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Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior in 2012

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FINANCING ELECTIONS AND “APPEARANCE OF CORRUPTION”: CITIZEN ATTITUDES AND BEHAVIOR IN 2012

Molly J. Walker Wilson⁺

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[M]ost Americans [] believe that [their] government is corrupt [Citizens United] has come to represent [a problem] . . . : The people have lost faith in their government. They have lost the faith that their government is responsive to them, because they have become convinced that their government is more responsive to those who fund [congressional] campaigns

—Lawrence Lessig, testifying before Congress¹

Outside these walls, the public's perception is that not only is Congress a do-nothing institution, but that it is bought and paid for as well. And, in politics, perception is reality, and the perception is that it is getting worse, not better.

—Charles Roemer, testifying before Congress²

The Supreme Court began expressing concern about the appearance of corrupt political campaign spending in the early 1970s. The Court first articulated this concern in *Buckley v. Valeo*,³ stating that the “impact of the *appearance of corruption* stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” was a concern as important as that of actual corruption.⁴ The Court has held that preventing both actual corruption and the appearance of corruption are sufficiently important concerns such that restrictions on spending for campaign

1. *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 18 (2012) [hereinafter *Taking Back Our Democracy Hearing*] (statement of Lawrence Lessig, Professor, Harvard Law School).

2. *Id.* at 62 (statement of Charles Roemer, former Congressman and Governor of Louisiana).

3. 424 U.S. 1 (1976) (per curiam).

4. *Id.* at 27 (emphasis added).

communication, which the Court deems "speech," should be imposed.⁵ Although "appearance of corruption" is omnipresent in the Court's campaign finance jurisprudence,⁶ this concern receives scant attention compared to actual corruption. Meanwhile, the Court's narrow definition of corruption yields judicial opinions that permit unprecedented amounts of money to support political messaging.⁷

As campaign spending has escalated, so has the controversy surrounding new structures for bundling and spending campaign funds, known as Super Political Action Committees (Super PACs). Because of the influence of Super PACs, the number of campaign advertisements—most of them negative—in the past two election cycles has increased dramatically.⁸ Simultaneously, members of the media, election law scholars, and watchdog groups have disseminated information regarding the political objectives of wealthy donors. The public appears to be taking notice. Polls conducted in the two years leading up to the 2012 elections reveal that Americans almost unanimously believe that there is too much money in political campaigns.⁹ The polls reveal that Americans oppose Super PACs, support a constitutional amendment banning corporate political spending, and believe that the current system allows wealthy interests to drown out the voice of ordinary citizens.¹⁰ Perhaps most importantly, survey respondents believe the current system of campaign financing leads to corruption, and many claim they are less likely to vote in elections as a result.¹¹

In 2010, *Citizens United v. FEC*¹² profoundly changed the current campaign finance landscape by removing the barrier to unlimited independent spending.¹³ Before *Citizens United*, individuals, but not corporations, could spend unlimited sums on independent political advocacy.¹⁴ Those contributions could not be

5. See, e.g., *id.* at 17 (upholding restrictions on campaign financial contributions, noting that "it is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful'" (citing *United States v. O'Brien*, 391 U.S. 367, 382 (1968))).

6. See, e.g., *id.* at 27 (noting the Court's concern that appearance of corruption may be as dangerous as actual corruption).

7. See *infra* Part I.B.

8. See *infra* notes 136–39 and accompanying text.

9. See *infra* Part III.C.2 (referencing several polls that demonstrate the public's belief that campaign contributions improperly influence political campaigns).

10. See *infra* Part III.C.2.

11. BRENNAN CTR. FOR JUSTICE, NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 3 (2012) [hereinafter NATIONAL SURVEY], available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/SuperPACs_Corruption_Democracy.pdf.

12. 558 U.S. 310 (2010).

13. See *id.* at 365.

14. "Independent Expenditures" are those made in support of "a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's

pooled with the money of other individuals. However, individual contributions of less than \$5,000 could be combined under the auspices of what is now known as a “traditional” Political Action Committee (PAC).¹⁵ *Citizens United* changed the law. A few months after *Citizens United*, the D.C. Circuit concluded in *SpeechNow.Org. v. FEC*¹⁶ that *Citizens United* had removed the limits on individual donations to independent groups.¹⁷ This decision led to the birth of Super PACs.¹⁸ Whereas in the past, traditional PACs could only receive donations up to \$5,000 per year, after *SpeechNow.org*, donations to Super PACs were unlimited. According to the Center for Responsive Politics, in 2012, Super PACs spent a record \$609 million on independent expenditures and were major players in more than a dozen congressional races.¹⁹

Empirical data suggests that the proliferation of money available to influence politics undercuts citizens’ sense of political efficacy.²⁰ Political efficacy is determined by the responsiveness of government to citizen involvement in politics.²¹ Social scientists note that when citizenry lacks a minimum level of political efficacy, members of the public stop participating in politics, either in opposition or out of a sense of futility.²² Recent polling data suggests Americans

authorized committee, . . . [its] agents, or a political party committee or its agents.” 11 C.F.R. § 100.16(a) (2013).

15. *Terms & Resources*, CLEANSLATENOW, http://www.cleanslatenow.org/terms_and_resources (last visited July 28, 2014).

16. 599 F.3d 686 (D.C. Cir. 2010).

17. *See id.* at 694–95.

18. The Federal Election Commission (FEC) recognizes Super PACs and Hybrid PACs (PACs with non-contribution accounts) as political action committees engaged in uncoordinated spending. Per FEC guidelines, Super and Hybrid PACs must file a “Statement of Organization” within ten days of “raising or spending in excess of \$1,000 in connection with federal elections.” *Quick Answers to PAC Questions*, FED. ELECTION COMMISSION, http://www.fec.gov/ans/answers_pac.shtml#super_hybrid (last visited July 28, 2014) [hereinafter *Quick Answers to PAC Questions*]. Further, “the committee must submit a letter to identify itself as a Super PAC or Hybrid PAC.” *Id.*

19. Ctr. for Responsive Politics, *2012 Outside Spending, by Super PAC*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=S> (last visited July 28, 2014).

20. *See infra* Part IV.B (noting that citizens tend to doubt their ability to influence the government when they perceive a rise in independent campaign contributions).

21. Richard G. Niemi, Stephen C. Craig & Franco Mattei, *Measuring Internal Political Efficacy in the 1988 National Election Study*, 85 AM. POL. SCI. REV. 1407, 1407-08 (1991); Timothy Vercellotti, *Reaping Dividends From a Personal Investment in Politics: The Link Between Campaign Activism, Election Outcomes, and Political Efficacy* 1 (Am. Political Sci. Ass’n, working paper 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902399.

22. Albert Bandura, *Personal and Collective Efficacy in Human Adaptation and Change*, in 1 ADVANCES IN PSYCHOLOGICAL SCIENCE 51, 52 (John G. Adair, David Bélanger, & Kenneth L. Dion eds., 1996). *C.f.* David Easton & Jack Dennis, *The Child’s Acquisition of Regime Norms: Political Efficacy*, 61 AM. POL. SCI. REV. 25, 26, 28 (1967) (stating that individuals are more likely to participate in the political process if they have a sense of political efficacy).

are responding to a lack of political efficacy by increasingly disengaging with the political process.²³

An examination of the 2012 election reveals an interesting pattern: small donations were numerous and volunteering was strong, but voting decreased—not only from 2008 numbers, but from 2004 levels as well.²⁴ At first blush, this mixed picture is puzzling. It is difficult to explain why high-investment participation was up while low-investment participation was down. However, certain features of the presidential campaign—and specifically Barack Obama's campaign tactics—may explain the anomaly. The Obama campaign's ability to bolster political efficacy through various channels of communication—including, most notably, the Internet—paid dividends in 2008.²⁵ In particular, the campaign's slogans involved a focus on the individual voter and the power of the message's recipient to make a difference in the election.²⁶ The Obama campaign was rewarded for its efforts with record numbers of volunteers and small donations.²⁷

Obama benefitted from similar direct pleas for support in 2012. In a substantially closer race, Obama needed to up the ante in his turn-out-the-vote strategy.²⁸ On Election Day 2012, some hailed the Democrats' turnout efforts

23. See NATIONAL SURVEY, *supra* note 11, at 3 (finding Americans are less likely to vote because of the rise of Super PAC spending). See also Todd Paulson & David Schultz, *Bucking Buckley: Voter Attitudes, Tobacco Money, and Campaign Contribution Corruption in Minnesota Politics*, 19 HAMLINE J. PUB. L. & POL'Y 449, 469–70 (1998) (noting the major impact that even a small number of citizens choosing not to vote can have on the political process).

24. See *Voter Turnout*, FAIRVOTE.ORG, <http://www.fairvote.org/research-and-analysis/voter-turnout/> (last visited July 28, 2014) (noting that fifty-nine percent of eligible voters participated in the 2012 election, whereas sixty-one percent of that population voted in 2004).

25. See Beth Fouhy, *2012 Campaign: Obama, Romney Volunteers Hope To Make The Difference In November*, HUFFINGTON POST (July 3, 2012, 5:34 PM), http://www.huffingtonpost.com/2012/07/03/2012-campaign-obama-romney_n_1647029.html.

26. See *id.*

27. Jose Antonio Vargas, *Obama Raised Half a Billion Online*, WASH. POST, Nov. 20, 2008, http://voices.washingtonpost.com/44/2008/11/20/obama_raised_half_a_billion_on.html (noting that of the 6.5 million online donations to the 2008 Obama campaign, 6 million were in increments of \$100 or less, and that the campaign was very “volunteer-centric”). The Pew Research Center reported that Obama's 2008 strategy resulted in a surge of both monetary donations and volunteer hours. Notably, “young people provided not only their votes but also many enthusiastic campaign volunteers. Some may have helped persuade parents and older relatives to consider Obama's candidacy. And far more young people than older voters reported attending a campaign event while nearly one-in-ten donated money to a presidential candidate.” Scott Keeter, Juliana Horowitz & Alec Tyson, *Young Voters in the 2008 Election*, PEW RES. CENTER (Nov. 13, 2008), <http://www.pewresearch.org/2008/11/13/young-voters-in-the-2008-election/>. The donations alone were an accomplishment for the Obama campaign, given that most of Obama's supporters were under thirty. See *id.* (noting sixty-six percent of the youth vote went to Obama).

28. Robert Butler, *US Election History: Razor-Thin Finish In 2012 Would Be Far From Nation's First*, THEPRESIDENCY (Nov. 7, 2012), <http://thepresidency.us/2012/11/us-election-history-razor-thin-finish-in-2012-would-be-far-from-nations-first/>. See also Lucy Madison, *In*

as historic.²⁹ Obama's Republican challenger, Mitt Romney responded by ramping up turn-out efforts. Yet, in spite of the proven success of direct appeals, after overall voter numbers were calculated, it became clear that both Democratic and Republican voter participation was down.³⁰ Polling of self-identified non-voters revealed fifty-four percent believed the political process was corrupt.³¹

Although one should not draw conclusions based upon this data, the numbers imply a correlation between perceptions of corruption and depressed voter turnout. Further, in light of the 2008 Obama campaign's success in drawing out volunteers, donors, and voters, the lower numbers from 2012 may portend a more substantial decline in future elections. Indeed, members of the American public increasingly may decide not to participate in politics as their discontent with "big money"³² in politics grows.³³ Ultimately, the appearance of corruption stemming from the rise of Super PACs and similar campaign finance bundling groups could usher in a new era of political apathy and citizen disengagement.

