Keeping American Elections Afloat: Why Citizens United Should Be Abandoned And The Floodgates Should Be Closed

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I. INTRODUCTION

Where can a corporation come into existence, donate one million dollars to a leading candidate for president, and then vanish into thin air, all within four months? And where can presidential candidates rely on “charities” to fund iPad purchases, blisteringly negative attack ads, and travel via private luxury jets? Thanks to a quirky set of rulings by the nation’s high court, right here in the United States. Quite magnanimously, the Supreme Court allows corporations’ living, breathing counterparts - individuals - the same opportunity to contribute ludicrous amounts of money to influence elections. Individuals, however, lack corporate shape-shifting abilities to dissolve, reemerge in a new form with a new name, and thus disguise or erase traces of the donation. The Court’s recent campaign finance jurisprudence and Congress’s failure to counteract that judicial extremism have set the 2012 presidential election up to “be about as transparent as a Chinese sovereign-wealth fund.”¹ In fact, newly created outside organizations have already spent more than thirteen million dollars to influence the 2012 contest, nearly twice what was spent at this point in 2008.² These organizations have also already taken steps to shield their donors’ identities entirely, or until after crucial election dates.³

“There has been much hysteria expressed about the Roberts Court’s decision in *Citizens United*” and this article attempts to “contribute to, and expand upon this unsophisticated hysteria” by examining the problematic nature of the country’s current campaign finance jurisprudence. It argues that the Court has left only meager and ineffective tools in place for regulating campaign finance, refuses to recognize a legitimate source for reform, does not show appropriate deference to Congress, and has created further problems in the lower courts.

The following section gives a brief background on the *Citizens United* ruling, and Section III recounts a story that highlights quite clearly the problems the country faces in reforming this area of law. Next, Section IV tracks the chronically ineffective history of campaign finance regulation up to the *Citizens United* ruling. After that, Section V examines three recent Supreme Court decisions post-*Citizens United* that illuminate the Roberts Court’s endorsement of disclosure as the only means of regulating campaign financing, its failure to recognize voters as a legitimate source for reform, and its inappropriate level of deference to legislatures’ and voters’ attempts at reform. Section VI looks at several lower court decisions that demonstrate the types of arguments anti-reformists have advanced under the guise of *Citizens United* to undo even long-accepted forms of regulation. Finally, Section VII discusses paths forward for reformists in the form of legislation, court action, or a constitutional amendment.

**II. OPENING THE FLOODGATES: *Citizens United v. Federal Election Commission***

In January 2008, Citizens United, a non-profit corporation, released a documentary, *Hillary*, critical of Senator Hillary Clinton, a candidate running for the Democratic Party’s

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5 This term is used broadly to address those interests that oppose changes to the current campaign finance paradigm. There is no definite form to these interests, and the parties battling regulations in the cases discussed in Sections VI A-D, *infra*, comprising individuals and corporations, are a non-exhaustive amalgam of the types of groups described by this term.
presidential nomination.⁶ Citizens United planned on releasing the documentary through cable television video-on-demand services and wished to run advertisements for the film.⁷

At the time, federal law prohibited corporations from using general treasury funds to make independent expenditures for “electioneering communications” and speech that expressly advocated for the election or defeat of a candidate, but there was no such prohibition on more general, so-called “issue advocacy” expenditures.⁸ An “electioneering communication” was “any broadcast, cable, or satellite communication that refer[ed] to a clearly identified candidate for [f]ederal office. . . made within [thirty] days of a primary or [sixty] days of a general [election] and that [was] publicly distributed.”⁹ In the case of presidential candidates, “publicly distributed” meant that 50,000 or more persons in a state where a primary election was being held within 30 days could receive the communication.¹⁰ Corporations had to establish political action committees (PACs) for express advocacy and electioneering communication purposes.¹¹

Citizens United successfully sought declaratory and injunctive relief arguing that the portions of federal law forbidding their advertising of Hillary were unconstitutional.¹² The Supreme Court held that Congress could not constitutionally limit corporate independent expenditures, regardless of whether they expressly advocate for or against a candidate, placing corporations on “equal First Amendment grounds” with individuals and “subjecting laws that single out corporate speech for special treatment to the most rigorous scrutiny.”¹³

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⁷ Id.
⁸ Id. at 886.
⁹ Id. at 887.
¹⁰ Id.
¹¹ Id.
¹² Id. at 912-13.
The decision has complicated an already problematic situation. Far from resolving a long fomenting issue - campaign finance reform - it has stoked further ills that hinder hopes of a transparent and fair regulatory scheme for financing American elections.

III. THE LIFE SPAN OF W SPANN LLC: No Harm, No Foul?

On April 28, 2011, a company called W Spann LLC made a one million dollar donation to Restore Our Future, a committee organized in support of Republican presidential candidate Mitt Romney.14 Restore Our Future, a “super PAC,”15 is organized as a separate entity from Romney’s presidential campaign, and to preserve its Citizens United-created ability to raise and spend unlimited sums of money, it does not officially coordinate its expenditures with Romney’s campaign.16 However, Restore Our Future’s founders - Carl Forti, Romney’s former political director, Larry McCarthy, a former Romney spokesman, and Charles R. Spies, the PAC’s Treasurer and Romney’s general counsel during his 2008 presidential campaign17 - need little instruction on what benefits a Romney candidacy.

An associate at Ropes & Gray, a firm that represented Romney in a challenge to his residency status when he ran for governor of Massachusetts in 2002, formed W Spann LLC on

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15 Under the Federal Election Campaign Act (FECA), an organization becomes a “political committee” - aka, a “PAC” - by receiving contributions or making expenditures in excess of one thousand dollars per calendar year for the purpose of influencing a federal election. 2 U.S.C. § 431 (2006). So-called “Super PACs” are the result of recent Supreme Court cases discussed supra, Section II, and infra, Sections V A-B. These organizations may not be subject to the same contribution and expenditure limits, and disclosure requirements FECA imposes on PACs. Also known as “independent expenditure only” committees, the only caveat is that they cannot coordinate directly with candidates or party committees on expenditures made to influence elections. They are required to disclose their donors, however, because they can be formed strategically close to elections, full disclosure may not occur until after elections have taken place. See, e.g., Dan Eggen & T.W. Farnam, New “Super PACs” Bringing Millions Into Campaigns, WASHINGTON POST (Sept. 28, 2010, 2:05 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706500.html.
17 See, e.g., Chabot, supra note 12.
March 15, 2011. One of the firm’s partners was trustee of a Romney trust when he ran for president in 2008. Ropes & Gray also represented Bain Capital, Romney’s company, which is located at 590 Madison Avenue in New York, the same address that W Spann LLC used.

On July 12, 2011, two weeks before Restore Our Future made its first campaign filing on July 31, W Spann LLC was dissolved. Spies maintains that Restore Our Future “has fully complied with all Federal Election Commission (FEC) regulations, including publicly disclosing donors on our July 31 report.” Romney’s campaign is - at least theoretically - wholly separate from Restore Our Future, and thus owes no explanation. However, after complaints were filed with the FEC and the Justice Department, Ed Conard, a former executive at Bain Capital, came forward as the creator of the company. Romney’s non-answer to a question regarding the contribution from a voter in New Hampshire only begs further questions:

And, and given the fact that, that - you make the, yeah, it was a company you say was acting as a person, that may well be. You can take it up with [Conard]. But there’s actually, given the fact that [Conard] said, ‘Oh, well it’s me,’ I don’t think there was, if you will, no harm, no foul. Yeah, yeah . . .

Restore Our Future went on to play the role of an attack dog for Romney leading up to the 2012 Iowa caucuses. It laid out more than three million dollars for direct mail and

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18 See Isikoff, supra note 14.
19 Id.
21 See Isikoff, supra note 14.
22 Id.
23 Id.
24 Id.
26 Id.
advertising in Iowa. Much of that advertising was in the form negative attack ads, meant to “pummel” former House Speaker Newt Gingrich, the candidate perceived as Romney’s biggest competition in the closing weeks of the campaign. Winning Our Future, a super PAC supporting Gingrich, has promised to spend more than three million dollars on attack ads against Romney in South Carolina, another critical early primary state. Romney was thus able to “outsource” his negative advertising, reaping the benefit of a rival’s plummet in the polls while avoiding having to assume direct responsibility for the negative ads. Super PACs supporting other candidates in Iowa took similar tactics, often outspending the candidates they supported.

