of the primary election and the final sixty days of the general election. *Wisconsin Right to Life* signaled the anti-regulatory direction of the Roberts Court, and set the stage for the *Citizens United v. FEC* ruling.

III. *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

Of all the cases brought before the U.S. Supreme Court since the enactment of BCRA, no ruling has had more far-reaching implications than *Citizens United v. FEC*. As noted at the outset of this Article, the ruling overturned FECA's prohibition on corporations and labor unions using their general treasury funds to finance electioneering communications and independent expenditures. This decision overturned *Austin v. Michigan Chamber of Commerce* and part of *McConnell v. FEC*, which had upheld the constitutionality of BCRA's regulations on electioneering communications.

The case came before the U.S. Supreme Court when the nonprofit corporation, Citizens United, released a film about then-Senator and former First Lady Hillary Clinton of New York, who was at the time seeking the Democratic Party's nomination for President of the United States. Citizens United sought to pay cable companies (from its general treasury funds) to offer the film through their video-on-demand services free of charge to their cable subscribers within thirty days of the 2008 primary elections. However, fearing criminal and civil penalties because of the federal ban on corporations from using their treasury funds to pay for independent expenditures, Citizens United went to the District Court for declaratory and injunctive relief against the FEC, hoping to have this provision of the law, as well as the disclosure and disclaimer requirements in BCRA, declared unconstitutional. The District Court ultimately ruled against Citizens United, denying the injunction.

Citizens United appealed the case to the U.S. Supreme Court, where the District Court's ruling was overturned on First Amendment grounds, ruling that Section 441(b) of FECA as amended under BCRA, which prohibited corporate independent expenditures and electioneering communications, was a ban on free speech. According to the Court, the government failed to demonstrate that enacting such a restriction furthered a compelling interest. The Court took especially sharp aim at the *Austin* ruling's "anti-distortion" rationale, arguing that it interferes with the "open marketplace of ideas."[26] Justice Kennedy's opinion, for instance, noted that "[t]he rule that

26. *Citizens United*, 130 S. Ct. at 973 (internal quotation marks omitted).

political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits suppression of political speech based on the speaker's identity."[27]

The Court further rejected anti-corruption arguments to justify BCRA's restrictions. Similar to the rationale in *Buckley v. Valeo*, the majority in *Citizens United v. FEC* ruled that the danger for corruption through independent expenditures had not been established and, therefore, could not justify restrictions on free speech. In the words of the ruling: "[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[28]

Reformers did win a small victory in *Citizens United v. FEC*. As noted earlier, the Court deemed federal law requiring disclaimer and disclosure requirements associated with electioneering communications and express advocacy to be constitutional. Of course, this did little to quell the outcries from the reform community in the aftermath of the ruling. Four of the most common predictions that the ruling would have harmful effects included:

1. *Spending by independent groups would increase significantly.* Before the ruling was announced, one campaign finance law expert predicted that if Citizens United prevailed, "[i]t will be no holds barred when it comes to independent expenditures."[29] President Obama also famously commented that the *Citizens United* ruling would, "open the floodgates for special interests . . . to spend without limit in our elections."[30]

2. *Corporations and pro-business interests would drown out the voices of others in the electoral arena.* In the immediate aftermath of the ruling, Fred Wertheimer of Democracy 21 wrote in an op-ed: "[t]he decision will unleash unprecedented amounts of corporate 'influence-seeking' money on our elections and create unprecedented opportunities for corporate 'influence-buying' corruption."[31] Then-Democratic Senatorial Campaign Committee (DSCC) Chair, Senator

27. *Id.* at 905.

28. *Id.* at 909.

29. David D. Kirkpatrick, *Courts Roll Back Limits on Election Spending*, N.Y. TIMES, Jan. 8, 2010, http://www.nytimes.com/2010/01/09/us/politics/09donate.html.

30. Pete Williams, Kelly O'Donnell & Ken Strickland, *Justice Openly Disagrees with Obama in Speech*, MSNBC, Jan. 28, 2010, http://www.msnbc.msn.com/id/35117174/ns/politics-white_house/t/justice-openly-disagrees-obama-speech/ (quoting President Barack Obama, State of the Union Address (Jan. 27, 2010)).