Part I of this Article provides background on campaign finance law, highlighting the Supreme Court's recent *Citizens United* decision that makes the accumulation of large pools of money for candidate and issue advertisements possible. Part I explains the Court's acceptance of citizen perceptions of corruption as a legitimate basis for regulating campaign communication, but notes the Court has failed to elaborate on or use this interest as a determining

Last Days of Campaign, a Final Push to Get Out the Vote, CBS NEWS (Jan. 5, 2013, 5:21 PM), <http://cbsnews.com/news/in-last-days-of-campaign-a-final-push-to-get-out-the-vote/>.

29. See, e.g., Rebecca Sinderbrand, *Analysis: Obama Won with a Better Ground Game*, CNN (Nov. 7, 2012, 7:00 AM), <http://www.cnn.com/2012/11/07/politics/analysis-why-obama-won/> (noting that Obama's 2012 campaign "made history"). The predicted numbers and make-up of polling place no-shows were weighted against Obama, making the get-out-the-vote ground game particularly important for his campaign. See Susan Page, *Why 90 Million Americans Won't Vote in November*, USA TODAY (Aug. 15, 2012, 6:15 AM), <http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/> (noting that, in advance of the 2012 election, two-thirds of voters classified as "unlikely to participate" in 2012 supported Obama in 2008).

30. CURTIS GANS, BIPARTISAN POLICY CTR., 2012 ELECTION TURNOUT DIPS BELOW 2008 AND 2004 LEVELS: NUMBER OF ELIGIBLE VOTERS INCREASES BY EIGHT MILLION, FIVE MILLION FEWER VOTES CAST 1 (2012), available at <http://bipartisanpolicy.org/sites/default/files/2012%20Voter%20Turnout%20Full%20Report.pdf>.

31. Susan Page, *The No Votes: 90 Million; That's How Many Americans Could Vote in November but Likely Won't. They're Busy, Fed Up, Disillusioned. Lisa Goicochea, 19, is One of Them.*, USA TODAY, Aug. 15, 2012, at A1.

32. The term "big money" is often used by opponents of the current campaign finance laws and climate. See, e.g., *Money in Politics*, COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4764307> (last visited July 28, 2014) (suggesting that the "power of big money" can be challenged by "small donor contributions and public funds," and noting that "big money" became a greater problem following *Citizens United*).

33. See Philip B. Heymann, *Democracy and Corruption*, 20 FORDHAM INT'L L.J. 323, 328–29 (1996) (recognizing that the potential for corruption inherent in a system that allows large campaign contributions can lead to cynicism among voters).

factor in its decisions. Part II explains how *Citizens United* triggered a series of events, including the D.C. Circuit's decision in *SpeechNow.org* and the subsequent birth of the Super PAC, which increased the potential for bundling contributions. Part II illustrates the effect of Super PACs and other financing structures by citing data on the amount of independent money spent during the most recent presidential election. Part III illustrates how developments in campaign financing influenced the appearance of corruption. Additionally, Part III includes extensive discussion of polling data evincing Americans' distrust of the political election process and the government generally. Part IV discusses implications of polling data that reveal widespread perceptions of campaign corruption. This Part begins with a discussion of the Supreme Court's adoption of appearance of corruption as a compelling concern, and illustrates how the Court considered the issue in past opinions. Further, Part IV explains how perceptions of corruption affect voters' sense of political efficacy, thereby threatening democracy. Finally, Part V analyzes citizen involvement in the 2012 political election, both as a function of donations and volunteerism and in terms of voter turnout. In particular, Part V focuses on the 2012 Obama campaign's strategy, arguing that the 2012 election cycle simultaneously illustrates the importance of political efficacy while foreshadowing problems for future elections.

I. A HISTORY OF CAMPAIGN FINANCE JURISPRUDENCE AND THE "APPEARANCE OF CORRUPTION"

Public suspicion regarding the role of money in politics dates back to colonial times. Even the revered George Washington was accused of exploiting money for political gain.³⁴ Toward the close of the nineteenth century, direct contributions from corporate treasuries provided William McKinley's Republican campaign a \$16 million to \$600,000 edge over Democrat William

34. See R.T. BARTON, THE FIRST ELECTION OF WASHINGTON TO THE HOUSE OF BURGESSSES 123–24 (1891). It is largely believed that Washington engaged in irregular campaign spending, with one historian noting that Washington spent campaign money on more than a quart of rum, beer, and hard cider per voter during his campaign. *Id.* at 124. Historian R. T. Barton noted that after the 1757 election, the House of Burgesses passed a law providing that:

[N]o one should be qualified to hold a seat in that house, who should, "before his election, either himself or by any other person or persons on his behalf and at his charge, directly or indirectly give, present or allow any person or persons having voice or vote in such election any money, meat, drink, entertainment or provision, or make any present, gift, reward, or entertainment, &c., &c., in order to be elected." . . . [H]ad [the law] been in force prior to [Washington's] election[,] he would certainly have been ineligible to his seat. . . . As a law-abiding citizen it is to be presumed that [after the law's passage,] meat and drink, except in the ordinary way of hospitality, were not among the means resorted to by Washington and his friends to secure popular favor.

Id. See also John Morgan & Felix Várdy, *On the Buyability of Voting Bodies*, 23 J. THEORETICAL POL. 260, 260 (2011) (discussing Washington's distribution of alcohol in exchange for votes).

Jennings Bryan.³⁵ In the face of widespread public opposition to McKinley's campaign financing, Theodore Roosevelt publicly opposed such practices.³⁶ Outrage was so significant that Roosevelt called for, and Congress passed, the first major campaign-finance reform law. The Tillman Act of 1907 banned all contributions by corporations to any federal political campaign for any political purpose.³⁷ The sponsor of the bill, Senator Benjamin Tillman, remarked that it was a "sad thought that the Senate is discredited by the people of the United States as being a body more or less corruptible or corrupted."³⁸ Forty years after the passage of the Tillman Act, the Taft-Hartley Act "extended the ban on corporate donations to labor unions."³⁹ Early campaign finance legislation reveals political actors have long worried about how campaign donations and outside spending appears to their constituents.

A. Pre-Citizens United

The modern era of campaign finance law dates to the 1973 Supreme Court decision *United States Civil Service Commission v. National Ass'n of Letter Carriers*.⁴⁰ In that case, the Court held that federal employees were prohibited from taking formal positions in political parties or running for office on partisan political tickets.⁴¹ The Court stated that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the

35. See Jack Beatty, *A Sisyphian History of Campaign Finance Reform*, ATLANTIC, July 2007, <http://www.theatlantic.com/magazine/archive/2007/07/a-sisyphian-history-of-campaign-finance-reform/306066/>. See also *Big Money and Politics*, NPR (Nov. 2003) [hereinafter *Big Money and Politics*], <http://www.npr.org/news/specials/democracy/index.html>.

36. Beatty, *supra* note 35 (discussing how the "[p]ublic recoil against the corruption of politics by business led McKinley's successor, Theodore Roosevelt, to act"). In his 1905 State of the Union address, Roosevelt condemned the perception that the dollar speaks louder than the vote, stating that there is: "[n]o enemy of free government more dangerous and none so insidious as the corruption of the electorate." President Theodore Roosevelt, State of the Union Message (Dec. 5, 1905), available at <http://theodore-roosevelt.com/images/research/speeches/sotu5.pdf>. Roosevelt subsequently suffered a major crisis of public confidence "[w]hen it was revealed that railroad and oil companies provided 75 percent of [his] campaign funds during the 1904 presidential election." *Big Money and Politics*, *supra* note 35.

37. Beatty, *supra* note 35.

38. *Id.*

39. *Id.*

40. 413 U.S. 548 (1973).

41. *Id.* at 580–81. The case arose when a group of federal employees and local party committees challenged a Hatch Act provision that banned federal employees from "engag[ing] in political activity . . . in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof . . ." 5 U.S.C. § 7324(a)(2) (2012). This was not the first Supreme Court case to challenge the Hatch Act. See, e.g., *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 145 (1947) (upholding the statute).

system of representative Government is not to be eroded to a disastrous extent."⁴² Importantly, this decision reflected the Court's understanding that an important aspect of democratic politics is public perception of the fairness of the process.

One year prior to the *National Ass'n of Letter Carriers* decision, Congress amended the Federal Election Campaign Act (FECA).⁴³ The FECA Amendments limited certain political contributions and expenditures, imposed disclosure requirements on political committees that receive contributions and on individuals and groups who made contributions, developed public financing programs for Presidential elections, and created the Federal Election Commission (FEC) to administer the new requirements.⁴⁴ Predictably, the amendments were challenged, and in 1976, the Court handed down its opinion in *Buckley*. The *Buckley* appellants argued that limiting the use of money for political purposes constituted an impermissible restriction of speech, because, in their view, the modern political environment required monetary expenditures to make meaningful political communications.⁴⁵ The appellees countered that the regulations advanced several important governmental interests, including: (1) preventing corruption or the appearance of corruption; (2) "equaliz[ing] the relative ability of all citizens to affect the outcome of elections;" and (3) tempering dramatic increases in the costs of political campaigns with the goal of encouraging political candidates lacking substantial sums of money to participate in the political process.⁴⁶ Ultimately, the *Buckley* Court sustained FECA's individual contribution limits, disclosure provision, and public financing scheme, but it found the expenditure limitations "constitutionally infirm."⁴⁷ In upholding limitations on direct contributions, the Court determined that Congress' interest in preventing not only actual corruption, but also the appearance of corruption, was justified. The Court explained that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"⁴⁸ The *Buckley* Court referred to the Government interest in combating *the appearance or perception of corruption* engendered by large campaign contributions as having "almost equal" importance as combatting actual corruption.⁴⁹

42. *Id.* at 565.

43. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 47 U.S.C.).

44. *Id.* at 5–12.

45. *Buckley v. Valeo*, 424 U.S. 1, 11 (1975) (per curiam).

46. *Id.* at 25–26.

47. *Id.* at 143.

48. *Id.* at 27 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

49. *Id.* at 27.