While sketchy, million-dollar donations that so conveniently skirt contribution limits and anonymously funded candidate character assassinations may not result in a “fouls” under current laws, are they not harmful to our system, even and especially if other candidates are doing it? If this is the future of campaign contributions in the wake of Citizens United, what good are the meager disclosure regulations the Court has endorsed? How can individuals, unable to similarly aggregate wealth and resources and direct them towards manipulating the law in their favor, compete with corporations that specialize in this behavior? And given the sentient, living, and

27 See Schouten, supra note 2.
28 Id.
31 See Schouten, supra note 2 (“In many cases, the [Super] PACs are spending more than the candidates. The Red, White and Blue Fund, a Super PAC backing Republican Rick Santorum [the surprise second place - by only a handful of votes - finisher in Iowa], boasts that it outspent Santorum by twenty to one in Iowa advertising.”)
32 See, e.g., Steve McVicker, Mitt and Rick’s Secret Donor Deal, MSN POWERWALL (Sept. 21, 2011 9:19 AM), http://powerwall.msnbc.msn.com/politics/mitt-and-ricks-secret-donor-deal-1702106.story (describing questionable donations received by a rival of Romney’s for the 2012 Republican presidential nomination, Governor Rick Perry); see also Dan Eggen, Herman Cain Campaign’s Financial Ties to Wisconsin Charity Questioned, WASHINGTON POST (Oct. 31, 2011), http://www.washingtonpost.com/politics/campaigns/herman-cain-campaigns-financial-ties-to-wisconsin-charity-questioned/2011/10/31/gIQAJ61gZM_story.html (describing questionable donations, including luxury jet travel and iPads, received by another Republican presidential contender, Herman Cain, from a Wisconsin tax-exempt charity, Prosperity USA); see also Schouten, supra note 2.
voting characteristics that can only exist in a human, should we even be equating corporation’s rights in this area with those of individuals?

IV. HISTORY

There have been several phases of campaign finance regulation in the U.S., largely turning around the passage of the Federal Election Campaign Act (FECA) of 1971 (and later amendments) and the Bipartisan Campaign Reform Act (BCRA) of 2002, and Supreme Court decisions in Buckley v. Valeo, Austin v. Michigan Chamber of Commerce, and Citizens United.

A. Pre-FECA Campaign Finance Reform, aka Nothing at All

In the early days of the republic, campaign finance was a non-issue, with many offices being unelected or uncontested, and many candidates being familiar to the small base of eligible voters. 33 The first attempts at campaign finance legislation at the national level occurred during the progressive era in an attempt to remove the influence of corporations from elections. 34

The first such attempt was the Tilman Act of 1907, prohibiting the direct contribution by banks and corporations to national candidates or parties. 35 This first attempt had “little practical effect” as enforcement was “non-existent,” and very soon, “money from corporate coffers again flowed into campaigns.” 36 A short time later, The Publicity Act of 1910 was enacted (and amended in 1911), requiring post-election disclosures of contributions over one hundred

35 Tillman Act, ch. 420, 34 Stat. 864-65 (1907) (“[I]t shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.”).
36 Urofsky, supra note 26, at 17.
dollars. This act was also largely unsuccessful due to its failure to regulate relevant political party committees, an adverse Supreme Court ruling, and its total lack of enforcement or oversight provisions.

Four more notable attempts were made in the following six decades. The Federal Corrupt Practices Act of 1925 required disclosure of all receipts by candidates for Congress and by the national political parties. The Hatch Act imposed yearly limits on individual contributions to federal candidates and national party committees. The Taft-Hartley Act of 1947 banned direct contributions by unions to candidates, and corporate or union spending in connection with a candidate for federal office. In upholding the Act’s constitutionality, the Supreme Court outlined the government interest that would become the gauge for the constitutionality of campaign finance reform: preventing corruption and the appearance of corruption. Finally, the Long Act of 1966 envisioned a public funding system of political parties to pay for presidential campaigns through a voluntary check-off on income tax returns, but it would not become operational until a decade after its passage.

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37 Publicity of Political Contributions Act, ch. 392, 36 Stat. 822 (1910, amended 1911) (“[W]hoever… receives any contribution… shall… within five days after the receipt of such contribution… render… a detailed account of the same, together with the name and address from whom received.”).
38 See Urofsky, supra note 26, at 18.
39 Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (1925) (“Every person who receives a contribution for a political committee shall… within five days… render… a detailed account thereof, including the name and address of the person making such a contribution and the date on which received.”).
40 Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939, amended 1940) (“[I]t shall be unlawful for any person… to make contributions in an aggregate amount in excess of $5,000, during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office…”).
41 Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 304, 313, 61 Stat. 136 (1947) (“It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election… or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any [federal] election… in connection with any primary election… or for any candidate, political committee, or other person to accept or receive any [prohibited] contribution.”).
Thus, the effects of pre-FECA campaign finance laws were “negligible at best,” because they went unenforced and because candidates and parties found ways around new regulations “almost as quickly as new laws were passed.”

B. FECA and Buckley: A Bumpy Start

In 1971, Congress passed two campaign finance measures. The Revenue Act of 1971 would put into effect the Long Act’s envisioned public financing system for presidential elections, but to secure presidential backing, implementation had to be delayed until 1976. More significantly, Congress enacted FECA, “the most comprehensive campaign finance reform effort to date.” FECA restricted political contributions and expenditures broadly in all phases of the election process and by all its participants. It set a limit on the amount individuals could contribute to any single candidate and the amount they could contribute in a single year. The law also limited the amount that could be spent on independent expenditures made relative to a clearly identified candidate. After the Watergate scandal in 1972, Congress amended FECA to include further restrictions on candidate contributions and expenditures, and created the FEC to monitor and enforce campaign finance laws.

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44 Urofsky, supra note 26, at 33.
46 Bingham, supra note 11, at 1038.
48 Buckley, 424 U.S. at 13.
49 Id.
“fulfillment of the reform agenda advocated for by many for more than two decades,” but the Supreme Court had yet to weigh in.

In 1976, the Court considered a First Amendment challenge to FECA in Buckley v. Valeo. The Court upheld FECA’s individual and party contribution limits and its public financing provisions. But, it struck down candidate expenditure limits because, in contrast with contribution limits, they place a direct and substantial restraint on the spender’s political speech. The Court balanced the burdens imposed on free expression against the governmental interest asserted to justify the burdens - chiefly, the government’s interest in preventing corruption or its appearance. The Court did not directly deal with the issue of independent corporate expenditures; however, it did create a distinction between express advocacy - pointed exhortations to vote for or against a particular person - and issue advocacy - expenditures made for the discussion of issues without express words of advocacy. The examination of expenditures for these express words of advocacy came to be known as the “magic words” test, and expenditures on things like political ads that included express advocacy for a clearly identified candidate could constitutionally be prohibited.

Thus, corporations could not spend general treasury funds on express advocacy, but they could do so for more general issue advocacy, “whether or not the purpose or effect of the spending was to influence the outcome of an election for federal office.” Later, the Court would strike down a statute limiting independent expenditures in the state referendum context,

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51 Urofsky, supra note 26, at 57.
52 See Buckley, 424 U.S. 1.
53 Id. at 143.
54 Id. at 19-21.
55 Id. at 143, and 26-27.
57 Id.
58 See, e.g., Bingham, supra note 11, at 1039.
59 See Buckley, 424 U.S. at 143.
60 Bingham, supra note 11, at 1039.
noting that there was no risk of corrupting a candidate in those types of elections.\textsuperscript{61} This complex analytical scheme pervades the campaign finance debate today.\textsuperscript{62}