31. Fred Wertheimer, President, Democracy 21, Statement: Supreme Court Decision in Citizens United Case is Disaster for American People and Dark Day for the Court (Jan. 21, 2010), http://www.prnewswire.com/news-releases/supreme-court-decision-in-citizens-united-case-is-disaster-for-american-people-and-dark-day-for-the-court-82260992.html.

Robert Menendez of New Jersey, added, "[g]iving corporate interests an outsized role in our process will only mean citizens get heard less. We must look at legislative ways to make sure the ledger is not tipped so far for corporate interests that citizens' voices are drowned out."[32]

3. *The* Citizens United *ruling would provide Republicans with an advantage over Democrats.* In the days just before the ruling, Senator Menendez stated of a Citizens United victory that, "[c]learly, the Republican Party overwhelmingly would benefit."[33] National Republican Senatorial Committee (NRSC) Chair, John Cornyn, admitted as well that the ruling would "open up resources that have not previously been available" for Republicans.[34]

4. *Foreign corporations would play a more significant role in the U.S. electoral process.* In his 2010 State of the Union Address, President Obama commented not only that the *Citizens United* ruling would "open the floodgates for special interests," but added that this included "foreign corporations" and that he did not think that "American elections should be bankrolled by America's most powerful interests, or worse, by *foreign entities*."[35] Likewise, Justice John Paul Stevens, in his dissenting opinion of the *Citizens United* case, warned that the decision "would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans."[36]

IV. THE EFFECTS OF *CITIZENS UNITED* IN THE 2010 ELECTION

Although it is difficult to pinpoint the effects of the *Citizens United* ruling with only a single election to examine, there are some figures and statistics available, which allow for some preliminary conclusions on the four common predictions made after the *Citizens United* ruling. What follows is an analysis of four questions related to the predictions that followed the *Citizens United* ruling: (1) Did spending by interest groups increase significantly in the 2010 election? (2) Did corporations and pro-

32. Kyle Trygstad, *Reactions to SCOTUS Campaign Finance Decision*, THE REAL CLEAR POLITICS BLOG (Jan. 21, 2010), http://realclearpolitics.blogs.time.com/2010/01/21/reactions-to-scotus-campaign-finance-decision (quoting Robert Menendez, Chairman, Democratic Senatorial Campaign Comm., Instant Reaction to *Citizens United* Decision).

33. Kirkpatrick, *supra* note 28 (quoting Robert Menendez, Chairman, Democratic Senatorial Campaign Comm., Statement Regarding *Citizens United* Expected Result).

34. *Id.* (quoting John Cornyn, Chairman, National Republican Senatorial Comm., Statement Regarding Anticipated Result of *Citizens United*).

35. Alan Silverleib, *Gloves Come Off After Obama Rips Supreme Court Ruling*, CNN (Jan. 28, 2010), http://articles.cnn.com/2010-01-28/politics/alito.obama.sotu_1_supreme-court-court-s-conservative-majority-high-court?_s=PM:POLITICS (emphasis added) (quoting President Barack Obama, State of the Union Address (Jan. 27, 2010)).

36. *Citizens United*, 130 S. Ct. at 947-48 (Stevens, J., dissenting).

business interests drown out the voices of others in the electoral arena in the 2010 election? (3) Did the *Citizens United* ruling provide Republicans with an advantage over Democrats in the 2010 election? (4) Did foreign corporations play a more significant role in the electoral process in the 2010 election?

A. Did Spending by Interest Groups Increase Significantly in the 2010 Election?

The question of whether interest group spending increased significantly in the 2010 election is examined in Table 1. According to the results, during the 2010 election cycle, interest groups spent $304.7 million on independent expenditures to run ads, electioneering communications, and other communication costs such as making phone calls and distributing literature to members. This amount topped the totals in the 2008 election, which stood at $301.7 million. What makes this comparison more impressive is that the 2008 election was a presidential election year when spending is almost always significantly higher than it is in a mid-term election cycle, such as 2010. Indeed, when one compares the 2010 outside spending totals to the most recent mid-term election in 2006, outside spending increases in the post-*Citizens United* environment were considerable. As Table 1 shows, interest groups increased their spending by more than $235.8 million in 2010 when compared to the $68.9 million spent in 2006—an increase of more than *340%*.