Although the *Buckley* Court found that direct contributions could pose a threat to the legitimacy of elections, it did not regard independent expenditures as posing the same threat.⁵⁰ The Court worried about limiting political speech without a sufficiently compelling reason to do so.⁵¹ In finding the expenditure limitations constitutionally infirm, the Court noted that limiting spending “necessarily reduces the quantity of expression . . . because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”⁵² Moreover, the Court asserted that “[t]he First Amendment’s protection against governmental abridgment of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.”⁵³ Finally, the Court decided there is nothing “invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate’s message to the electorate.”⁵⁴ In so holding, the Court determined that unrestricted independent spending on political messaging does not create the appearance of corruption.⁵⁵ *Buckley* established that the only constitutionally acceptable rationale for campaign finance regulation was to combat corruption or the appearance of corruption; neither leveling the playing field nor any other rationale would suffice.⁵⁶

50. *See id.* at 44–51 (finding that the justifications for other limitations did not support limiting individual expenditures). The Court concluded that “the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.” *Id.* at 29. The Court also held that the \$5,000 limit on contributions by political committees enhanced the opportunity of association “of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees.” *Id.* at 35–36. Finally, the Court noted that the \$25,000 limitation on total contributions during any calendar year was constitutional even though it did impose a restriction on “the number of candidates and committees with which an individual may associate himself by means of financial support[.]” because the restraint serves “to prevent evasion of the \$1,000 contribution limitation” and is thus no more than a corollary to the individual limitation. *Id.* at 38. The *Buckley* Court held that, following amendments in 1974, the Federal Election Campaign Act (FECA) limited expenditures by individuals or groups “relative to a clearly identified candidate” to “\$1,000 to any single candidate per election . . .” *Id.* at 7.

51. *See id.* at 18–19 (noting the real dangers to freedom of speech posed by campaign spending restrictions). The Court characterized expenditure limitations as restricting the quantity of speech by individuals, groups, and candidates. *Id.* at 18.

52. *Id.* at 19.

53. *Id.* at 49.

54. *Id.* at 56.

55. Daniel R. Ortiz, *Recovering the Individual in Politics*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 263, 272 (2012) (stating that *Buckley* made clear that regulation of independent expenditures to “avoid the appearance of corruption” is not a legitimate interest).

56. *Buckley*, 424 U.S. at 48–49. The Court explicitly rejected the goal of “equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Id.* The Court explained that there is no precedent in support of the proposition that “the First Amendment permits

In October 1989, the Court heard arguments for *Austin v. Michigan Chamber of Commerce*.⁵⁷ The *Austin* plaintiffs challenged a Michigan statute that prohibited non-media corporations from using general treasury funds for independent expenditures in state election campaigns.⁵⁸ The Court held the statute was constitutional as applied to the plaintiffs because it was narrowly tailored and served a compelling state interest, thus satisfying a strict scrutiny analysis.⁵⁹ The Court believed Michigan had a compelling interest in “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.”⁶⁰ The Court was concerned that corporations would gain an unfair advantage in the political arena.⁶¹ The *Austin* Court’s perspective relates to the goal of safeguarding First Amendment values by preserving space for individuals to create meaningful and perceptible political speech.⁶² According to the *Austin* Court, the numerous advantages enjoyed by corporations “not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”⁶³

In *Nixon v. Shrink Missouri Government PAC*,⁶⁴ the Court upheld Missouri’s \$1,075 funding limit to candidates for state wide office.⁶⁴ Justice Souter, writing for the Court, emphasized evidence showing Missouri residents *perceived* a need for limits. He wrote “although majority votes do not, as such, defeat First Amendment protections, the statewide vote on [the funding limit bill] certainly attested to the perception relied upon here: ‘[a]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.’”⁶⁵ The opinion cited newspaper stories

Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.” *Id.* at 49 n.55.

57. 494 U.S. 652 (1990).

58. *Id.* at 654.

59. *Id.* at 655.

60. *Id.* at 660 (citation omitted). *Austin* was not the first occasion in which the Court identified both corruption and the appearance of corruption as the twin concerns of campaign finance legislation. Prior to *Austin*, the Court held in *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”

61. *Austin*, 494 U.S. at 659.

62. *Id.*

63. 528 U.S. 377 (2000).

64. *Id.* at 381–83, 397–98.

65. *Id.* at 394.

and editorials arguing that wealthy interests were controlling Missouri politics.⁶⁶ Justice Souter's examples of media accounts were notable, not because they demonstrated actual corruption, but because they evinced the belief among Missouri residents that money had a corrupting influence.

In spite of the *Austin* and *Shrink Missouri* holdings, lawmakers heard a call for more comprehensive campaign finance reforms. In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA)—or the McCain-Feingold Act.⁶⁷ BCRA was a Congressional attempt to close “loopholes” in FECA and other portions of the United States Code in order “to purge national politics of what is *conceived to be* the pernicious influence of ‘big money’ campaign contributions.”⁶⁸ BCRA was challenged in the 2003 case, *McConnell v. FEC*.⁶⁹ The *McConnell* Court found limits on electioneering communications permissible, citing concern for the “eroding of public confidence in the electoral process through the appearance of corruption.”⁷⁰ The *McConnell* Court also referred to the compelling interest in preventing both actual corruption and the appearance of corruption.⁷¹ The Court's special emphasis on the appearance of corruption suggested growing concern about the potential for citizens to disengage with the political process as well as a focus on the legitimacy of democratic institutions.

66. *Id.* at 393. Justice Souter also noted that Missouri previously adopted campaign finance limits through a ballot proposition that received seventy-four percent approval from voters. *Id.* at 394.

67. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

68. *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 572 (1957) (emphasis added). *See generally* 81 Stat. at 116 (providing various forms of campaign finance reform).

69. 540 U.S. 93 (2003). The Bipartisan Campaign Reform Act (BCRA) formed the basis for this decision. In *McConnell*, the Court found that FECA regulated donations “made by any person for the purpose of influencing any election for Federal office,” but did not regulate donations made “solely for the purpose of influencing state or local elections.” *Id.* at 122 (quoting 2 U.S.C. § 431(8)(A)(i) (2012)). As a result, prior to BCRA's enactment, corporations, unions, and even wealthy individuals “who had already made the maximum permissible contributions to federal candidates” could contribute “nonfederal money” (also known as “soft money”) to political parties in order to influence state or local elections. *Id.* at 123. “[S]uch soft money contributions [were] designed to gain access to federal candidates” and were frequently “solicited by the candidates themselves.” *Id.* at 125. The *McConnell* Court noted that “[t]he solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections.” *Id.* at 126.

70. *Id.* at 136. (citing *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982)). An “electioneering communication” is a “broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . [and] is made within . . . sixty days before a general, special, or runoff election . . . or thirty days before a primary or preference election.” 2 U.S.C. § 434(f)(3)(A)(i).

71. *McConnell*, 540 U.S. at 96.

B. Citizens United

When the *Citizens United* opinion was handed down, it set off a storm of controversy and commentary from lawmakers, political pundits, scholars, and the American public. The decision involved the question of whether Citizens United, a not-for-profit advocacy group, could advertise and freely distribute a political documentary titled *Hillary: The Movie* during the thirty-day period leading up to an election.⁷² Both the advertisements for the movie and the movie itself were highly critical of Hillary Clinton and made the case that she was unfit to serve as United States president.⁷³ Because Citizens United received corporate funding, federal law forbade Citizens United from broadcasting the film.⁷⁴ The *Citizens United* trial court denied the group's request for declaratory and injunctive relief, basing its decision upon existing campaign finance laws.⁷⁵

By a vote of 5-4, the Supreme Court overturned *Austin*,⁷⁶ the portion of *McCormell* that restricted independent corporate expenditures,⁷⁷ and section 203 of BCRA as codified at 2 U.S.C. § 441(b).⁷⁸ In particular, *Citizens United* invalidated laws forbidding corporations and unions from using general treasury funds for "electioneering communication," political advocacy transmitted by "broadcast, cable, or satellite communication" in the period leading up to a federal election.⁷⁹ After the ruling, no state could limit the amount of money corporations or unions poured into advertising for or against issues or candidates in the run-up to an election.⁸⁰

72. *Citizens United v. FEC*, 558 U.S. 310, 319–21 (2010).

73. *Id.* at 325. Citizens United wanted to promote and make available an on-demand version of the film. *Id.* at 320. The group also wanted to pay for two ten-second and one thirty-second advertisements for the film. *Id.* "Each ad [was to] include[] a short (and . . . pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's [w]ebsite address." *Id.* at 320.

74. 2 U.S.C. § 441b(a), (b)(2) (prohibiting corporate expenditures for certain political campaigns). *See also supra* note 70 (defining "electioneering communication").

75. *See Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008) (*per curiam*) (denying Citizens United's request for a preliminary injunction). The court held that § 441b was facially constitutional under *McCormell*, and that it was constitutional as applied to *Hillary* because the film was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.* at 279–80.

76. *Citizens United*, 558 U.S. at 365.

77. *Id.* at 366.

78. *Id.* at 365.

79. *Id.*

80. Much is made of the fact that Citizens United provided the Court many avenues by which the Court could decide the question on narrow grounds in the group's arguments. *See, e.g.*, Glen M. Vogel, *Clinton, Campaigns, and Corporate Expenditures: The Supreme Court's Recent Decision in Citizen's United and its Impact on Corporate Political Influence*, 86 ST. JOHN'S L. REV. 183, 200 (2012) (noting that *Citizens United* offered alternate grounds for the Court to make its decision).

In striking down previous corporate spending limits, the *Citizens United* Court asserted that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”⁸¹ Justice Kennedy, writing for the Court, decisively rejected *Austin*’s distortion rationale, finding that interest “unconvincing and insufficient.”⁸² Importantly, Kennedy asserted that even the appearance of influence from such donations does not cause the citizenry to lose faith in the election process.⁸³ The only evidence Kennedy provided for this supposition was Kennedy’s own conclusion that “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”⁸⁴ Confident that his logic would guide voter behavior, Kennedy concluded that unlimited corporate spending would not adversely affect citizen participation in elections.⁸⁵

In response to the majority’s opinion, Justice Stevens penned a partial dissent in which he questioned virtually all of Kennedy’s assumptions. Stevens noted that the majority ignored the fundamental concerns underlying the legislature’s and the Court’s previous decisions to limit corporate spending in the electoral process.⁸⁶ Stevens went on to assert:

A democracy cannot function effectively when its constituent members believe laws are being bought and sold. At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public’s faith therein, not only “the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves”⁸⁷

81. *Citizens United*, 558 U.S. at 357.

82. *Id.* at 366.

83. *Id.*

84. *Id.* at 360.

85. *Id.* See also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 609 (2011) (highlighting “the majority’s unsupported empirical statement—apparently for all types of elections and any identity of speaker—that independent spending can never cause voters to ‘lose faith in our democracy’”). In spite of Kennedy’s assertion, commentators argue that the opinion purports to make speech available for all, but actually hinders participation by the public. For example, Monica Youn proposes that the opinion establishes a “‘source-blind’ approach to the regulation of money in politics that forbids the state from differentiating among different sources of political spending Under [this] fully commodified conception of speech, speakers drop out of the picture.” Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, 5 HARV. L. & POL’Y REV. 135, 137 (2011).

86. *Citizens United*, 558 U.S. at 472 (Stevens, J., dissenting).

87. *Id.* at 450, 453 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S., 449, 507 (2007) (Souter, J., dissenting)).

Stevens' dissent was notable in part because it explicitly contemplated the damage *appearance* of corruption could cause. He found the implications and potential effects of *Citizens United* deeply troubling.