**C. Austin and the BCRA: Glimmers of Hope Snuffed Out by the Court**

The Court then began walking a very fine line in recognizing the legitimacy of legislatures’ concerns that organizations that amass great wealth not gain an unfair advantage in the political system.\textsuperscript{63} In *Austin v. Michigan Chamber of Commerce*, overturned by *Citizens United*,\textsuperscript{64} the Court declined to strike down a state statute that banned corporations from directly funding the advocacy of a candidate for statewide office and required the establishment of a PAC for such advocacy.\textsuperscript{65} The Court framed the government’s legitimate interest justifying the regulation as one of reducing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”\textsuperscript{66} This came to be known as the “antidistortion” logic,\textsuperscript{67} and in compelling language, the Court held that it was not the “fact that corporations may accumulate large amounts of wealth” that warranted limits on corporate independent expenditures, but rather “the unique state-conferred corporate structure that facilitates” those accumulations.\textsuperscript{68} FECA, together with *Buckley*, *Belotti*, *Massachusetts Citizens*, and *Austin* governed campaign finance until 2002.\textsuperscript{69}

\begin{itemize}
\item[62] See, e.g., Arizona Free Enterprise Club’s Freedom Club PAC v. Bennet, 131 S. Ct. 2806 , 2820 (2011) (quoting *Buckley*, “[R]estrictions on the amount of money a person or group can spend on political communication. . . necessarily reduces the quantity of expression.”).
\item[66] Id.
\item[67] See, e.g., Bingham, *supra* note 11, at 1043.
\item[68] *Austin*, 494 U.S. at 660.
\item[69] See Bingham, *supra* note 11, at 1043.
\end{itemize}
In 1998, a Senate Report was released indicating widespread abuses of campaign finance laws in the 1996 presidential election. The abuses were the result in large part of problems with FECA. First, in collecting “soft money,” national parties were able to circumvent contribution limits by using local party affiliates. Also, so-called “sham issue ads” had proliferated. In 2002, Congress passed the BCRA in response to the Senate’s report. The Act banned national party committees from raising funds not subject to FECA, discouraging the national parties from asking donors to give money in excess of FECA’s contribution limits by donating to local party branches. The Act redefined “express advocacy” ads as “electioneering communications” - broadcast, cable, or satellite communications that clearly identify a candidate for federal office within sixty days of a general election or thirty days of a primary and are targeted to the relevant voting electorate - which were not allowed if funded with the general treasury funds of a union or corporation.

Three more Supreme Court cases of note were decided in the area of campaign finance between BCRA’s passage and the Citizens United decision. The Court reaffirmed the federal ban against direct contributions to candidates by corporations, upheld the “soft money” and “electioneering communications” provisions of BCRA, and revised its endorsement of the

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71 “Soft money” is “money that companies, unions or individuals may give to a political party to support ‘party-building’ activities at the local or state level, which is not regulated by [FECA], and therefore has become a way for parties to indirectly support candidates.” See, e.g., Politics Glossary, WASHINGTON POST, http://projects.washingtonpost.com/politicsglossary/election/soft-money/ (last visited Oct. 22, 2011).
72 See McConnell, 540 U.S. at 131.
73 Id. at 132 (2003) (characterizing “sham issue ads” as “advertisements paid for by corporations in order to influence elections” that only very loosely complied with Buckley’s limitations on express advocacy).
74 Id.
76 BCRA, supra note 68; see McConnell, 540 U.S. at 189.
78 See McConnell, 540 U.S. at 138.
“antidistortion” logic.\textsuperscript{79} So even when meaningful legislative reforms like FECA and the BCRA have been enacted, “there have been significant judicial restrictions in place on [them] for all but the years of 1974-76, and 2002-07,”\textsuperscript{80} certainly not enough time to measure their effectiveness. In fact, the “only constant restriction on corporate spending in the last century has been the Tilman Act’s ban on direct contributions to candidates.”\textsuperscript{81} Under this constellation, the stage was set for further hamstringing of these legislative reforms in \textit{Citizens United}.

\textbf{V. RECENT SUPREME COURT DECISIONS}

Recent decisions by the Supreme Court demonstrate the Roberts Court’s hostile attitude toward reforming campaign finance, and pose a real problem for reformers, particularly in relation to corporate spending in elections. The Court has left only the feeblest means of regulation in place, it does not recognize a legitimate source for reform, and it fails to show deference to Congress in an area where deference would be appropriate. Three recent cases are illustrative of the problems the Court has created: \textit{Doe v. Reed, Arizona Free Enterprise v. Bennett,} and \textit{Holder v. Humanitarian Law Project.}

\textbf{A. Look How Transparently You Can Beat the Rules! Don’t You Feel Better?: Disclosure and Doe v. Reed}

Citizens United made two challenges in its suit: the successful challenge to the limits on corporate independent expenditures, and an unsuccessful challenge to the BCRA’s disclosure requirements.\textsuperscript{82} Despite Citizens United’s claims that disclosure requirements had a chilling effect on First Amendment free speech rights, the Court held they were a “less restrictive

\textsuperscript{79} See Fed. Election Comm’n v. Wisconsin Right to Life, 551 U.S. 449, 470 and 474 (2007) (holding that an advertisement is express advocacy and can thus be regulated only when there is “no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” and “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.”).
\textsuperscript{80} Bingham, supra note 11, at 1051.
\textsuperscript{81} Id.
alternative” to other forms of campaign finance regulation that “enable the electorate to see whether elected officials are ‘in the pocket’ of so-called moneyed interests, make informed decisions, and give proper weight to different speakers and messages.”83 This would not, however, deter anti-reform minded interests from challenging the rather straightforward guidance from the high court.

In May 2009, Washington enacted a law expanding the rights of state-registered domestic partners, including same-sex partners.84 Washington allows its citizens to challenge state laws via referendum if roughly four percent of voters sign a petition to place the referendum on the ballot.85 Protect Marriage Washington (PMW, a plaintiff in the suit) was organized as a “State Political Committee” in Washington for the purpose of collecting signatures to place the domestic partners law on the ballot for a referendum, and it was successful.86 A referendum was held, and voters approved the law by a margin of six points.87 Shortly after the referendum, the state received several requests for copies of PMW’s petition under the state’s Public Records Act.88 PMW and its co-parties filed suit, seeking an injunction prohibiting the release of the petition, believing the signatories would be subject to threats, harassment, and reprisals.89 The Court rejected this argument and held that, as applied to referendum petitions in general, disclosure requirements under the state’s Public Records Act did not violate the First Amendment, because of their minimally restrictive nature and their adequate relation to Washington’s interest in protecting the integrity of its electoral process.90

83 Id. at 915.
84 Doe v. Reed, 130 S. Ct. 2811, 2816 (2010).
85 Id. at 2815.
86 Id. at 2816.
87 Id.
88 Id.
89 Id.
90 Id. at 2821.
The analogy was quickly made that the decision was an affirmation of disclosure requirements for campaign financing as well. Thus, it appears disclosure is one of the few ways courts are prepared to accept regulation of independent campaign financing and spending. Indeed, there is hope that disclosure could be a bright spot for reformists. Broad disclosure requirements can serve the important goal of informing the public. They may be a panacea for solving problems like how to secure information on donors to non-profit corporations that engage in both electoral and non-electoral activities. They may also hold candidates publicly accountable for the direct contributions they accept, and require explanations of indirect and independent support.

Harder to accept, however, are arguments that disclosure requirements - by themselves - will do the legwork of holding politicians and their independent corporate supporters accountable, particularly in light of stories like W Spann LLC’s. It is a positive sign for reformers that the public is aware of the massive campaign contribution made in support of a presidential candidate, and that the only string attached was admitting who made it. But knowing that the transaction took place is only a first step towards accountability. No real repercussions have been forthcoming.

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91 See, e.g., Ciara Torres-Spelliscy, Citizens United v. FEC: Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed, 27 GA. ST. U.L. REV. 1057, 1059 (2011) (noting that post-Doe, lower courts all over the country have adopted the view that disclosure and disclaimer requirements can be constitutionally applied to campaign finance and spending in addition to disclosure surrounding ballot measures).
92 Id. at 1103.
96 See, e.g., Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 916 (2010) (“[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).
97 See Ciaramella, supra note 23.
Furthermore, the timing of disclosure is critical. Because of the nuances of FECA, it is possible for a PAC to be formed, raise money, and make disbursements that will affect elections, and not disclose that activity until 12 days before the election. Activities that then occur in the final 12 days of the election can go unreported to the FEC until after the election, far too late for voters to consider the information when deciding how to vote.

By endorsing disclosure as the only possible means of regulation, the Court is satisfied to rest on the unlikely hopes that: disclosure will occur at a time when it is still useful, and if disclosure is timely, enough voters are paying attention and will be so put off by this type of behavior, that meaningful accountability at the ballot box will result. The Court’s hopes have not panned out in reality. While disclosure may represent a positive step forward in reforming campaign finance, effective regulation will not ensue if disclosure is the only tool available.