TABLE 1. OUTSIDE SPENDING FROM NON-PARTY GROUPS BY ELECTION CYCLE, 1990-2010[37]

CYCLE	TOTAL	INDEPENDENT EXPENDITURES	ELECTIONEERING COMMUNICATIONS	COMMUNICATION COSTS
2010	$304,679,091	$210,912,167	$79,958,557	$13,808,367
2008	$301,685,003	$156,846,968	$119,256,138	$25,581,897
2006	$68,852,502	$37,394,589	$15,152,326	$16,305,587
2004	$200,132,170	$68,716,443	$100,218,129	$31,197,598
2002	$27,289,285	$16,588,844	N/A	$10,700,441
2000	$50,796,592	$33,034,631	N/A	$17,761,961
1998	$15,191,107	$10,266,937	N/A	$4,924,170
1996	$17,884,043	$10,167,742	N/A	$7,716,301
1994	$9,538,844	$5,219,215	N/A	$4,319,629
1992	$19,637,179	$10,947,345	N/A	$8,689,834
1990	$7,221,205	$5,658,510	N/A	$1,562,695

With more money available to corporations and labor to use for independent expenditures in the aftermath of *Citizens United*, Table 1 also indicates that independent expenditures grew most dramatically when compared to other forms of communication. In the 2010 election cycle, independent expenditures increased to $210.9 million from $156.8 million in 2008 (an increase of more than *34.5%* from 2008 to 2010) and from $37.4 million in 2006 (an increase of more than *460%* from 2006 to 2010).

Electioneering communications increased as well in the 2010 election cycle from the previous mid-term in 2006, although the most significant increase and the highest total came in 2008 when the amounts on electioneering communications reached nearly $119.3 million. The explanation for this increase lies in the Court's 2007 ruling in *FEC v. Wisconsin Right to Life, Inc.*, which relaxed the original electioneering restrictions in BCRA. Because general treasury funds were not available for groups to use in 2008 for

37. CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/index.php.

independent expenditures, but were available for use on electioneering communications, the large amount of money spent on electioneering communications in 2008 reflects a strategic reaction to the legal options available to interest groups at that time. While the 2010 totals on electioneering communications declined from 2008 with general treasury funds now available for independent expenditures, there was still a considerable increase from 2006, suggesting that *FEC v. Wisconsin Right to Life, Inc.* continued to have some impact even in the aftermath of the *Citizens United* ruling.[38]

A separate analysis of political advertising further showed considerable spending increases in the 2010 election cycle. According to the research, interest groups in 2010 increased their advertising totals over 2008 by 168% in House races and 44% in Senate races.[39] The author of the study, however, cautions that these increases also mirrored increases from other sponsors that were not affected by the *Citizens United* decision. He notes that candidates in House races, for example, aired 26% more ads in 2010 from 2008, and that Senate candidates increased their ad totals by 61% in 2010 from 2008.[40] Increases in outside spending by interest groups in 2010 may have, therefore, been attributable not only to the *Citizens United* ruling, but also to overall inflation in campaign spending. Indeed, there were a disproportionately high number of vulnerable incumbents and competitive contests in the 2010 election that undoubtedly helped drive up spending as well.

Still, other election cycles also included disproportionately high numbers of vulnerable incumbents and competitive contests, and failed to post the equivalent increases in outside spending. The 1994 election, for example, had a comparable electoral environment to the one in the 2010 election (in both elections, Republicans made historic gains in the U.S. House and won seats in the U.S. Senate). Outside spending in the 1994 cycle, however, increased from the previous mid-term election in 1990 by a much smaller percentage—34%—than the staggering 340% increase from 2006 to 2010.

The sharp increases in spending by interest groups in the immediate aftermath of the *Citizens United* ruling therefore lends some support to the critics of the decision who predicted significant increases in outside spending. Of course, defenders of the ruling would see little wrong with this development as increased spending merely suggests more speech, which in turn,

38. *See also* Michael M. Franz, *The* Citizens United *Election? Or Same As It Ever Was*, 8 FORUM 1, 6 (2010), *available at* http://www.bepress.com/forum/vol8/iss4/art7/.