He was not alone. The *Citizens United* opinion received immediate and widespread media coverage. Scholarly discussion and commentary flourished, as did far-reaching media coverage. For example, Bill Moyers interviewed Monica Youn and Zephyr Teachout on PBS,⁸⁸ a preliminary *New York Times* article received more than 2,000 posted comments,⁸⁹ and a series of articles and a spate of editorials followed the initial article.⁹⁰ Other widely read news outlets and blogs published stories and opinion pieces on the decision, including the *Wall Street Journal*, the *Washington Post*, *Politico*, *Slate*, *USA Today*, and the *Huffington Post*.⁹¹ Television outlets of all political stripes also weighed in.⁹²

88. See *Free Speech for Corporations*, PBS, <http://www.pbs.org/moyers/journal/01292010/profile2.html> (last updated Jan. 29, 2010).

89. See Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all>.

90. See, e.g., Matt Bai, *How Did Political Money Get This Loud?*, N.Y. TIMES MAG., July 22, 2012, at 14; Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 1, 2010, at A30; Editorial, *The Supreme Court Acts: Justices Assert Federal Power on Immigration and Refuse to Revisit the Citizens United Disaster*, N.Y. TIMES, June 25, 2012, at A22; Editorial, *When Other Voices Are Drowned Out*, N.Y. TIMES, Mar. 25, 2012, at A26.

91. See, e.g., Daniel Henninger, Op-Ed., *The Rage Against Citizens United*, WALL ST. J., Oct. 28, 2010, at A15; Philip Rucker, *The Film that Cracked the Case*, WASH. POST, Jan. 22, 2010, at C8; Bradley Smith, *The Incumbent's Bane: Citizens United and the 2010 Election*, WALL ST. J., Jan. 25, 2011, at A15; Joan Biskupic & Fredreka Schouten, *Supreme Court Rolls Back Campaign Spending Limits*, USA TODAY (Jan. 21, 2010, 5:50 PM), http://usatoday30.usatoday.com/news/washington/judicial/2010-01-21-campaign-spending-supreme-court_N.htm; John C. Coates & Taylor Lincoln, *Fulfilling the Promise of 'Citizens United'*, WASH. POST (Sept. 6, 2011), http://www.washingtonpost.com/opinions/fulfilling-the-promise-of-citizensunited/2011/09/02/gIQAa4np7J_story.html; Dan Eggen, *Citizens United Challenges the Strident Side of Supreme Court Ruling*, WASH. POST (Apr. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033104028.html>; Richard L. Hasen, *Money Grubbers*, SLATE (Jan. 21, 2010, 12:58 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.html; Richard L. Hasen, *The Numbers Don't Lie*, SLATE (Mar. 9, 2012, 2:56 PM), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html; Ashby Jones, *What Will Citizens United Do to the 2010 Election Cycle?*, WALL ST. J. L. BLOG (Jan. 21, 2010, 2:59 PM), <http://blogs.wsj.com/law/2010/01/21/what-will-citizens-united-do-to-the-2010-election-cycle/>; Jason Linkins, *The Supreme Court's Citizen United Decision is Terrifying*, HUFFINGTON POST (Mar. 23, 2010, 6:12 AM), http://www.huffingtonpost.com/2010/01/21/the-supreme-courts-citize_n_432127.html; Deborah Tedford, *Supreme Court Rips Up Campaign Finance Laws*, NPR (Jan. 21, 2010, 10:09 AM), <http://www.npr.org/templates/story/story.php?storyId=122805666>.

92. See, e.g., Ken Klukowski, *Founding Fathers Smiling After Supreme Court Campaign Finance Ruling*, FOXNEWS (Jan. 22, 2010), <http://www.foxnews.com/opinion/2010/01/22/ken-klukowski-supreme-court-amendment-mccain-feingold/>; *The Rachel Maddow Show: Interview with Ilya Shapiro* (MSNBC television broadcast July 23, 2012), available at

CNN analyst and *New Yorker* contributor Jeffrey Toobin wrote a detailed analysis of Chief Justice Roberts' strategy regarding the opinion.⁹³ Other authors, including Bill Moyers and Lawrence Lessig, wrote books focusing on the opinion, most of which are unwaveringly critical of the decision and pessimistic about its short and long-term effects.⁹⁴

C. *The Supreme Court Reaffirms Citizens United*

In June 2012, a short time after the *Citizens United* decision, the Court reaffirmed the holding in *American Tradition Partnership v. Bullock*,⁹⁵ a per curiam, 5-4 decision. *American Tradition* summarily reversed a decision of the Montana Supreme Court upholding the state's existing restrictions on corporate political spending.⁹⁶ The Montana court had ruled that the state's distinctive history and characteristics warranted a departure from the principles announced in *Citizens United*.⁹⁷ Despite numerous amicus briefs containing testimonials about the dangers of unchecked corporate spending on political advocacy,⁹⁸ the *American Tradition* majority emphatically reaffirmed its earlier position. The brief opinion states that, "[t]he question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. . . . Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."⁹⁹

As with *Citizens United*, media coverage on the topic of corporate electoral spending was extensive, both leading up to and following the *American Tradition* decision. After the decision, a flood of articles addressed a range of issues, from the changing role of the Roberts Court to the implications for First

<http://www.cato.org/multimedia/video-highlights/ilya-shapiro-citizens-united-msnbcs-rachel-maddow-show>.

93. See Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, NEW YORKER, May 21, 2012, at 36-47 (discussing Roberts' acts and intention to overturn decades-old campaign finance precedent).

94. See, e.g., JEFFREY D. CLEMENTS, CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT (2012); THOM HARTMANN, UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE"—AND YOU CAN FIGHT BACK (2d ed. 2010); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011); THE CENTURY FOUNDATION, MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED (Monica Youn ed., 2011).

95. 132 S. Ct. 2490 (2012) (per curiam).

96. *Id.* at 2491.

97. *Id.*

98. Lyle Denniston, *Opinion Recap: Citizens United Solidified*, SCOTUSBLOG (June 25, 2012, 12:48 PM), <http://www.scotusblog.com/2012/06/opinion-recap-citizens-united-solidified/> (noting that "[t]he brevity of the . . . opinion . . . overruling the Montana Supreme Court suggested . . . the [Court was] . . . unmoved by . . . briefs urging the Court to reconsider [*Citizens United*] in the wake of the flood of money going into races [in 2012]").

99. *Am. Tradition P'ship*, 132 S. Ct. at 2491.

Amendment jurisprudence; publications also addressed the impact on corporate governance, theory, and tax law.¹⁰⁰ Very little commentary focused on the perceptions of the American voter.¹⁰¹ Given the prominence of the “appearance of corruption” issue in *Citizens United* and earlier campaign finance decisions, this omission is surprising. How corrupt the process appears was a concern prominently featured in every previous Supreme Court campaign finance opinion, dating back to pre-*Buckley* days. This “appearance” concern is routinely discussed in tandem with “actual” corruption.¹⁰²

D. The D.C. Circuit Weighs In

Two months after *Citizens United*, the D.C. Circuit decided *SpeechNow.org*.¹⁰³ *SpeechNow.org* addressed whether the federal government may require an unincorporated association that makes only independent expenditures to register as a political committee subject to various requirements and restrictions.¹⁰⁴ The *SpeechNow.org* court noted that the committee in

100. See, e.g., Adam Liptak, *Court Declines to Revisit Its Citizens United Decision*, N.Y. TIMES, June 25, 2012, at A14; Seth Cline, *Supreme Court Considering Case that Defies Citizens United Ruling*, U.S. NEWS & WORLD REP. (June 15, 2012), <http://www.usnews.com/news/articles/2012/06/15/supreme-court-considering-case-that-defies-citizens-united-ruling>; Seth Cline, *Supreme Court Re-Affirms Citizens United*, U.S. NEWS & WORLD REP. (June 25, 2012), <http://www.usnews.com/news/articles/2012/06/25/supreme-court-re-affirms-citizens-united>; Michael Doyle, *Citizens United Stands; No Exceptions for States*, SEATTLE TIMES (June 26, 2012, 8:31 AM), http://seattletimes.com/html/politics/2018532177_scotuscampaign26.html; Josh Levs & Bill Mears, *Supreme Court Refuses to Reconsider Campaign Finance Controversy*, CNN (June 26, 2012, 5:34 AM), <http://www.cnn.com/2012/06/25/politics/scotus-campaign-finance/index.html>; Peter Overby, *Supreme Court Says Montana Cannot Ignore 'Citizens United' Ruling*, NPR (June 25, 2012, 12:16 PM), <http://www.npr.org/blogs/itsallpolitics/2012/06/25/155707295/supreme-court-says-montana-cannot-ignore-citizens-united-ruling>; Amanda Terkel, *Montana Nonpartisan Judicial Elections System Struck Down by Appeals Court*, HUFFINGTON POST (Sept. 18, 2012, 9:33 PM), http://www.huffingtonpost.com/2012/09/18/montanas-ban-political-endorsements-judicial_n_1895318.html?utm_hp_ref=politics; Rachel Weiner, *Supreme Court's Montana Decision Strengthens Citizens United*, WASH. POST (June 25, 2012, 10:43 AM), http://www.washingtonpost.com/blogs/the-fix/post/supreme-courts-montana-decision-strengthens-citizens-united/2012/06/25/gJQA8Vln1V_blog.html.

101. But see Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 HARV. L. REV. F. 91, 91, 95 (2012) (addressing “perceived corruption”); Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1599–1619 (2012) (focusing on appearance of corruption).

102. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 27 (1975) (per curiam) (calling actual corruption “quid pro quo” while also discussing appearance of corruption).

103. 599 F.3d 686 (D.C. Cir. 2010).

104. According to FECA, a “political committee” is “any committee, club, association, or other group of persons’ that receives contributions of more than \$1000 in a year or makes expenditures of more than \$1000 in a year.” *Id.* at 691 (quoting 2 U.S.C. § 431(4) (2012)). See also *id.* (explaining that a “political committee” is subject to the \$5,000 per year limit on contributions, under 2 U.S.C. § 441a(1)(c), as well as the total individual biennial aggregate limit of \$69,900 pursuant to 2 U.S.C. § 441a(a)(3)).

question proposed to engage exclusively in independent expenditures and said: “[b]ecause of the Supreme Court’s recent decision in [*Citizens United*], the analysis is straightforward [T]he government has *no* anti-corruption interest in limiting independent expenditures.”¹⁰⁵ Previously, as the *SpeechNow.org* court pointed out, the “Court concluded that limiting the government’s anticorruption interest to preventing *quid pro quo* [sic] was a ‘crabbed view of corruption, and particularly of the appearance of corruption’ that ‘ignores precedent, common sense, and the realities of political fundraising.’”¹⁰⁶ The D.C. Circuit acknowledged that the *Citizens United* Court had “retracted this view of the government’s interest.”¹⁰⁷ After concluding that the Supreme Court had rescinded its prior commitment to addressing broader corruption concerns, the *SpeechNow.org* court had no choice but to lift restrictions on independent expenditure committees.¹⁰⁸ This holding has important implications for the evolution of new forms of political action committees and similar non-profit political advocacy groups.