B. Silly Voters, Campaign Finance Laws Are for Courts: Other Sources of Reform and Arizona Free Enterprise v. Bennett

98 See Federal Election Commission, Campaign Guide for Nonconnected Committees 49-50 (May 2008) (Certain PACs may choose to file disclosure reports on a quarterly schedule, meaning reports are due in April, July, October, and January. PACs that elect to report on this schedule must also file “Pre-Election” reports that disclose donations and expenditures in the periods between reports immediately preceding primary and general elections (e.g., between the October and January quarterly reports). These reports must be submitted 12-15 days before the primary or general election. A committee formed during this 12 day window could potentially disclose none of its fundraising activities before the election.), available at http://www.fec.gov/pdf/nongui.pdf#page=59.
99 Id.; see also, Dan Eggen & T.W. Farnam, New “Super PACs” Bringing Millions Into Campaigns, Washington Post (Sept. 28, 2010 2:05 AM) (noting that some PACs were “so new” that they had not yet filed any disclosure reports as late as September in a year where Congressional primary elections had already occurred and the general election was six weeks away), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706500.html; see also Federal Election Commission, Campaign Guide for Corporations and Labor Organizations 47 (July 2007), available at http://www.fec.gov/pdf/colagui.pdf, Federal Election Commission, Campaign Guide for Congressional Candidate Committees 83 (Aug. 2011), available at http://www.fec.gov/pdf/candgui.pdf, and Federal Election Commission, Campaign Guide for Political Party Committees 67-68 (July 2009), available at http://www.fec.gov/pdf/partygui.pdf (Corporate and union PACs, along with Congressional campaign committees and political party committees file similar disclosure reports in election years; in addition to the reports described above, a report disclosing activity in between the 12-day pre-election report and 20 days after the election, due to the FEC 30 days after the election must be filed. The information contained in these reports suffers from the same utility problem as the disclosure of late-stage fundraising activity of nonconnected committees, in that it is not disclosed until after the election when it is too late for voters to take it into account in making their decision.).
100 See Gillum, supra note 3 ("Independent political groups. . . are taking advantage of federal rules that essentially let them shield the identities of their donors until after important primary elections [in January 2012].").
In June, the Court told the voters of Arizona that a scheme they had enacted in an attempt to combat perceived flaws with state campaign finance laws did not pass constitutional muster.\textsuperscript{101} Arizona first enacted new limits on campaign contributions several years ago in an effort to combat corruption in the state.\textsuperscript{102} However, those limits would prove fruitless, as evidenced by the “AzScam” scandal, in which nearly ten percent of the state’s legislators were caught accepting campaign contributions or bribes in exchange for supporting legislation.\textsuperscript{103} The voters thus turned to a more inventive approach by enacting a public financing scheme.\textsuperscript{104} A publicly financed candidate had to first opt into the process,\textsuperscript{105} and by accepting certain campaign restrictions and obligations, they were granted an initial outlay of public funds to conduct their campaign.\textsuperscript{106} In most cases, this initial outlay was the extent of the state’s financial backing of a publicly funded candidate; however, under the Arizona scheme, when certain conditions were met, publicly funded candidates would be granted additional “matching” funds.\textsuperscript{107}

Arizona’s scheme set an amount that could be spent in primary and general elections, and once that amount was exceeded by privately financed candidates, the matching funds would be triggered for publicly financed candidates.\textsuperscript{108} The maximum amount that could be spent by privately financed candidates before triggering matching funds included expenditures by the candidate, and by independent groups in support of the privately financed candidate or in opposition to a publicly financed candidate.\textsuperscript{109} Once matching funds were triggered, each additional dollar the privately financed candidate spent over the limit resulted in one dollar in

\textsuperscript{102} Id. at 2832 (Kagan, J., dissenting).
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} See Buckley v. Valeo, 424 U.S. 1, 57 (1976) (Public financing systems must be voluntary to pass constitutional muster because of their restrictions on contributions and expenditures.).
\textsuperscript{106} Arizona Free Enterprise, 131 S. Ct. at 2814 (majority opinion).
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
additional state funding to the publicly financed candidate - less a six percent reduction meant to account for fundraising expenses - up to two times the initial authorized grant of public funding.\textsuperscript{110} Privately financed candidates could raise and spend unlimited funds (subject to state-imposed individual contribution limits and disclosure requirements), while publicly financed candidates agreed to limit their expenditures of personal funds to five hundred dollars, participate in a public debate, adhere to an overall expenditure cap, and return all unspent public money.\textsuperscript{111}

In rebuking Arizona voters for attempting to curb corruption in their state, the Court found that the state’s public financing system imposed “an unprecedented penalty on any candidate who robustly exercises his First Amendment rights,” was not tailored closely enough to the state’s interest in preventing corruption, and was therefore unconstitutional.\textsuperscript{112} Noteworthy in the cognitive dissonance engaged in by the Court is its lamentation that “of course” granting additional funds to a publicly financed candidate “[m]ake[s a privately financed candidate’s] message. . . less effective,” because “[a]n advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.”\textsuperscript{113} This is the same Court that hails the ability of voters to discern for themselves the credibility and effectiveness of a message based on who sponsors it.\textsuperscript{114} Rather than permit the voters the chance to judge campaign messages disseminated with matching funds, the Court paternalistically takes the matter out of voters’ consideration.

The majority opinion totally disregards the purpose behind the voter-enacted scheme, and fails to recognize a legitimate source for campaign finance reform. The public financing scheme

\begin{footnotes}
\footnote{\textsuperscript{110} Id.}
\footnote{\textsuperscript{111} Id. at 2813-14.}
\footnote{\textsuperscript{112} Id. at 2818.}
\footnote{\textsuperscript{113} Id. at 2824.}
\footnote{\textsuperscript{114} See Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 916 (2010) (“[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).}
\end{footnotes}
was a direct response by voters to real corruption in the state.\textsuperscript{115} And yet, the Court rather abruptly dismisses this reality by referencing \textit{Citizens United}\textsuperscript{116} and claiming that self-financed candidates pose a reduced risk of corruption.\textsuperscript{117} The W Spann LLC story - not to mention “AzScam” - certainly raises questions about the corruptive potential of independent expenditures, and the corruptibility of wealthy\textsuperscript{118} individuals, in direct contradiction to the Court’s assertions that rich politicians pose less of a threat of corruption, and that independent expenditures pose no risk of corruption.

Furthermore, this case is an example of a voter-enacted scheme being struck down by the Court. This is significant when combined with the invalidations of legislative attempts to reform campaign finance. When taken together with \textit{Citizens United}, the Court has essentially said that the appropriate source for campaign finance reform is neither legislatures, nor the voters that elect them. If the Court endorses only the ineffective measures sanctioned in \textit{Doe}, while recognizing no legitimate source for reform, those wishing to see a more fairly regulated scheme are left with few choices other than more judicial action or a constitutional amendment.

\textbf{C. What Can The Terrorists Teach Us About Campaign Finance?: \textit{Holder} v. \textit{Humanitarian Law Project}}

While not directly relating to campaign finance, this case is an example of the type of deference and restraint the Court should have demonstrated when evaluating laws like those at

\begin{itemize}
\item \textsuperscript{115} \textit{Arizona Free Enterprise}, 131 S. Ct. at 2832 (Kagan, J., dissenting).
\item \textsuperscript{116} \textit{Id}. at 2826 (majority opinion) (“[I]ndependent expenditures... do not give rise to corruption or the appearance of corruption...”).
\item \textsuperscript{117} \textit{Id}. (“Burdening a candidate’s expenditure of his own funds on his own campaign does not further the State’s anticorruption interest. Indeed, we have said that reliance on personal funds reduces the threat of corruption and that discouraging the use of personal funds disserves the anticorruption interest... That is because the use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse of money in politics.”).
\end{itemize}
issue in *Citizens United* and *Arizona Free Enterprise*. Over a complicated twelve-year history, a group of individuals and domestic organizations challenged a federal anti-terrorism statute on First Amendment grounds. Federal law prohibits knowingly providing material support or resources - including training, expert advice, and personnel - to a foreign terrorist organization. The plaintiffs wished to interact with two organizations - the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) - that the State Department had classified as “terrorist organizations.” The plaintiffs wanted to train PKK members to use international law to resolve disputes peacefully and petition the United Nations and other bodies for relief, and to engage in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka.