39. *Id.*

40. *Id.*

betters the overall democratic process. While the normative implications of increased outside spending are debatable, the impact of *Citizens United* in fostering increases in outside spending by interest groups is less so.

B. Did Corporate and Pro-Business Interests Drown Out the Voices of Others in the Electoral Arena?

A second major criticism of the *Citizens United* ruling was that corporations would now be able to drown out the voices of other groups with the vast sums of money that they could draw from their general treasuries. If this was indeed the case in the 2010 election cycle, then one would expect the leading spenders among conservative groups in the 2010 election cycle to be those with corporate and pro-business interests. Table 2 presents the five conservative groups that spent the most money in the 2010 election, and the results show that three of them were in fact those with pro-business interests. The Chamber of Commerce, for example, spent nearly $33 million on electioneering communications during the 2010 election cycle. Only Ed Gillespie's and Karl Rove's American Crossroads and Crossroads GPS combined to spend more than the Chamber.

TABLE 2. 2010 INDEPENDENT EXPENDITURES, ELECTIONEERING COMMUNICATIONS, AND COMMUNICATION COSTS FROM CONSERVATIVE, NON-PARTY GROUPS[41]

ORGANIZATION	2010 TOTALS
American Crossroads/Crossroads GPS	$38,675,723
U.S. Chamber of Commerce*	$32,851,997
American Action Network	$26,088,031
American Future Fund*	$9,599,806
Americans for Job Security*	$8,991,209

Several other pro-business and self-described "free-market" groups were among the top conservative spenders in independent expenditures, electioneering communications, and communication costs in 2010. As Table 2 shows, two such groups, the American Future Fund and Americans for Job Security, spent $9.6 million and $9 million respectively. Numerous other corporate PACs and organizations with business interests spent millions more in 2010.

Additional information from the Wesleyan Media Project shows that in the final sixty days of the 2010 election alone, the Chamber spent $21 million on 21,991 ads in twenty-eight House

41. CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/index.php.

races and twelve Senate contests.[42] With the exception of the Republican Governor's Association, no political organization ran more spots or spent more money on advertising than the Chamber did during this final sixty-day period of the 2010 election. The Chamber's 2010 efforts also topped the $10 million on advertising that it spent in the previous 2006 midterm election.[43]

While pro-business interests played a considerable role in the 2010 election, these expenditure totals were likely influenced by more than the *Citizens United* ruling. Many in the business community were opposed to much of President Obama's policy agenda during his first two years in office. Bill Miller, the national political director of the Chamber of Commerce, explained in an interview that the Chamber's political program was "an outgrowth of the frustrations of the business community."[44] The increased spending on the part of the Chamber of Commerce and other pro-business groups may therefore have been a stimulated by its opposition to the positions and policies of the Obama administration.

In contrast, Gerald McEntee of the American Federation of State, County, and Municipal Employees (AFSCME) admitted that on the labor side in 2010, "[i]t's hard to get [union] people juiced up."[45] Nevertheless, labor organizations were the three biggest spenders among liberal groups in the 2010 election cycle (see Table 3). The Service Employees International Union (SEIU), AFSCME, and the National Education Association (NEA) spent a combined $39.4 million—a competitive amount when compared with the big pro-business spenders in 2010.

42. *Id.* at 1, 5.

43. *Id.*

44. Peter H. Stone, *Inside the Shadow GOP*, NAT'L J., Oct. 27, 2010, http://www.nationaljournal.com/njonline/no_20101004_4486.php (quoting Bill Miller, Nat'l Political Dir., U.S. Chamber of Commerce, Statement: Ctr. for Pub. Integrity Special Report).

45. *Id.* (quoting Gerald McEntee, President, Am. Fed'n of State, Cnty. & Mun. Emp., Statement: Ctr. for Pub. Integrity Special Report).