II. AFTER CITIZENS UNITED: THE RISE OF THE SUPER PAC

Although the direct impact on corporate spending patterns remains unclear, there is no question that the campaign finance landscape changed dramatically following *Citizens United*. In the 2008 presidential election, total spending by outside organizations equaled \$301.6 million.¹⁰⁹ In the 2012 presidential election cycle, estimated spending by independent groups rose to \$652.8 million.¹¹⁰ Total independent spending for the 2012 election cycle was more than \$1.3 billion.¹¹¹ Although *Citizens United* led to an increase in independent spending, only a small amount of that spending is attributable to direct corporate spending.¹¹² Direct corporate expenditures are tempered by fear of negative

105. 599 F.3d at 692–93, 695.

106. *Id.* at 694 (quoting *McConnell v. FEC*, 540 U.S. 93, 152 (2003)).

107. *Id.*

108. *See id.* at 696.

109. Evan Mackinder, *Ten Weeks Out From Election Day, Outside Spending Exceeds 2008 Total*, OPENSECRETS (Sept. 6, 2012, 11:15 AM), <http://www.opensecrets.org/news/2012/09/ten-weeks-out-from-election-day-out.html>. *See also* Press Release, Federal Election Commission, 2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total (June 8, 2009), *available at* <http://www.fec.gov/press/press2009/20090608PresStat.shtml> (reporting that “[i]ndividuals, parties and other groups spent \$168.8 million independently advocating the election or defeat of presidential candidates during the 2008 campaign”).

110. Ctr. for Responsive Politics, *Independent Expenditures*, OPENSECRETS, <http://www.opensecrets.org/pres12/index.php> (last visited July 30, 2014).

111. *Follow the Unlimited Money*, SUNLIGHT FOUND., <http://reporting.sunlightfoundation.com/outside-spending/overview/> (last updated Apr. 11, 2013, 9:34 PM).

112. *Taking Back Our Democracy Hearing*, *supra* note 1, at 16 (statement of Ilya Shapiro, Senior Fellow in Constitutional Studies at the Cato Institute).

publicity from flagrant political spending.¹¹³ Rather than spawning a rash of direct independent spending by corporations, the decision led to a series of Court decisions that opened the door to new mechanisms for bundling funds. One particularly prominent new structure is the Super PAC. Super PACs are campaign finance game-changers.¹¹⁴ Before *Citizens United*, individuals, but not corporations, could spend unlimited funds on independent advertising directly supporting or opposing candidates.¹¹⁵ However, that money had to be spent by the individual directly rather than pooled with the money of others.¹¹⁶ Before *Citizens United*, these PACs were also banned from accepting corporate or union funds. After *Citizens United*, lower courts had no choice but to conclude that the Court's previous intent to restrict corporate political speech through spending had shifted.

Before *SpeechNow.org*, the only existing PACs were those receiving or spending \$1,000 or more to influence political elections.¹¹⁷ Donations to PACs were capped at \$5,000 per year.¹¹⁸ *SpeechNow.org* removed all limits on how much individuals could donate to a Super PAC.¹¹⁹ Moreover, before *Citizens United* allowed PACs to aggregate unlimited amounts of wealth from various sources, an individual who wanted to spend money on advertising for federal elections was required to own her ads by including a statement "paid for by _____." Another alternative was contributing to a so-called "527 organization" (named for a provision in the tax code) that was not technically a PAC.¹²⁰ However, tax scholars debated whether 527 organizations could legally

113. *Id.* (noting that companies "actually spend very little money on political advertising, partly because it's more effective to spend money on lobbying but more importantly, why would they want to alienate half of their customers?"). In the spring of 2012, companies faced a record number of shareholder demands for disclosures regarding corporate campaign spending. Fredreka Schouten, *Activists Pressure Corporations to Disclose Political Spending*, USA TODAY, Apr. 16, 2012, at 5A. As a result, a number of prominent companies cut ties with advocacy groups affiliated with controversial positions. *Id.*

114. *But see* Justin Elliott, *Is Citizens United Just Misunderstood?*, SALON (Jan. 18, 2012, 2:08 PM), http://www.salon.com/2012/01/18/is_citizens_united_just_misunderstood/singleton/ (defending the *Citizens United* decision by suggesting methods such as taxation or antitrust laws are more appropriate for limiting corporate influence on elections than restrictions on a corporation's freedom of speech).

115. *See Citizens United v. FEC*, 558 U.S. 310, 356 (2010) (stating that at the time of the decision, "wealthy individuals and unincorporated associations [could] spend unlimited amounts on independent expenditures").

116. *See id.* (stating that only "disfavored associations of citizens" in a corporate form were penalized by the expenditure bans).

117. *SpeechNow.org v. FEC*, 599 F.3d 686, 691 (D.C. Cir. 2010).

118. *Id.*

119. *Id.*

120. *Exemption Requirements—Political Organizations*, IRS, <http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Exemption-Requirements-Political-Organizations> (last updated Mar. 12, 2014).

take unlimited amounts of money from individuals.¹²¹ The lack of clarity about the status of 527s as appropriate vehicles for individual contributions made many would-be political financiers nervous, but after *Citizens United* lifted restrictions on independent expenditures, an individual or entity could clearly donate unlimited amounts of money to a PAC to communicate political messages.¹²²

Donations also may be bundled and spent for political advocacy through 501(c)(4) organizations (named for the tax code provision under which they fall), known as Qualified Nonprofit Corporations (QNCs), which may not donate to political campaigns or parties directly and have no donor-disclosure obligations.¹²³ An important distinction between Super PACs and QNCs is that the latter may not accept donations from corporate or labor union treasuries.¹²⁴ While QNCs are not directly impacted by *Citizens United* and its fall-out, they provide a mechanism for wealthy individuals to funnel profits made through corporate enterprise into politically motivated action groups without ever being identified. According to one report issued in August 2012, two QNCs, Crossroads GPS and Americans for Prosperity, spent almost \$60 million in television-based advertising geared toward the presidential race.¹²⁵ This figure surpassed the spending of even the wealthiest Super PACs.¹²⁶

The spending impact of *Citizens United* is difficult to measure directly due to the number of vehicles available to bundle funds. Moreover, researchers draw different conclusions from the same data. For example, the impact of *Citizens*

121. See, e.g., PUB. CITIZEN, CONGRESSIONAL LEADERS' SOFT MONEY ACCOUNTS SHOW NEED FOR CAMPAIGN FINANCE REFORM BILLS: FIRST OF PUBLIC CITIZEN REPORTS ON "527" GROUPS REVEALS CORPORATE INFLUENCE ON BROADBAND, TOBACCO AND MONEY-LAUNDERING POLICIES 1 (2002) (claiming that "serious shortcomings exist in both the [527 organization] law and the disclosure system").

122. The FEC requires PACs to report on "receipts and disbursements" and PACs "have the option to file these reports quarterly or monthly." *Quick Answers to PAC Questions*, *supra* note 18.

123. Raymond Chick & Amy Henchey, *Political Organizations and IRC 501(c)(4)*, IRS (1995), <http://www.irs.gov/pub/irs-tege/eotopicm95.pdf>. However, the bundling exemption only applies to 501(c)(4) organizations if raising campaign funding is not the organization's sole purpose. *Id.* To qualify as a QNC, "the entity must be a nonprofit corporation . . . ideological in nature If a QNC makes electioneering communications that aggregate in excess of \$10,000 in a calendar year, it must certify that it is eligible for the QNC exemption." *Electioneering Communications*, FED. ELECTION COMMISSION (Oct. 2006) [hereinafter *Electioneering Communications*], <http://www.fec.gov/pages/brochures/electioneering.shtml>.

124. *Electioneering Communications*, *supra* note 123.

125. Kim Barker, *Two Dark Money Groups Outspending All Super PACs Combined*, PROPUBLICA (Aug. 13, 2012, 11:50 AM), <http://www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined>.

126. *Id.* See also Alicia Budich & Robert Hendin, *Non-Profits Outspending Super PACs*, CBS (Aug. 19, 2012, 12:42 PM), http://www.cbsnews.com/8301-3460_162-57496037/non-profits-outspending-super-pacs/.

United is discernable in studies that measure the post-*Citizens United* difference between spending in states that had an existing ban on corporate independent political spending and states without such bans. An increase in states that previously limited corporate campaign spending suggests the bans were successful in staunching the flow of political dollars. One study relying on this data asserted that “while spending did increase *more* in the states with a prohibition, the fact that a significant increase occurred across both sets [sic] tells us that we should be looking for alternative and more complicated explanations.”¹²⁷ However, another study analyzed the same data and found independent expenditures more than doubled in the pool of states that previously banned independent campaign expenditures.¹²⁸

A. *The Impact of Super PACs: Money in the 2012 Political Election*

According to the Center for Responsive Politics, in 2012, Super PACs spent nearly \$65 million on independent expenditures and were major players in more than a dozen congressional races.¹²⁹ At the close of the 2012 election cycle, the spending figures were record-breaking. The Center for Responsive Politics revealed that Super PACs had spent \$609 million for or against candidates.¹³⁰ Corporations, individuals, and other independent groups spent a total of \$92,821,398.¹³¹ The conservative group connected with Karl Rove, American Crossroads, organized as a Super PAC, had spent \$104,746,670, while its affiliate Crossroads GPS, organized as a 501(c)(4), totaled \$70,968,744 in spending.¹³² That amount included \$213,196 in electioneering

127. Keith E. Hamm et al., *The Impact of Citizens United in the States: Independent Spending in State Elections, 2006-2010* 6 (Amer. Political Sci. Ass'n Annual Meeting, Working Paper, 2012), available at http://www.cfinst.org/pdf/state/State-Indep-Spdg_2006-10_Working-Paper-as-Released-22October2012.pdf.

128. Douglas M. Spencer & Abby K. Wood, Citizens United, *States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 361 (2014). See also Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 223 (2010) (hypothesizing that *Citizens United* has created “so much sound and fury” because of “[t]he populist environment, hostile to generic corporate interests of many kinds”). Levitt suggests that “the case’s aggressive procedural approach, and its sweeping rhetoric, both of which seem to poke a finger in the eye of those who disagree with the legal merits” also play a part. *Id.*

129. Ctr. for Responsive Politics, *2010 Outside Spending, by Super PAC*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=S> (last updated Nov. 12, 2012).

130. Ctr. for Responsive Politics, *Outside Spending*, OPENSECRETS, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012 (last visited Sept. 9, 2014).