Rather than trumpeting the First Amendment and condoning the plaintiffs’ desire to speak freely, the Court ruled against them. In marked contrast to the decisions that so radically wielded the Court’s power of review and so readily discarded the BCRA and Arizona’s public financing system, the Court deferred to Congress, making reference to the “careful balancing of interests” performed by legislators in passing the anti-terrorism statute, and highlighting its own “[marked] lack of competence” in the area. Nowhere in *Citizens United* or *Arizona Free Enterprise* is there this type of admiration for the legislative or electoral process, nor is there recognition of Congress’ (an elected five hundred thirty five member body) and voters’ drastically greater and more personal experience in dealing with elections than the Supreme Court (a group of nine life-appointees). In more astonishing language, the Court easily

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120 Id. at 2712.
121 Id. at 2713.
122 Id. at 2716-18.
123 Id. at 2730.
124 Id. at 2728.
concludes that “everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order,” and justifies restrictions of First Amendment rights. 125

It is illustrative to compare this conclusion to the Court’s conclusion in Citizens United, and later Arizona Free Enterprise, that the government’s interest in preventing corruption and the appearance of corruption could not justify limits on independent corporate expenditures. 126 Thus, a vague and distant threat from “the terrorists” leads this Court to uphold an incredibly highly burdensome restriction - indeed, a total ban - on actual speech. Meanwhile, concrete and substantial threats of corruption from “AzScam” or W Spann LLC somehow leave the Court at peace with its determination that the government’s anti-corruption interest cannot justify even mere regulations of a less-pure form of speech, monetary contributions.

This is not an endorsement of the outcome of the case. 127 However, the Court’s approach to analyzing the anti-terrorism statute here would be much more reasonable in the campaign finance context than the approach taken in Citizens United and Arizona Free Enterprise.

These three cases demonstrate the ineffective tools the Roberts Court has left reformers to deal with campaign finance, its refusal to recognize a legitimate source of reform, and the inappropriate level of deference the Court shows to campaign finance reforms enacted by

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125 Id. at 2724.
127 The Court’s holding takes its Citizens United theme of unleashing independent corporate expenditures to the max, highlighting the exemption of “independent advocacy, or indeed any activities not directed to, or coordinated with, or controlled by foreign terrorist groups.” Holder, 130 S. Ct. at 2728. But in the same opinion, the Court held that because the organizations drew no line between the terrorism aspects of their groups and the legitimate aspects the plaintiffs wished to foster, any contribution to such an organization facilitates the terroristic conduct. Id. at 2729 (“A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. . .”). Thus, organizations like the plaintiffs’ that directly engage with “the terrorists” to provide schooling in international law and procedure commit a felony. 18 U.S.C.A. §2339B(a)(1) (2011). However, a company like W Spann LLC or Citizens United, out of the goodness of its heart, may buy television or radio time in Diyarbakır (a city in Turkish Kurdistan) or Jaffna (a major Tamil city in Sri Lanka), or produce Internet or on-demand videos, advocating that the watchers and listeners learn the ins and outs of international law completely free from worry about criminal prosecution. So the Court’s message is: help the terrorists win if you must, as long as you don’t “coordinate” with them.
Congress and voters. Given these factors, those wishing to see effective change are left with very few options, including further legislative and judicial action, or a constitutional amendment. Before discussing those options, it is also illustrative to look to the lower courts, which are full of further problems created by the Court’s current campaign finance jurisprudence.

VI. LOWER COURT DECISIONS

The lower courts have been a veritable stomping ground for anti-reformists in the wake of Citizens United. Despite the somewhat limited nature of the decision, opponents of campaign finance reform have moved to strike out at long-standing and widely accepted regulations, as well as more recent attempts at reform. The following four cases are illustrative of anti-reformist tactics. They are by no means a comprehensive list of possible cases that could be discussed, but they demonstrate how Citizens United is being used to challenge laws outside the scope of the decision, with unsettling degrees of success.

A. Politicians Gone Wild Part I: Thalheimer v. San Diego

San Diego’s campaign finance laws date to 1973; however, in the wake of Citizens United, they became one of many targets for anti-reformists in their constitutional challenges to campaign finance regulation. Phil Thalheimer, a plaintiff in the suit, was an unsuccessful candidate for city council in 2004 and 2008, spending in excess of one million, three hundred

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129 See Thalheimer v. San Diego, 645 F.3d 1109, 1113 (9th Cir. 2011).
thousand dollars on the two races.\textsuperscript{130} Along with several local PACs and the Republican Party, he challenged five provisions of San Diego’s campaign finance regulations.\textsuperscript{131} San Diego had provisions very closely resembling provisions struck down in \textit{Citizens United}, which were accordingly invalidated.\textsuperscript{132}

The plaintiffs advanced two troublesome arguments. First, they claimed that San Diego’s ban on contributions to candidates outside of a twelve-month, pre-election window was unconstitutional without a specific showing of actual or perceived corruption.\textsuperscript{133} This would have dealt another major blow - \textit{Citizens United} being the first - to the idea that states can regulate campaign finance in the interest of combating corruption or its appearance, by requiring that states carry the burden of showing specific instances of \textit{quis pro quo} corruption\textsuperscript{134} when defending campaign finance laws in court. Luckily, and rightly, the court did not accept this argument\textsuperscript{135} and do further damage to states’ anti-corruption interests.

Second, the plaintiffs challenged the only constant restriction on corporate spending in elections in the last one hundred years,\textsuperscript{136} a ban on direct contributions to candidates by non-individuals from general treasury (non-PAC) funds.\textsuperscript{137} Despite the strong government interest in regulating these types of contributions,\textsuperscript{138} a group of anti-reform minded interests was emboldened by the ruling in \textit{Citizens United}, and able to legitimately question one of the few tools that has been consistently available to reformers over the last century. The court did not

\begin{footnotes}
\item[131] See \textit{Thalheimer}, 645 F.3d at 1113.
\item[132] \textit{Id.} at 1118-21, and 1126-28.
\item[133] \textit{Id.} at 1121-23.
\item[134] \textit{Quis pro quo} corruption in this context refers to the giving of a political contribution in exchange for a political favor from the politician. \textit{See}, e.g., \textit{Citizens United v. Fed. Election Comm’n}, 130 S. Ct. 876, 901 (2010).
\item[135] See \textit{Thalheimer}, 645 F.3d at 1123.
\item[136] \textit{See Bingham}, supra note 11, at 1051.
\item[137] See \textit{Thalheimer}, 645 F.3d at 1125.
\item[138] \textit{Id.}
\end{footnotes}
find this argument persuasive,139 but both of the arguments advanced here show the slippery slope campaign finance reform finds itself on. In the wake of Citizens United, anti-reform interests are encouraged and willing to use it to unmake reform - even “reform” that is one hundred years old.

B. Anti-Reform’s Poster-Child: Minnesota Citizens Concerned for Life v. Swanson

In response to the Citizens United ruling, Minnesota amended portions of its election laws in an effort to comply with new Supreme Court precedent.140 It retained a ban similar to the ban in question in Thalheimer, but amended other sections relating to independent expenditures to allow for unlimited spending subject to simple disclosure requirements.141 Not satisfied with these changes, a group of corporations sued the state, seeking invalidation of the laws.142

In a display more egregious than Thalheimer, this group of anti-reformists completely misapplied Citizens United in an attempt to do away with regulations intended to prevent corruption in the electoral system. The plaintiffs complained that the reporting requirements for making independent expenditures were so burdensome as to amount to an effective ban on them altogether.143 What were these ban-like requirements? “[P]eriodic reports, segregated funds, and the appointment of a treasurer.”144 Figuring out how much money is in the bank, where it is going, and who will pay the bills are things American families do as a matter of daily existence. And yet, here is a group of corporations claiming that these are unconstitutional barriers to speech, even after the legislature modified the laws in direct response to Citizens United,145 an incredibly “speech friendly” opinion. Any corporation that views simple mathematical

139 Id.
140 See Minnesota Citizens Concerned for Life v. Swanson, 640 F.3d 304, 308 (8th Cir. 2011), cert denied 131 S. Ct. 446 (2010).
141 Id.
142 Id.
143 Id. at 311.
144 Id.
145 Id. at 308.
computations and organizational procedures as a burden on its rights should be viewed with more than a little suspicion when it then proposes to “educate” the American electorate through the use of independent expenditures.