TABLE 3. 2010 INDEPENDENT EXPENDITURES, ELECTIONEERING COMMUNICATIONS, AND COMMUNICATION COSTS FROM LIBERAL, NON-PARTY GROUPS[46]

ORGANIZATION	2010 TOTALS
SEIU*	$15,952,331
AFSCME*	$13,185,800
National Education Association *	$10,245,561
America's Families First Action Fund	$5,878,743
League of Conservation Voters	$5,496,070

Additional data from the Campaign Finance Institute (CFI) also indicate that organized labor played a significant role in the 2010 election. According to CFI's estimates, all labor organizations combined accounted for 68% ($156 million out of the $230 million) of total spending by Democratic-leaning political committees and nonprofit groups in the 2010 congressional elections.[47] By comparison, labor accounted for 47% ($93 million of the $198 million) of total spending by Democratic-leaning political committees and nonprofit groups in the 2008 congressional elections.[48]

While it is not surprising that pro-business and labor organizations were among the biggest spenders in the 2010 election, it is worth reemphasizing an important point: the *Citizens United* ruling has created more opportunities than ever before in the post-Watergate campaign finance era for business and labor interests to influence elections. Pro-business groups certainly took eager advantage of this new, less restricted regulatory environment. Nevertheless, the significant amounts of money spent by labor groups, which were also free to use treasury funds following the *Citizens United* decision, suggest that pro-business interests did not completely drown out the voices of its rivals in the electoral arena. This is not to suggest that the *Citizens United* ruling failed to provide an advantage to pro-business interests, which typically have more money to spend in elections than labor does; however, it seems fair to conclude from the data that there was a more competitive environment in the 2010 election than critics of the decision initially suggested might exist in the post-*Citizens United* world.

46. CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/index.php.

47. Michael Malbin, *Election-Related Spending by Political Committees and Non-Profits Up 40% in 2010*, CAMPAIGN FIN. INST. (Oct. 18, 2010), http://www.cfinst.org/pdf/federal/InterestGroup/Post-CU_Table2.pdf.

48. *Id.*

C. *Did the* Citizens United *Ruling Provide Republicans with an Advantage Over Democrats?*

A third claim that those critical of the *Citizens United* decision made was that additional funds available to corporations and pro-business groups would disproportionately benefit Republicans more so than Democrats. Table 4 provides a breakdown of liberal and conservative group totals from 1990 through 2010. The results indicate that spending by conservative groups that supported Republican candidates significantly increased in 2010, reaching $190.5 million compared to the $119.7 million that conservative groups spent in 2008. The 2010 totals for conservative groups were also considerably higher than the $98.9 million that liberal groups spent in 2010. This reversed the dominant position that liberal groups had over conservative groups, which dated all the way back to the 1996 election cycle.

TABLE 4. OUTSIDE SPENDING FROM LIBERAL AND CONSERVATIVE GROUPS BY ELECTION CYCLE, 1990-2010[49]

CYCLE	LIBERAL GROUP TOTALS	CONSERVATIVE GROUP TOTALS
2010	$98.9 million	$190.5 million
2008	$158.9 million	$119.7 million
2006	$38.7 million	$19.6 million
2004	$121.3 million	$68.5 million
2002	$18.0 million	$4.6 million
2000	$30.2 million	$17.1 million
1998	$7.5 million	$5.2 million
1996	$10.0 million	$6.5 million
1994	$2.6 million	$6.3 million
1992	$7.3 million	$9.4 million
1990	$2.4 million	$3.2 million

49. CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/index.php.

Yet, while the predictions of the decision's critics appear to have come true, a number of other reasons independent of the *Citizens United* ruling may explain the results. First, the 2010 election cycle, as noted earlier, was especially promising for Republican candidates as numerous polls revealed an "enthusiasm gap" among likely voters that heavily favored the Republican Party.[50] This gap undoubtedly translated into the donor pool as well, which, by extension, aided the fundraising efforts of conservative groups in 2010.

Second, it was widely reported that the Republican National Committee (RNC) was in financial trouble for much of the 2010 election season. Some conservatives even openly questioned the competence and management of then-RNC Chair, Michael Steele.[51] Indeed, one Republican operative went so far as to call the RNC "inept."[52] This may have pushed some conservative donors away the RNC and instead to conservative organizations, giving these pro-Republican outside groups more to spend in 2010.