131. *Id.*

132. Ctr. for Responsive Politics, *American Crossroads/Crossroads GPS*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2012> (last visited Sept. 9, 2014).

communication.¹³³ Restore Our Future, Americans for Prosperity, and the U.S. Chamber of Commerce, all conservative groups, had spent a total of \$214,107,293 in efforts to secure a win for conservative candidates.¹³⁴ The left-leaning Priorities USA Action group, organized as a Super PAC, had spent \$65,166,859.¹³⁵ The Center for Responsive Politics reported that “the 2012 election will not only be the most expensive election in U.S. history, the cost will tower over the next most expensive election by more than \$700 million.”¹³⁶

By the close of the 2012 presidential election polls, total campaign spending was astounding. Restore Our Future—a Super PAC that backed Republican presidential nominee Mitt Romney—was responsible for \$142,655,346 of the total \$631 million spent on independent expenditures by super PACs in the 2012 election cycle.¹³⁷ Conservative Super PAC American Crossroads and the affiliated 501(c)(4) “social welfare” group Crossroads GPS were second in spending, with a total of about \$175.8 million.¹³⁸ Priorities USA Action, a group that supported President Barack Obama, spent about \$65 million, rounding out the top three super PACs.¹³⁹ This spending was only a portion of the grand total likely spent by Super PACs in 2012. The Center for Responsive Politics notes that millions of dollars were spent on political campaign advertisements that ran “far enough before [the presidential] election that they [did not] need to be reported anywhere.”¹⁴⁰

In mid-August, prior to the election, NBC Nightly News reported more than half a billion dollars had been spent on television and radio advertisements alone.¹⁴¹ When this total passed the \$500 million mark, NBC anchor Brian

133. *Id.*

134. Ctr. for Responsive Politics, *2012 Outside Spending, by Group*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&type=p&disp=O> (last visited Sept. 13, 2014).

135. *Id.*

136. Ctr. for Responsive Politics, *2012 Election Spending Will Reach \$6 Billion, Center for Responsive Politics Predicts*, OPENSECRETS, <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6/> (last visited Aug. 12, 2014).

137. *Independent Spending Totals*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (last visited July 30, 2014); Michelle Martinelli, *Crossroads' \$175 Million Strikeout*, OPENSECRETS (Nov. 8, 2012), <http://www.opensecrets.org/news/2012/11/despite-dropping-millions-crossroads-strikes-out/>.

138. See Martinelli, *supra* note 137 (stating that American Crossroads was responsible for \$105 million in independent expenditures, and that Crossroads GPS spent \$70.8 million).

139. Tarini Parti, *Priorities USA Thinks about Life after Obama*, POLITICO (Feb. 22, 2013, 4:35 PM), <http://www.politico.com/story/2013/02/priorities-usa-thinks-about-life-after-obama-87961.html>.

140. Robert Maguire & Viveca Novak, *Shadow Money's Top 10 Candidates*, OPENSECRETS (Oct. 25, 2012, 5:06 PM), <http://www.opensecrets.org/news/2012/10/shadow-moneys-top-10-candidates.html>.

141. Domenico Montanaro, *Political Campaign Ad Spending Tops \$500 Million*, NBC (Aug. 16, 2012, 1:32 PM), http://firstread.nbcnews.com/_news/2012/08/16/13319834-political-

Williams informed viewers of what else that much money could buy: “[f]ive hundred million dollars could feed 9.2 million malnourished children for fifty days. It could immunize 29 million children for life. It could provide clean water for 500 million children for forty days [I]nstead, it’s buying television commercials, and the real general election campaign hasn’t even really started yet.”¹⁴² Television business news channel CNBC reported in late October 2012 that, combined, both presidential hopefuls were spending \$26.86 per second.¹⁴³

All told, campaign spending on messaging in the 2012 Presidential election shattered previous records, topping \$6 billion dollars.¹⁴⁴ Six billion dollars is more than the gross domestic product (GDP) of many small countries.¹⁴⁵ Thus, the amount of money spent during the 2012 presidential election cycle could have sustained a small nation for an entire year.

III. THE MAKING OF THE “APPEARANCE OF CORRUPTION”

In the Democratic National Committee’s amicus brief to the *Citizens United* case, Robert Bauer, campaign finance counsel to President Obama, predicted that removing corporate campaign spending limits would usher in a new era of citizen disillusionment.¹⁴⁶ Bauer forecasted that eliminating spending restrictions would cause the citizenry to believe that their voice would be drowned out by the voices of those with the most money.¹⁴⁷ This sentiment captures the notion that the *Citizens United* majority tipped the scales in favor

campaign-ad-spending-tops-500-million?lite (noting that in just one week of August 2012, \$37 million dollars went to political advertising).

142. *NBC Nightly News: 2012 Presidential Campaign Ads Surpass Half-Billion Mark* (NBC television broadcast Aug. 16, 2012), available at http://firstread.nbcnews.com/_news/2012/08/16/13319834-political-campaign-ad-spending-tops-500-million?lite.

143. Eamon Javers, *Here’s How Much Candidates Spend to Get Your Vote*, CNBC (Oct. 25, 2012, 10:16 AM), http://www.cnbc.com/id/49550998/Here039s_How_Much_Candidates_Spend_to_Get_Your_Vote. CNBC also reported that Obama and his supporters spent more than \$775 million “before the crucial election month of October.” *Id.*

144. Nicholas Confessore & Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES, Nov. 8, 2012, at A1 (explaining that the 2012 election was “[t]he most expensive . . . in American history”). Confessore and Bidgood claim that the election was “propelled by legal and regulatory decisions that allowed wealthy donors to pour record amounts of cash into races around the country.” *Id.*

145. For example, in 2012, Fiji’s GDP was \$4,035,420,973; Liberia’s was \$1,733,828,404; Sierra Leone’s was \$3,787,392,595; and Barbados’ was \$4,224,850,000. *World Bank Search*, WORLD BANK, <http://search.worldbank.org/data?qterm=GDP&language=EN> (follow “GDP (current US\$)” hyperlink; then type country name into search bar; then scroll to 2012 column). In fact, forty-one countries had GDPs under \$6 billion in 2012. *See id.*

146. Brief for Democratic Nat’l Comm. as Amicus Curiae in Support of Appellee at 16, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) (claiming that “[a] sudden change in the law, to the advantage of corporate wealth amassed in commercial transactions, would cause a violent disruption in [the election] process”).

147. *Id.*

of corporate interests and substantially diminished the ability of individual Americans to determine election outcomes.¹⁴⁸

A. *Concerns about Money in Political Elections*

Early in 2012, aggregation of wealth and spending came under attack on several grounds. Objections were often explicitly triggered by rising consternation about new spending vehicles, but, most fundamentally, the arguments were as old as corruption itself. One prominent concern was that groups would inappropriately influence lawmakers by conspicuously spending money to elect candidates who would then vote for legislation benefitting those groups. A second related concern was that the ability of “average” (non-wealthy) citizens to influence the outcome of elections would decrease. Much of the discussion focused on the potential for money from wealthy donors to overwhelm small donors’ contributions such that small donations would simply no longer matter. Thus, these constituencies would become disenchanted and disengage from the political process.¹⁴⁹

The uptick in influence of wealthy interests and the dwindling impact of average citizens was echoed by a related fear, namely that money, rather than a candidate’s qualifications, would select elected officials. After the 2012 election, the Center for Responsive Politics reported that better funded candidates won 92.7% of House of Representatives races and 63.6% of Senate races.¹⁵⁰ Although money could be an indication of support, it could also

148. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 174 (2004) (noting that the authors found “some support for several alternative hypotheses to the theory that improper influences on government generate Americans’ perceptions of corruption[,]” but concluding that “large shares of the American population distrust their government and believe the campaign finance system is a source of undue influence”).

149. This is not a novel concern. More than twenty years ago, one University of California, Los Angeles School of Law professor wrote:

A common way of describing this type of situation is to say that there is an “appearance of impropriety.” While not exactly wrong, discussion of the campaign finance question in terms of appearances is misleading. It suggests that there is an underlying reality that is either proper or not proper, and if we could only look behind the locked door or, perhaps, into the legislator’s head, we would know. Used as a rationale for reform measures, the argument is that the appearance of impropriety is a sufficient justification for reform, because it undermines popular confidence in government. Depending on who is speaking and who is listening, there may be an implied wink to the effect that impropriety is really very unlikely but that some sop must be thrown to the ignorantly suspicious public. Alternatively, the implied wink may suggest that of course there is impropriety, but it would be impolitic to say so directly.

Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 326 (1989).

150. Ctr. for Responsive Politics, *Blue Team Aided by Small Donors, Big Bundlers; Huge Outside Spending Still Comes Up Short*, OPENSECRETS (Nov. 7, 2012, 7:38 PM), <http://www.opensecrets.org/news/2012/11/post-election.html>.

represent backing by disproportionately wealthy interests, such as the oil, technology, or pharmaceuticals industries.

Objections did not come from outside observers alone. Lawmakers themselves were vocal about the negative consequences of unlimited interest group spending. When Charles Roemer, former Louisiana governor and congressman, testified before the Senate Judiciary Committee, he warned that:

Washington DC [sic] is not just broken. It is bought, rented, leased, owned by the money givers. Special interests, the bundlers, PACs, Super PACs, lobbyists, the Wall Street bankers, the pharmaceuticals, the corporate giants, the insurance companies, organized labor, the GSE's [sic] like Fannie and Freddie, energy companies, on and on and on and on. And this is not about one party versus the other, or about one person or another. It is about systemic and institutional corruption where the size of your check rather than the strength of your need or idea determine your place in line.¹⁵¹

During the same hearing, Professor Lawrence Lessig noted that in the 2012 election cycle only 196 citizens funded eighty percent of Super PAC spending.¹⁵² Lessig told lawmakers that "elected [officials] are dependent upon the tiniest slice of America, yet that tiny slice is in no way representative of the rest of America."¹⁵³ Lessig concluded that the situation he described was corrupt.¹⁵⁴

B. Availability of Information and Creating Appearance of Corruption

The American public agrees with Lessig. As one academic noted: "If limits on contributions are permissible only in times and places where wide segments of the public believe that special interests exert too much influence over politics, then they are permissible in all times and places. The public always believes this, and it always will."¹⁵⁵ Television, print, and web-based media provide much of the publicly available information about the role of money in elections. Because money's influence on politics is controversial, and controversy sells, news outlets regularly report on political election spending. Television and print

151. *Taking Back Our Democracy Hearing*, *supra* note 1, at 62 (statement of Charles Roemer, former Congressman and Governor of Louisiana).

152. *Id.* at 72 (statement of Lawrence Lessig, Professor, Harvard Law School).

153. *Id.* at 77.

154. *Id.*

155. Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH. U. J.L. & POL'Y 171, 177 (2001) (noting that Levin is opposed to considering appearances in the crafting of campaign finance regulation).

media tout segments like *Keeping Them Honest*,¹⁵⁶ *Fact Check*,¹⁵⁷ and *Political Hotsheet*,¹⁵⁸ all of which are designed to reveal little-known information. *ProPublica* tallies PAC and Super PAC contributions and tracks how much money they use to support or oppose political candidates.¹⁵⁹ The Center for Responsive Politics allows visitors to search individual or company donations and keeps a current list of interest group contributions.¹⁶⁰ Websites like *FactCheck*¹⁶¹ (unrelated to the *New York Times* sidebar companion referenced above) and *OpenSecrets*¹⁶² are dedicated to divulging facts behind controversial topics so American citizens receive campaign finance information. As a result, election dollars influence how the public views the political campaign process. For example, following the July 2012 defeat of the DISCLOSE Act,¹⁶³ CNN reported that almost 700 independent political groups donated more than \$187 million to the 2012 campaigns nationwide.¹⁶⁴

In 2012, in addition to increased media reports on campaign spending, Americans witnessed a dramatic increase in political advertising, most of which went to television commercials. Approximately 730,000 advertisements aired in the five months prior to the 2008 election.¹⁶⁵ Comparatively, in the five months prior to the 2012 election, 1,015,615 political television advertisements ran, representing a thirty-nine percent increase over the 2008 figure.¹⁶⁶ The

156. See, e.g., *AC360°: Keeping Them Honest: Where Did \$40 Million in Charity Donations Go?* (CNN television broadcast Feb. 10, 2014).