C. Politicians Gone Wild Part II: In re Ahn Cao

In litigation commenced during the 2008 election cycle, Congressman Joseph Ahn Cao and his political party filed suit to challenge campaign financing laws they viewed as adverse.146 Because of the unique characteristics of Louisiana elections to the House of Representatives,147 the Republican Party (through its national fundraising committee, the Republican National Committee (RNC)) had maxed out its ability to directly contribute monetarily to Congressman Cao’s reelection campaign.148 The complainants argued that the RNC would have contributed further to Congressman Cao’s campaign had it not been for FECA’s limitations.149

Although the plaintiffs could not have been motivated originally by the Citizens United decision, they found themselves in position to use it to attempt to advance their arguments. First, they challenged contribution limits on the grounds that there was no index in the limits for adjusting for inflation.150 The Court easily dismissed the argument, noting that no court had ever invalidated a contribution limit solely on that basis.151 The plaintiffs also tried to contend that

146 See In re Ahn Cao, 619 F.3d 410 (5th Cir. 2010), cert denied 131 S. Ct. 1718 (2011).
147 Louisiana uses what is known as a “jungle primary,” where all candidates, regardless of party affiliation, compete on the day of the general election. If a candidate wins more than fifty percent of the vote, they win the election. If no candidate receives a majority of the votes, the top two vote getters face each other several weeks later. This contrasts with most other states that hold primary elections several weeks before the general election to determine each party’s slate of candidates. On general election day in those states, the candidates chosen in the primaries face candidates chosen by other parties in the primaries. The candidate receiving the most votes, not necessarily an outright majority, is declared the winner. See, e.g., Chris Cillizza & Aaron Blake, Why Bobby Jindal (Still) Matters, WASHINGTON POST (Oct. 24, 2011, 7:23 AM), http://www.washingtonpost.com/blogs/the-fix/post/why-bobby-jindal-still-matters/2011/10/23/gIQAr9fACM_blog.html (discussing Governor Bobby Jindal’s recent reelection victory after receiving sixty six percent of the vote in a ten-way “jungle primary”).
148 In re Ahn Cao, 619 F.3d at 414-15 (“the RNC spent all of the $42,100 it was allowed to spend on coordinated expenditures . . . and reached its $5,000 [direct] contribution limit under [FECA].”).
149 Id. at 415.
150 Id. at 423.
151 Id.
Citizens United altered the analyses of contribution limits on political parties and PACs. The Court found nothing in Citizens United that would require such a change. The Court also had to grapple with a controversy created when the Republican Party attempted to adopt, as its own speech, an advertisement in support of Congressman Cao. Deciding that the parties had only raised one of two possible challenges to the law, the Court upheld it.

This is yet another example of anti-reformists, bolstered by language from Citizens United, attempting to rewrite campaign finance laws that should go unaffected by the decision. Though it is a positive sign that the Court did not “take the bait,” the case could have turned out differently because there was a fight over which arguments were actually advanced by the complainants. Had that question been decided differently, Louisiana and the Fifth Circuit might have different campaign finance laws than they do today. It is also noteworthy how blatantly and unabashedly the politician and his political party were willing to twist the law to work in their favor. Here, the RNC attempted to argue that an ad clearly developed in tandem and with the approval of the candidate represented its own speech. Surely this is not the “independence” the Supreme Court has in mind when it reveres “independent expenditures.”

D. Did the Sky Just Fall?: United States v. Danielczyk

One of the only constant restrictions on corporate spending in elections in the last century has been the ban on direct contributions to candidates from general treasury funds of corporations. That constant was shattered by a District Court in Virginia this year.

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152 Id. at 422.
153 Id. at 423.
154 Id. at 425-26.
155 See David Gunn, U.S. Supreme Court and Fifth Circuit Update, 54 THE ADVOC. (TEXAS) 2, 11 (2011) (“The majority concluded that the RNC had made only the broader challenge…”).
156 In re Ahn Cao, 619 F.3d at 434.
157 See Gunn, supra note 146, at 11 (“And so it was that an important campaign finance decision came down to a question of whether or not the party presented the argument.”).
158 See Bingham, supra note 11, at 1051.
In February 2011, a grand jury indicted two fundraisers for Hillary Clinton’s 2006 Senate campaign and 2008 Presidential campaign on charges that they illegally solicited and reimbursed campaign contributions.\(^{160}\) One of the charges claimed that the defendants violated a ban on direct corporate contributions to campaigns for federal office.\(^{161}\) In sweeping language that apparently contradicts *Minnesota Citizens Concerned for Life* and *Thalheimer*, this District Court states the “inescapable logic” that “[i]f human beings can make direct campaign contributions within FECA’s limits. . . then corporations must also be able to [do so].”\(^{162}\) Thus, the law banning corporations from exercising rights commensurate with their sentient-being “equivalents” was held unconstitutional.\(^{163}\) Perhaps recognizing the gravity of its ruling, the court issued an opinion twelve days later clarifying that the law was unconstitutional as applied to the defendants in this case, rather than applied to all corporate contributions.\(^{164}\)

Nevertheless, this is yet another example of the precipice *Citizens United* has left the country teetering on. Anti-reformists have zealously attacked even long-standing campaign finance regulations with the belief that *Citizens United* will help them prevail. Even if it was only for 12 days in one District Court, anti-reformists were successful in bringing down the one constant of the last century. Next time the country may be left with the result for quite longer. Looking forward, campaign finance reformists must consider not only the outrageous limitations imposed by the Supreme Court, but also the harm being done in lower courts as they are forced by aggressive and calculating plaintiffs to apply (or misapply) the Court’s poor precedent.

\(^{160}\) See Danielczyk, 788 F.Supp.2d at 476.
\(^{161}\) Id. at 478.
\(^{162}\) Id. at 494.
\(^{163}\) Id.
\(^{164}\) See Danielczyk, 791 F.Supp.2d at 519.
VII. PATHS FORWARD

The state of campaign finance law should be disconcerting at the least to most citizens. Not only has the country never really had an effective system for regulating the flow of money into and out of political campaigns, but this incarnation of the Supreme Court has heavily injected itself into the debate and is making things worse. The Court, in addition to “opening the floodgates” for more abuse in an already ineffective system, left only the tool of disclosure as a path forward for reformers. It has rejected the idea that voters have the power to enact systems on their own to attempt to combat corruption. And it has paved the way for anti-reformists to jam the lower courts with arguments only tangentially related to *Citizens United*, yet still meriting serious consideration and occasionally resulting in the overturning of even longstanding, widely accepted regulations of campaign finance. In this type of environment, reformers are left with three options: further legislative action, abandonment of problematic Supreme Court precedent, or a constitutional amendment.

A. Further Legislative Action

The most obvious path forward for campaign finance reformers is legislative action. One creative idea is to undo FECA’s five thousand dollar individual contribution limit to PACs. “Removing the restriction on contributions to PACs may reduce corporate money’s influence by enabling other interests to better compete with unions and corporations that contribute to candidates through their connected PACs.” But, this “solution” presumes an untapped pool of wealthy individuals aching to donate to PACs not affiliated with corporations, unions, or

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165 President Barack Obama, State of the Union Address (Jan. 27, 2010) (“Last week, the Supreme Court reversed a century of law to open the floodgates for special interests - including foreign corporations - to spend without limit in our elections.”), available at http://stateoftheunionaddress.org/2010-barack-obama.

166 See Jeremy Peterman, *PACs Post Citizens United: Improving Accountability and Equality In Campaign Finance*, 86 N.Y.U. L. REV. 1160, 1163 (2011) (arguing that “invalidating this regulation [referring to FECA’s $ 5000 limit on individual contributions to PACs that make direct contributions to candidates] provides a means - within the confines of current doctrine - to obviate some of the common criticisms of *Citizens United*.”).

167 Id.
political candidates, who have not found alternative routes for contribution. Especially given the dire circumstances of the country’s economy,\(^{168}\) it is unlikely such a pool of heretofore unknown and untapped wealthy donors exists. Furthermore, with the proliferation of organizations meant to circumvent FECA,\(^{169}\) rich individuals wishing to counterbalance (or complement, depending on their politics) corporate and union political spending are likely already doing so without regard to FECA’s limitations.\(^{170}\)

Because disclosure legislation is one of the few areas where the Supreme Court has endorsed regulation, the very least legislators could do is require detailed disclosure of political contributions and expenditures. Legislation like the DISCLOSE Act\(^ {171}\) is one option. But even this direct legislative response to \textit{Citizens United} presents opportunities for avoiding


\footnote{169 See, e.g., Cory Kalanick, \textit{Blowing Up the Pipes: The Use of C(4) to Dismantle Campaign Finance Reform}, 95 MINN. L. REV. 2254, 2255 (2011) (examining the “rise of § 501(c)(4) nonprofit organizations as a modern tool for bypassing campaign finance regulation”).}


\footnote{171 Democracy Is Strengthened By Casting Light On Spending In Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. (2010); see generally Kalanick, supra note 160, at 2278 (The Act would close several loopholes in the current campaign finance system that allow for avoiding disclosure, e.g., by “expressly requir[ing] nonprofits to disclose all contributions and expenditures over $1000, and to disclaim their top five corporate contributors. . . [The] Act passed the House [of Representatives] in June of 2010, but died in the Senate a month later on a party-line vote.”).}
Disclosure also poses the risk of discouraging the participation of a crucial group of political actors, small donors.\textsuperscript{173}

However, any disclosure mechanisms will necessarily be hindered by a utility problem.\textsuperscript{174} Contributions and expenditures made in the final days of primary and general election campaigns may not become available until after the election is decided,\textsuperscript{175} too late for the information to be useful to voters. This incentivizes misbehavior at the conclusion of elections rather than discouraging it at all stages.