Third, conservative groups, including those without pro-business interests, were much better coordinated in their efforts in 2010 than in previous election cycles, modeling their strategies after the successful efforts of Democrats in the 2006 and 2008 elections. Ed Gillespie, former RNC chairman, who helped form American Crossroads and Crossroads GPS with Karl Rove, remarked, "I'm glad we're taking a page out of [the Democrats'] playbook."[53] The NRCC further helped with coordination by taking the unprecedented step of disclosing its ad-buy-strategy to the public, thereby allowing conservative outside groups to coordinate their spending with the House Republicans' party committee. In short, Republicans certainly did reap a financial advantage in 2010 as critics of the *Citizens United* case predicted; however, whether these gains can be directly attributed to the *Citizens United* decision is still unclear given the many other conditions and factors that helped and were favorable to Republicans and conservative groups in 2010.

D. Foreign Corporations Would Play a More Significant Role in the Electoral Process

Finally, and perhaps most controversial of all, was the claim by critics of the *Citizens United* decision that the ruling would

50. Jeffrey M. Jones, *Record Midterm Enthusiasm as Voters Head to Polls*, GALLUP (Nov. 2, 2010), http://www.gallup.com/poll/144152/record-midterm-enthusiasm-voters-head-polls.aspx.

51. Stone, *supra* note 41.

52. *Id.*

53. *Id.* (quoting Ed Gillespie, former Chairman, Republican Nat'l Comm., Statement: Ctr. for Pub. Integrity Special Report).

allow foreign corporations to play a more significant role in the electoral process. While some of the earlier discussed predictions of the decision appear to be supported with at least some of the preliminary evidence coming from the 2010 election, the claim of foreign corporations taking on a sizeable role in the U.S. electoral process as a result of the *Citizens United* ruling appears to have little basis. The argument that states "a corporation is a corporation" and thus, *Citizens United* empowers any corporation, including a foreign one, overlooks some important provisions in federal law.

To begin with, the *Citizens United* decision did not overturn or even address the legal prohibition against foreign nationals (defined as "foreign governments, foreign political parties, foreign corporations, foreign associations, foreign partnerships, and individuals with foreign citizenship"[54]) from contributing in federal elections. This prohibition has been a part of federal law since 1966 under the Foreign Agents Registration Act (and was later incorporated into the 1974 FECA amendments) and remains part of federal law even in the aftermath of the *Citizens United* ruling. While there is a "green card" exception that allows permanent residents to contribute money in federal elections, this is again not an issue that the *Citizens United* case addressed.

A U.S. subsidiary of a foreign corporation is entitled to form a political action committee, but only if the foreign parent corporation does not finance the PAC's establishment, administration, or solicitation costs. The PAC is also prohibited from allowing individual foreign nationals from participating in the operation of the PAC, serving as officers of the PAC, participating in the selection of persons who operate the PAC, or from making decisions regarding PAC contributions or expenditures. Despite these restrictions, a number of foreign-connected PACs do exist and spend money in federal elections, although the amounts spent by these foreign-connected PACs have changed little from 2008 to 2010 (see Table 5).

54. FEC, *Foreign Nationals Brochure* (July 2003), *available at* http://www.fec.gov/pages/brochures/foreign.shtml.

TABLE 5. EXPENDITURES BY THE TOP 5 FOREIGN-CONNECTED PACS, 2008-2010[55]

ORGANIZATION	2008 TOTALS	2010 TOTALS
GlaxoSmithKline (United Kingdom)	$2,012,566	$1,615,009
AstraZeneca Pharmaceuticals (United Kingdom)	$1,431,312	$1,486,770
Anheuser-Busch (Belgium)	$2,052,814	$1,233,322
BAE Systems (United Kingdom)	$997,457	$1,149,485
Credit Suisse Securities (Switzerland)	$980,580	$904,840

Nonetheless, a story did break during the 2010 election based upon a report from the liberal organization, Think Progress, which claimed the Chamber of Commerce was soliciting funds from foreign corporations, including the Bahrain Petroleum Company and the Bank of India, to help pay for its attack ads in the 2010 election. The Chamber of Commerce subsequently denied that any foreign money was used to pay for its political and electoral activities. Yet, even if one chooses not to believe the Chamber of Commerce's denials, the *Citizens United* ruling is again irrelevant. The allegations against the Chamber of Commerce are restricted under existing criminal law.