157. See, e.g., *Fact-Checking de Blasio vs. Lhota: Round 1*, N.Y. TIMES (Oct. 15, 2013), <http://www.nytimes.com/news/2013-10-15-first-mayoral-debate/> (illustrating a *New York Times* sidebar companion to coverage of campaign debates in which candidates' claims are vetted).

158. See, e.g., *Politics*, CBS, <http://www.cbsnews.com/politics/> (last visited July 31, 2014).

159. See, e.g., Al Shaw & Kim Barker, *PAC Track: What and Where are the Super PACs Spending?*, PROPUBLICA (Dec. 7, 2012), <http://projects.propublica.org/pactrack/#committee=all>.

160. See, e.g., Ctr. for Responsive Politics, *2010 Outside Spending*, by Super PAC, OPENSECRETS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> (last visited July 31, 2014).

161. See, e.g., FACTCHECK, <http://www.factcheck.org/> (last visited July 31, 2014).

162. See, e.g., Ctr. for Responsive Politics, *Our Mission: Inform, Empower & Advocate*, OPENSECRETS, <http://www.opensecrets.org/about/> (last visited July 31, 2014) (noting that the site is dedicated to compiling statistics and reporting on lobbying and political donation activities).

163. See Paul Blumenthal, *DISCLOSE Campaign Spending Act Blocked by Senate Republicans*, HUFFINGTON POST (July 16, 2012, 8:41 PM), http://www.huffingtonpost.com/2012/07/16/disclose-act-senate-campaign-spending_n_1678055.html. Senate Republicans blocked the DISCLOSE Act, as the 51-44 vote fell seven short of the required sixty needed to overcome the GOP filibuster. *Id.* The DISCLOSE Act would require groups spending more than \$10,000 during an election cycle to identify donors of more than \$10,000. *Id.*

164. Halimah Abdullah & Matt Smith, *Outside Political Donors Still Shrouded in Smoke*, CNN (July 18, 2012, 6:39 PM), <http://www.cnn.com/2012/07/18/politics/campaign-finance/index.html>.

165. Dan Eggen, *Obama Campaign Has Spent More on Ads Than Romney's*, WASH. POST (Nov. 2, 2012, 1:12 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/02/romney-campaign-ads-outnumber-obama-ads-in-final-stretch/>.

166. *Id.*

Wesleyan Media Project provided the analysis, and upon reviewing the results, co-director Erika Fowler commented: "Everyone expected ads to be more abundant this election than in 2008, especially with super PAC involvement and both candidates opting out of public funding, but passing the one million mark is a real milestone."¹⁶⁷

C. Empirical Polling Data Regarding Citizen Perceptions

As Americans became more aware of the impact of *Citizens United*, the potential for perception of corruption increases. In fact, the public currently evinces a groundswell of opposition to corporate campaign spending, suggesting citizens are already noticing *Citizen United*'s effects.¹⁶⁸

1. Polling before *Citizens United*

Americans expressed concern about corruption in government long before *Citizens United*. For example, during the 2008 primary election, Gallup conducted a poll on the "[i]mportance of [c]andidates' [p]ositions on [e]ach [i]ssue in [i]nfluencing Americans' [v]ote for President."¹⁶⁹ Of those polled, seventy-nine percent rated a presidential candidate's position on government corruption "extremely/very important."¹⁷⁰ Interestingly, poll-takers ranked government corruption a higher concern than terrorism, Social Security, Medicare, and taxes.¹⁷¹ In February 2010, Gallup conducted another poll, asking "[w]hat are the one or two weaknesses of the United States that make you most pessimistic about the future of the country over the next [twenty] years?"¹⁷² Those polled rated poor governance the United States' biggest weakness.¹⁷³

An empirical study that examined polling data immediately prior to *Citizens United* found "strong support" among almost half of respondents for the assertion that "[c]andidates who run for federal offices should only be allowed to spend money funded through a public financing system. No individual or political action committee contributions [s]hould be allowed."¹⁷⁴ Almost

167. *Id.*

168. See *infra* Part III.C.1-2.

169. Lydia Saad, *Iraq and the Economy Are Top Issues to Voters*, GALLUP (Feb. 13, 2008), <http://www.gallup.com/poll/104320/Iraq-Economy-Top-Issues-Voters.aspx>.

170. *Id.*

171. *Id.* (demonstrating that those polled consider only terrorism and Social Security to be of similar importance, with seventy-seven percent and seventy-three percent, respectively, indicating those issues were significant in their selection of a presidential candidate).

172. Lydia Saad, *One in Three Cite "American People" as Key U.S. Asset*, GALLUP (Feb. 17, 2010), <http://www.gallup.com/poll/126032/One-Three-Cite-American-People-Key-Asset.aspx>.

173. *Id.*

174. Abby K. Blass, Brian E. Roberts & Daron R. Shaw, 'Pay to Play' or 'Money for Nothing'? Americans' Assessment of Money and the Efficacy of the Political System (Sept. 2010) (unpublished meeting paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644346.

seventy percent strongly supported the statement, “[f]ree and equal airtime on television should be available for candidates.”¹⁷⁵ However, political corruption tied as the second most important issue facing America along with a balanced budget and education (and after unemployment).¹⁷⁶ However, respondents also ranked campaign spending second-to-last on the list of priorities.¹⁷⁷ That respondents were simultaneously worried about corruption in government and unconcerned about campaign spending suggests they perceived little connection between the two.

2. *Polling after Citizens United*

Following *Citizens United*, the public’s view shifted. An April 2012 poll revealed that Americans infer a connection between campaign spending and corruption.¹⁷⁸ The poll suggests Americans fear that Super PACs and corporate interests influence elected officials, and that this fear may influence voter behavior.¹⁷⁹ According to the survey, conducted by the Brennan Center for Justice at the New York University School of Law, Americans believe that money spent on a politician’s campaign impacts how that politician later votes.¹⁸⁰ More than two-thirds of all respondents “agreed that a company that spent \$100,000 to help elect a member of Congress could successfully pressure him or her to change a vote on proposed legislation.”¹⁸¹ Republicans and Democrats equally supported the notion.¹⁸² Further, seventy-seven percent of all respondents thought members of Congress would put the interests of groups that spent millions on their campaigns before the public’s interests.¹⁸³ Both Republicans and Democrats also agreed with this idea.¹⁸⁴

Other recent polls tell a similar story. A January 2012 *New York Times* poll asked: “Which one of the following two positions on campaign financing do you favor more: limiting the amount of money individuals can contribute to political campaigns, or allowing individuals to contribute as much money to political campaigns as they’d like?”¹⁸⁵ Almost two-thirds of respondents favored limiting

175. *Id.*

176. *Id.*

177. *Id.*

178. NATIONAL SURVEY, *supra* note 11, at 2. The Opinion Research Corporation conducted the telephone survey between April 12 and 15, 2012. *Id.* at 1. The survey captured the attitudes of 1,015 American adults, and was based upon 764 landline and 251 cell phone interviews. *Id.*

179. *Id.* at 2.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Politics*, POLLINGREPORT, <http://www.pollingreport.com/politics.htm> (last visited July 31, 2014).

political advertising spending.¹⁸⁶ Similarly, more than two-thirds favored restricting how much groups can spend independently on political campaigns.¹⁸⁷ A March 2012 *Washington Post* telephone poll found nearly seven in ten registered voters would support banning Super PACs; of that seven in ten, more than half strongly felt that Super PACs should be illegal.¹⁸⁸ Only twenty-five percent said Super PACs "should remain legal."¹⁸⁹ In June 2012, Clarus Research Group for Common Good, a nonpartisan government reform coalition, conducted a survey that found that "[fifty-seven] percent of American voters think the current system of financing political campaigns doesn't work."¹⁹⁰ The poll numbers, published in *The Atlantic*, also reveal that eighty percent of those polled believe members of Congress are more interested in re-election than improving the campaign finance system.¹⁹¹ Almost nine out of ten respondents agreed that public disclosure of campaign contributions should be mandatory, and three-quarters of respondents supported a constitutional amendment to limit presidential and congressional campaign spending.¹⁹²

A more recent poll, commissioned by the Corporate Reform Coalition, studied "Americans' attitudes toward corporate political spending."¹⁹³ Published in October 2012, the poll found that eighty-nine percent of Americans agree that "there is way too much corporate money in politics]" and fifty-one percent strongly agreed.¹⁹⁴ Seventy percent of those polled believe that banning corporate-funded political ads would improve American politics, and more than half advocated "a Constitutional amendment to ban all corporate political spending."¹⁹⁵ Eighty-four percent of poll-takers agreed that corporate political spending stifles the average American's voice, and eighty-three percent "believe

186. *See id.* (noting that sixty-four percent of respondents believe campaign contributions should be limited).

187. *Id.* (finding that sixty-seven percent of those polled think advertisement funding should be capped).

188. Chris Cillizza & Aaron Blake, *Poll: Voters Want Super PACs to Be Illegal*, WASH. POST (Mar. 13, 2012, 7:00 AM), http://www.washingtonpost.com/blogs/the-fix/post/poll-voters-want-super-pacs-to-be-illegal/2012/03/12/gIQA6skT8R_blog.html.

189. *Id.*

190. Ron Faucheux, *U.S. Voters: Congress Is Selfish About Campaign Finance*, ATLANTIC (July 16, 2012, 12:14 PM), <http://www.theatlantic.com/politics/archive/2012/07/us-voters-congress-is-selfish-about-campaign-finance/259812/>.

191. *Id.*

192. *See id.* (noting that eighty-eight percent of respondents support disclosures, while seventy-five percent desire a constitutional amendment to limit campaign funding).

193. Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending and Support for Achievable Reforms*, DEMOS 1 (Oct. 2012), http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf.

194. *Id.*

195. *Id.*

that corporations and corporate CEOs have too much political power.”¹⁹⁶ Similarly, most Americans agreed that corporate political spending negatively impacts federal politics and increases congressional corruption.¹⁹⁷ Poll-takers expressed similar concerns about state politics; eighty percent agreed that corporate funding negatively impacts state campaigns and politics, and seventy-eight percent believe this influence corrupts state politics.¹⁹⁸ Finally, the Corporate Reform Coalition poll demonstrates Americans are prepared to take action consistent with their professed concerns.¹⁹⁹ Seventy-nine percent of those polled would protest corporate political spending by refusing to patronize a particular company.²⁰⁰ Sixty-five percent would sell a politically active company’s stock, and a majority would take other steps to avoid investing in the company.²⁰¹ Fifty-two percent of those polled would demand disclosure at the company’s stockholder meeting, and seventy-five percent would petition the SEC for corporate disclosure.²⁰²

These findings are powerful evidence that current campaign finance laws fail to address the appearance of corruption. The growing cynicism of the American public and corresponding evidence that voter cynicism influences voter behavior is particularly concerning. Citizen distrust of the democratic process threatens the health of our democracy.