Legislators could attempt to deal with this gap, either by requiring “rolling disclosure,” or banning contributions at the point where they could no longer be disclosed to the public before an election. Rolling disclosure, or requiring that candidates disclose contributions as they are received, could solve this utility problem. It would prevent the gap in knowledge voters currently face, where they are aware of fundraising and spending activities up to a certain point, but not in the final days of the election. Perhaps with online credit card donations the technology exists to implement a system like this. However, this system would likely not be feasible where checks and cash contributions are concerned. Requiring daily disclosures of those kinds of contributions in the final days of an election would require a substantial investment in staff and other resources for both political committees and the FEC, and would likely be too cumbersome.

\textsuperscript{172} See, e.g., Schotland, supra note 88, at 759 (noting the exemption of groups like the NRA and, in fact, any “organization of at least 500,000 individuals who paid membership dues during the previous calendar year,” from the Act’s new requirements,).
\textsuperscript{173} See, e.g., Briffault, supra note 87, at 1013-1014 (“Over-disclosure has the potential to discourage the political participation of the small donors whose contributions are among the least corrupting aspects of the campaign finance process, and whose increased involvement is desirable for democratizing our campaign finance system.”).
\textsuperscript{174} See supra, Section V A.
\textsuperscript{175} See Gillum, supra note 3 (“It is secret money - you won’t know until after the primaries have occurred who helped fund them,’ said Trevor Potter, a former Republican FEC commissioner and president of the watchdog group Campaign Legal Center. ‘Whether [Super PACs are making independent expenditures] for the right or wrong reasons, it’s the opposite of what the disclosure system was designed to do.’”); see also Schouten, supra note 2 (“‘We may find the Republican nomination campaign is all but wrapped up before we know who's behind these [Super PACs],’ said Anthony Corrado, a campaign-finance expert at Colby College in Maine. ‘It's legal, but it reduces accountability in the system.’”).
to pass constitutional review. Similarly, banning any contribution that could not be disclosed to voters before an election, or banning committees from being formed strategically to avoid pre-election disclosure of its fundraising would not sit well with courts convinced that less restrictive alternatives to outright bans on political activities should be used.

Moreover, as evidenced by the W Spann LLC story, disclosure is only part of a larger battle. Knowing about shady political money is a great start, but actual repercussions and consequences for abusive behavior would be a better deterrent to that behavior than the clucking of political pundits and the hope that voters will investigate, remember, and vote against politicians that flout crooked campaign contributions. Yet, as shown in multiple cases since Citizens United, any legislation with real, consequential teeth other than disclosure regulations is likely to face a court’s rebuke. Proposals that “approach the problem without regard for the limits imposed by the Supreme Court” on previous efforts would be struck down, while “those that work around” the limitations would “likely not address the fundamental problems in the campaign finance system.”

It is also unclear whether Washington is capable of any legislative action. The 112th Congress is one of the least productive in decades. Teetering on the edge of competence, it has engaged in brinksmanship with government shutdowns and national default as

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176 See H.R. 158, 111th Cong. (2009) (which would unconstitutionally require all House members to participate in a public funding system, prohibit private campaign contributions, and put a maximum on the amount that can be spent in elections).
177 See H.R. 6116, 111th Cong. (2010) (which would create a public financing system with the goal of encouraging small contributions from donors within the candidate’s constituency).
negotiating tactics, and maintains some of the lowest approval ratings ever measured.\textsuperscript{182} Furthermore, even the Court-backed and politically popular area of disclosure has met resistance from members of Congress that once endorsed such measures.\textsuperscript{183} Even without those hurdles, bringing about meaningful campaign finance reform legislatively would pose a significant challenge. Given the current political climate and judicial attitude toward campaign finance legislation, it is not really a “solution” so much as a road to further problems.

B. Court Action

Another path forward would be for the Supreme Court to abandon \textit{Citizens United} and \textit{Arizona Free Enterprise}. In doing so, the Court could return to a more balanced approach toward campaign finance. They could reaffirm the “antidistortion” logic of \textit{Austin}, which - although it was part of an ineffective paradigm before \textit{Citizens United} - allowed for more flexibility, and more consequential regulation of inappropriate corporate activity related to influencing elections. Abandoning \textit{Arizona Free Enterprise}’s reasoning would also afford the Court an opportunity to revise its message to voters that they do not have the authority to regulate spending in elections according to their desires. Given the undemocratic nature of judicial existence on the Supreme Court and the distinctiveness of corporate campaign contributions, it should show much more deference to legislatures and executives who have


\textsuperscript{183} See, e.g., Alter, \textit{supra} note 1 (pointing out that Senator John McCain - once a proponent of strong disclosure requirements and namesake of BCRA’s more common title, the McCain-Feingold Act - “repudiated one of the great principles on which he’d staked his now-tarnished career” when he voted against the DISCLOSE Act in the Senate in 2010).}
better first hand experience with the fundraising process, and certainly more deference to voters that choose to root corruption out of their campaign finance system in an election. This “solution” also remains unlikely, though. First, the Court would have to locate a case that would factually enable them to make such a ruling. Given the proclivities of anti-reformists to sue, this may not be too much trouble. But, with the Court just having struck down a voter-enacted scheme, it may be some time before activists again attempt campaign finance regulation by this method. The second challenge is that the five-member “majority” of the *Citizens United* Court (Roberts, C.J., and Alito, Kennedy, Thomas, and Scalia, JJ.) remains intact. This is the same majority that decided *Arizona Free Enterprise*. Even if a case that afforded the Court the opportunity to abandon those decisions came up - barring some change in heart by a justice, or a change in the composition of the Court - it is unlikely a different result would ensue.

The Montana Supreme Court recently took bold action to judicially combat *Citizens United*’s extremism. In *Western Tradition*, a corporation-plaintiff challenged a state statute dating to 1912 that prohibited corporations from making independent political expenditures on

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184 This article does not argue that in reversing *Citizens United* or *Arizona Free Enterprise*, the Supreme Court should allow the entirety of election law to be subject majority rule. The country’s experience with civil rights and “Jim Crow” laws are the perfect example of why this is not a viable approach. However, voters should have a say in who may contribute in elections and how much they may contribute, where the contributors are non-human, and therefore non-voting, entities such as corporations.

185 See supra, Section VI.


behalf of a candidate.\textsuperscript{189} Unlike other courts discussed above, this court did not interpret \textit{Citizens United} as a mandate to undo the state’s regulation. Rather, the court “applied the principles enunciated in \textit{Citizens United}” to determine that Montana had a compelling interest in regulating independent expenditures, and that the statute was sufficiently tailored to accomplish that end.\textsuperscript{190} The distaste for \textit{Citizens United} is palpable, and even a dissenting justice that felt obligated to follow the precedent blew gaping holes in its reasoning.\textsuperscript{191}

It is unclear whether the Supreme Court can or will accept this application of precedent.\textsuperscript{192} However, as a judicial strategy, the Montana Supreme Court’s reading of \textit{Citizens United} offers much more hope for reformists than the status quo. Rather than rolling over in the face of litigation by anti-reformists, reformists should respond with overwhelming evidence of their reforms’ relation and specific tailoring to the state’s anti-corruption interest.