Some have followed up on this controversy by demanding better disclosure requirements of foreign-connected funding.[56] This suggestion is worthy of serious consideration, particularly in light of a controversy that surfaced in August of 2011 involving a mystery firm that gave $1 million to the group, Restore Our Future (a super PAC started by a group of former aides to presidential candidate, Mitt Romney), and then dissolved leaving behind few clues initially as to the owner of the company, its address, or its type of business.[57] Although there was never any suggestion of foreign-connected funding nor did there prove to be any,[58] the apparent breakdown of the public disclosure system raises some legitimate questions about whether current law is adequate to police potentially illegal donations.

55. CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pacs/foreign.php.

56. Democratic leaders in the U.S. House have pushed the DISCLOSE Act to improve transparency, and specifically singled out strengthening disclosure to prevent "secret money" from "U.S. corporations controlled by foreign governments" from influencing U.S. elections. *See, e.g., DISCLOSE Act: Shine the Light on Special Interests Behind American Elections*, DEMOCRATIC LEADER NANCY PELOSI, http://www.democraticleader.gov/ floor?id=0381.

57. Michael Isikoff, *Firm Gives $1 Million to Pro-Romney Group, then Dissolves*, MSNBC (Aug. 4, 2011), http://www.msnbc.msn.com/id/44011308.

58. Jerry Seper, *$1 Million Romney Donor Steps Forward*, WASHINGTON TIMES (Aug. 7, 2011), http://www.washingtontimes.com/news/2011/aug/7/1-million-romney-donor-steps-forward/.

V. CONCLUSION

The effects of the *Citizens United* ruling are difficult to disentangle after just one election. However, with the data that are available, this Article can offer the following preliminary conclusions:

(1) Spending by interest groups did increase significantly in the 2010 election, with it likely that the *Citizens United* ruling played a major part in this development.

(2) Corporations and pro-business interests played an increased and very significant role in the 2010 election. Yet while the influence of corporations and pro-business interests was strong in the aftermath of the *Citizens United* ruling, rival groups, such as those affiliated with organized labor, also spent competitive amounts of money in the 2010 election.

(3) As critics of the *Citizens United* case predicted, conservative group spending rose significantly in the 2010 election cycle, although, the increases may have been attributable to other favorable conditions that helped Republicans in the 2010 election. Researchers will need to look beyond the 2010 election for a more definitive answer as to whether the *Citizens United* ruling altered the balance of power to the Republicans' advantage.

(4) There is little evidence following the 2010 election to support the claim that the *Citizens United* ruling enhanced the power and influence of foreign corporations in the U.S. electoral process, although recent efforts to undermine disclosure requirements raise some concerns about the potential for this.

Taken together, these findings suggest that more money from outside groups is likely to pour into federal elections in the years to come. For those with faith in pluralism, this development is not to be feared, and may indeed benefit the democratic process by creating a livelier and more robust debate between competing interests such as business and labor. However, those who believe, as the political scientist E.E. Schattschneider once wrote, that the "flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent,"[59] will undoubtedly be skeptical that any group or interest will be able to check the money, power, and influence of corporations and business interests over the long run. These skeptics of the *Citizens United* ruling see the future of American democracy in much bleaker terms with moneyed interests and perhaps even Republican politicians ultimately dominating the electoral process if new reforms to the campaign finance system are not enacted.

Regardless of what may be in store for American democracy, the present reality is that the U.S. Supreme Court—for better or

59. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 35 (1960).

for worse—has significantly weakened the regulatory apparatus of the modern campaign finance system. Barring a shift in the ideological composition of the Court or a constitutional amendment, the future of campaign finance seems to be headed back in the direction of the Watergate and even pre-Watergate period. With less regulation of money in elections, fewer restrictions on campaign spending, and a weakened disclosure system, the campaign finance system in the post-*Citizens United* era appears likely to be headed in a direction that takes it back in time as it moves to the future.