\textbf{C. Constitutional Amendment}

This author would not advocate for “frequent and untried changes” to the Constitution, but “laws and institutions must go hand in hand with the progress of the human mind. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.”\textsuperscript{193} Americans should not be

\begin{footnotesize}
\textsuperscript{189} Id. at 3.
\textsuperscript{190} Id. at 41.
\textsuperscript{191} Id. at 32 (“The question then, is when in the last 99 years did Montana lose the power or interest sufficient to support the statute, if it ever did. If the statute has worked to preserve a degree of political and social autonomy is the State required to throw away its protections because the shadowy backers of WTP seek to promote their interests? Does a state have to repeal or invalidate its murder prohibition if the homicide rate declines? We think not.”); id. at 120 (Nelson, J., dissenting) (“I find the entire concept [of corporate personhood] offensive. Corporations are artificial creatures of law. As such, they should enjoy only those powers - not constitutional rights, but legislatively-conferred powers - that are concomitant with their legitimate function, that being limited-liability investment vehicles for business. Corporations are not persons. Human beings are persons.”).
\textsuperscript{192} See Dahlia Lithwick, \textit{In Montana, Corporations Aren’t People}, \textit{Slate} (Jan. 4, 2012 6:00 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/montana_supreme_court_citizens_united_can_montana_get_away_with_defying_the_supreme_court_.html (“. . .[T]he opinion practically begs to be overturned at the Supreme Court. . .”).
\textsuperscript{193} Letter from Thomas Jefferson to H. Tompkinson (Aka Samuel Kercheval) (July 12, 1816) (“As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions
satisfied with the barbarous campaign finance regimen of their ancestors. With the advancement of democracy, society, and technology, they should rightly expect an electoral system they can easily hold accountable. The Supreme Court has largely hampered attempts to bring about that expectation in the form of legislation. Given the limited possibility of legislative action and the Court’s attitude toward reform, a constitutional amendment may be the only way for an effective campaign finance system to be built. On top of the legal implications discussed here, there is understandable Congressional opposition to the Court’s approach to regulation.

Though the logistics of amending the Constitution present greater obstacles than reform legislation, political capital would be much better spent on a long-term solution to the problem, rather than piecemeal attempts at reform. Passing smaller bills and waiting for the Supreme Court’s interpretation is the least efficient way to build an effective campaign finance regime.

There have been at least three recent proposals in Congress for such an amendment and any one of them would represent a great step forward for campaign finance reform. One approach is narrower, focusing on giving Congress explicit authority to regulate corporate and union spending in federal elections, and states the authority to do so in state elections. This approach has the benefit of only tinkering with the more extreme aspects of the Supreme Court’s recent jurisprudence in the area - mainly independent corporate expenditures - without raising

change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.”), in PAUL LEICESTER FORD, THE WRITINGS OF THOMAS JEFFERSON, VOL. 12, 3 (New York and London, G.P. Putnam’s Sons 1904-5).

But see supra, Section VII A (Any effort at amending the Constitution would face the same institutional and political barriers that regulatory legislation currently faces in Congress. These barriers are compounded by the requirements that Congressional super-majorities approve amendments before they are sent out for further approval by the states.).

See Udall, supra note 167, at 252 (arguing that Citizens United creates an “unprecedented new risk for corruption” and that “[o]ur campaign finance system substantially harms Congress’s function - with each passing election, public officials spend less time doing their jobs as lawmakers and more time raising money for the next election.”).

See S.J. Res. 36, 111th Cong. (2010).
fears of infringing unacceptably on other First Amendment rights.\textsuperscript{197} But the narrow approach risks the shenanigans of the past continuing to repeat themselves, with groups formed explicitly to fall outside the scope of new constitutional authority.\textsuperscript{198}

Another approach is to grant broader powers to Congress and states to regulate all contributions and expenditures, rather than only those made by corporations or unions.\textsuperscript{199} Granting authority to regulate contributions and expenditures in elections regardless of whether the source is a corporation would have the benefit of discouraging the creative manipulation of such a distinction to circumvent any new requirements.

A final approach attempts to deal with campaign finance reform in the larger context of corporate personhood.\textsuperscript{200} It adopts a broad approach to Congress’s authority to regulate and set limits on election contributions and expenditures.\textsuperscript{201} It also expressly excludes for-profit corporations from rights granted to natural persons under the Constitution.\textsuperscript{202} Given the breadth of the problem, the length of time the country has been grappling with it, and the barriers to approval an amendment faces, the broadest approach is the best strategy for reformers. If they are to invest time and energy into passing an amendment, it should be one that grants enough authority to effectively deal with the problem. Corporations have already demonstrated a willingness to exploit any loopholes in campaign finance laws. Their behavior in other areas—particularly where money is involved, such as paying taxes\textsuperscript{203}—makes them rather suspect fellow

\textsuperscript{197} Id. (“Nothing contained in this Amendment shall be construed to allow Congress or a State to make any law abridging freedom of the press.”).

\textsuperscript{198} See Udall, supra note 167, at 250.

\textsuperscript{199} See S.J. Res. 28, 111th Cong. (2010).

\textsuperscript{200} See S.J. Res. 33, 112th Congress (2011).

\textsuperscript{201} Id. (“... [A]n amendment to the Constitution of the United States to... affirm the authority of Congress and the States to regulate corporations and to regulate and set limits on all election contributions and expenditures.”).

\textsuperscript{202} Id. (“... [A]n amendment to the Constitution of the United States to expressly exclude for-profit corporations from the rights given to natural persons by the Constitution...”).

\textsuperscript{203} See SARAH ANDERSON ET AL., INSTITUTE FOR POLICY STUDIES, EXECUTIVE EXCESS 2011: THE MASSIVE CEO REWARDS FOR TAX DODGING 1 (Aug. 31, 2011) (noting that twenty-five of last year’s highest-paid CEOs were
“citizens” as well. The third approach has the benefit of granting Congress the most explicit power to deal with the campaign finance problem, in addition to other problems related to the expansion of the “corporation-person.”

While an approach that grants Congress broad authority to regulate election spending and corporate involvement in campaigns would be most desirable, any of the amendment approaches discussed here would be an enormous step in the right direction. Much more so than any legislative approach, an amendment offers the hope of an authoritative, comprehensive solution that cannot be questioned at the whim of a court. It would also avoid the somewhat awkward position of state supreme courts “politely declining” to follow Supreme Court precedent, which could result from a purely judicial reformist strategy along the lines of Western Tradition.

D. Conclusion

The history of campaign finance is glaringly devoid of any effective regulatory scheme. The Supreme Court has endorsed only ineffective tools for regulating campaign finance, has not left open a legitimate source of reform, and has not shown an appropriate level of deference to Congress’s expertise. The Court’s precedent is creating problems in the lower courts, even inviting outright disregard of its authority by state courts. In practice, the Court’s jurisprudence has led to the creation of only marginally “independent” groups that can raise and spend unconscionable amounts of money, disguise their financial backers, and be used to lob anonymous political assaults. Legislative reforms have some potential to effect positive change,

compensated more than their company paid in 2010 federal income taxes; eighteen of those corporations operated five hundred fifty six subsidiaries in offshore tax haven jurisdictions, while twenty spent more on lobbying than they paid in corporate taxes, and eighteen gave more to political campaigns than they did to the IRS), available at http://www.ips-dc.org/files/3552/Executive-Excess-CEO-Rewards-for-Tax-Dodging.pdf.

204 See generally Carol Goforth, A Corporation Has No Soul - Modern Corporations, Corporate Governance, and Involvement in the Political Process, 47 HOUS. L. REV. 617, for a discussion of corporate personhood as it relates to political involvement.

205 Lithwick, supra note 191 (“[The Montana Supreme Court’s] decision to politely decline to follow Citizens United wasn’t merely a rebuke to the checked-outedness of five members of the U.S. Supreme Court. . . ”).
but they face substantial barriers to enactment and enforcement. A purely judicial strategy of reform is unlikely to bring results without a change in the Supreme Court’s composition, and risks erosion of the Court’s authority if pursued only in state courts.

Thankfully, corporations do not (yet) have the most meaningful of civil rights, the vote. But the Supreme Court’s equivalence of these legal creations’ rights with those of sentient beings has created a class of “people-like” things with a bogus and inflated sway over elections. This should appall every American who - unlike corporations - can actually feel life, liberty, and happiness. Putting aside the questionable behavior of the current crop of presidential hopefuls,\(^{206}\) this false equivalence alone is enough to show there is something rotten in the state of campaign finance in America. It is broken, and the Supreme Court is unwilling to allow for its repair. Having failed to create a more functional system for the better part of a century, and with limited options moving forward, it is high time we begin. What better place to start than the document that has ensured elections would be held in the first place?

\(^{206}\) It should be noted that questionable behavior is not limited to presidential candidates, a certain political party, or even other candidates for federal and state office. The problem is sadly much more endemic than that; see, e.g., Michael Howard Saul et al., Fund-Raiser For Liu Faces Charges, THE WALL STREET JOURNAL (Nov. 17, 2011), http://online.wsj.com/article/SB10001424052970203611404577042263089358408.html (outlining a scandal plaguing New York City’s Democratic Comptroller, John Liu, arising from inappropriate fundraising activities).