IV. WHY APPEARANCE MATTERS: THE CONSEQUENCES OF PERCEPTIONS OF CORRUPTION

Although Supreme Court campaign finance opinions historically focus on actual corruption, the Court acknowledges that appearance of corruption is problematic. The Court has expressed a willingness to consider public perception. The Court manifests a belief that appearances matter in two ways: (1) directly, by explicitly referencing the concern in dicta; and (2) indirectly, through the type of evidence it considers relevant in making determinations.

196. *Id.* at 2.

197. *Id.* (finding that eighty-four percent of Americans believe that corporate political spending corrupts Congress).

198. *Id.*

199. *Id.* at 6.

200. *Id.*

201. *Id.* (indicating that respondents would ask their employer to remove a company’s stock from their retirement portfolio).

202. *Id.* See also Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP (July 30, 2012), <http://www.gallup.com/poll/156347/Americans-Next-President-Prioritize-Jobs-Corruption.aspx>. When Gallup conducted a poll in July 2012 that asked “how important a priority should each of the following issues be for the next president,” those polled said “reducing corruption in federal government” was the second most important issue. *Id.* Forty-five percent polled considered it an “extremely important” issue, and eighty-seven percent considered it an “extremely/very important” issue. *Id.* Job creation was the only issue that outranked corruption reduction. *Id.*

A. *The Court's View of Appearance of Corruption*

The Court characterizes avoiding the appearance of corruption as a compelling interest in all of its major campaign finance decisions, including *Buckley*, *McConnell*, *Austin*, and *Citizens United*.²⁰³ Even the *SpeechNow.org* Court noted that the Court historically interpreted the definition of corruption broadly enough to encompass the appearance of “‘undue influence’ created by large donations given for the purpose of ‘buying access.’”²⁰⁴ The *SpeechNow.org* opinion cited the Court’s earlier reticence about adopting a pure *quid pro quo* definition of corruption.²⁰⁵ Though *Citizens United* narrowed that definition,²⁰⁶ the Court never wavered from its perspective that the appearance of corruption is dangerous. The *Buckley* opinion maintained that the appearance of corruption is almost as dangerous as actual corruption, and must be avoided to maintain citizens’ confidence in the government.²⁰⁷ Maintaining citizens’ confidence was a vital governmental interest when *Buckley* was decided in 1976, and it remains one today.

However, “[t]he issue is whether . . . [that] governmental interest [is] compelling enough to justify restricting . . . speech that causes the appearance [of corruption].”²⁰⁸ In evaluating the balance between governmental interest and freedom of speech, the judiciary historically accepted empirical evidence of citizen perception. For example, in *Daggett v. Commission on Governmental Ethics*,²⁰⁹ the U.S. Court of Appeals for the First Circuit noted that seventy percent of one survey’s respondents believed campaign contributions cause political corruption, and that new limits on contributions would bolster faith in the democratic process.²¹⁰ In *Montana Right to Life Ass’n v. Eddleman*,²¹¹ the Ninth Circuit considered polls showing that nearly seventy-nine percent of Montana voters thought money was “synonymous with power” and that sixty-nine percent of Montanans believed “elected officials [gave] special treatment”

203. *See supra* Part I.

204. 599 F.3d 686, 694 (D.C. Cir. 2010).

205. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 95, 144, 148 (2003)). *See also* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (noting that “corruption” refers to both actual corruption and the appearance of corruption); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388–89 (2000) (citing prior Supreme Court precedent supporting the proposition that appearance of corruption is a legitimate concern).

206. *SpeechNow.org*, 599 F.3d at 694 (noting that *Citizens United* retracted the Court’s view that appearance of corruption is an important government interest).

207. *Buckley v. Valeo*, 424 U.S. 1, 27 (1975) (per curiam).

208. Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. COLLOQUY 203, 218 (2011).

209. 205 F.3d 445 (1st Cir. 2000).

210. *Id.* at 457.

211. 343 F.3d 1085 (9th Cir. 2003).

to large contributors.²¹² In *Homans v. City of Albuquerque*,²¹³ the U.S. Court of Appeals for the Tenth Circuit contemplated a poll demonstrating that city voters believed federal elections, which had no spending limits, were more susceptible to special interest influence than local elections, to which spending limits applied.²¹⁴ Courts take heed of data about citizen perceptions because “[a]ttitudes toward the *processes* of government, as apart from the *policies*, constitute an important, free-standing variable that has serious implications for the health of democracy.”²¹⁵ Harvard Law School professor Mark Warren has written:

[C]orruption undermines the culture of democracy. When people lose confidence that public decisions are taken for reasons that are publicly available and justifiable, they become cynical about public speech and deliberation. People come to expect duplicity in public speech And when people are mistrustful of government, they are also cynical about their own capacities to act on public goods and purposes Finally, corruption undermines democratic capacities of association within civil society by generalizing suspicion and eroding trust and reciprocity.²¹⁶

As Justice Stevens pointed out, “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”²¹⁷ Ultimately, the cost to democracy is the refusal of citizens to participate. Warren argues that democracies necessarily involve mistrust because they are rife with political conflict, and political actors’ interests are not always in sync with those of their constituents.²¹⁸ He believes that:

In aggregate, candidates engaged in spending races need to rely on a relatively wealthy class of people and interest groups who, in aggregate, have interests that differ from the less wealthy. Under these

212. *Id.* at 1093.

213. 366 F.3d 900 (10th Cir. 2004).

214. *Id.* at 910. Courts will accept evidence derived from empirical polls and other social science sources. *See, e.g.*, Defendant FEC’s Reply Memorandum in Support of its Proposed Findings of Fact at 4–6, *Libertarian Nat’l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013) (No. 11-562(RLW)) (noting that courts may rely on those sources because “[l]egislative facts are [also] frequently based on a variety of materials such as academic studies, research papers, news articles, polling data, and political and social science analyses,” and courts must depend upon legislative facts to make decisions).

215. John R. Hibbing & Elizabeth Theiss-Morse, *Process Preferences and American Politics: What the People Want Government to Be*, 95 AM. POL. SCI. REV. 145, 147 (2001).

216. Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J. POL. SCI. 328, 328 (2004).

217. *Citizens United v. FEC*, 558 U.S. 310, 450 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 144 (2003)).

218. Mark E. Warren, *Democracy and Deceit: Regulating Appearances of Corruption*, 50 AM. J. POL. SCI. 160, 161 (2006).

circumstances, the public is justified in inferring improper influences from high levels of privately-financed spending *in itself*.²¹⁹

The belief that wealthy interests dictate which candidates win elections erodes confidence in the democratic process and undermines the American people's sense that they play a meaningful role in selecting the men and women who govern. Ultimately, citizens lose faith in their ability to be politically efficacious.

B. Political Efficacy Research

The link between perception of corruption and breakdown of participatory democracy is best viewed through the lens of "political efficacy." "Political efficacy" describes both an individual's ability to understand political issues in order to participate in politics, and an individual's beliefs about government responsiveness to citizen input.²²⁰ Contemporary work in political efficacy is informed by two social psychology lines of work regarding self-efficacy. One line of work describes self-efficacy as motivational, characterized by an effort to influence events and outcomes.²²¹ The other relates to a cognitive view of efficacy, and focuses on the degree to which an individual anticipates and perceives control over her environment.²²² As Albert Bandura wrote: "Unless people believe they can produce desired effects by their actions they have little incentive to act. Efficacy belief is, therefore, the foundation of action."²²³

Political efficacy is the manifestation of a particular form of personal and collective influence. This form of efficacy is generally realized early in life, long before meaningful political input is possible. Researchers find that children form a basic sense of political efficacy as early as third grade.²²⁴ Although children grasp political efficacy early, one's views on political efficacy can change over the course of a lifetime.

219. *Id.* at 172 n.13. Warren also suggests that for a democracy to succeed, citizens must be enfranchised and "must also have the conditions and capacities to make *autonomous* judgments—that is, decisions free from coercions, threats, or blackmail, and based on a good understanding of the interests and values of oneself and others." *Id.* at 165.

220. See Niemi, Craig & Mattei, *supra* note 21, at 1407, 1412.

221. See Robert W. White, *Motivation Reconsidered: The Concept of Competence*, 66 PSYCHOL. REV. 297, 329 (1959) (suggesting that "[e]ffectance motivation must be conceived to involve . . . a feeling of efficacy . . . to find out how the environment can be changed and what consequences flow from these changes").

222. See Richard deCharms, *Personal Causation and Perceived Control*, in CHOICE AND PERCEIVED CONTROL 29, 29–31 (Lawrence C. Perlmutter & Richard A. Monty eds., 1979) (theorizing that one either appreciates a feeling control as "the experience of personal causation" or as experiences attributable to that person's visual perception).

223. Bandura, *supra* note 22, at 52.

224. Easton & Dennis, *supra* note 22, at 31.

An individual's investment of time or money in political campaigns often increases internal political efficacy.²²⁵ Internal efficacy is an individual's personal assessment of how much power or influence she has on political outcomes. External efficacy represents a general evaluation of political institutions' willingness to receive input from all individuals in society. One study found high investment activities are more likely to increase efficacy than low investment activities, but both high and low investment activities increase voters' sense of power over the political process.²²⁶ Another study observed the connection between corruption and democracy globally, finding that citizens of democracies with higher levels of corruption reported lower levels of satisfaction with the performance of their political systems and trust in public servants.²²⁷

Empirical findings suggest political efficacy is important because the more internal efficacy a citizen experiences, the more likely she is to vote and engage in other forms of societal participation.²²⁸ An early study reported that an individual's feeling of political efficacy relates to other measures of power in society, such as income level.²²⁹ The study's authors found large variations between racial and income groups regarding political participation.²³⁰ The study asked respondents to report the number of elections in which they had voted since they were eligible to vote.²³¹ The authors reported that "[t]he distribution of their responses followed exactly the income-race hierarchy: almost nine-tenths of the rich indicated they had always voted, followed by the middle-income whites, middle-income blacks, poor whites, and poor blacks in that order"²³² The relationship between political efficacy and participation is self-perpetuating. Feelings of efficacy increase likelihood of voting or volunteering time or money,²³³ and one's level of participation, in turn, influences the degree

225. See Priscilla L. Southwell, *The End of Alienation? The Rise of Political Trust and Efficacy in the United States* 5 (Sept. 4, 2009) (unpublished meeting paper), available at <http://ssrn.com/abstract=1451380> (noting the relationship between a personal sense of efficacy and the power an individual has to influence politics).

226. Vercellotti, *supra* note 21, at 18.

227. Christopher J. Anderson & Yuliya V. Tverdova, *Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies*, 47 *AM. J. POL. SCI.* 91, 104 (2003).

228. Southwell, *supra* note 225, at 11.

229. William H. Form & Joan Huber, *Income, Race, and the Ideology of Political Efficacy*, 33 *J. POL.* 659, 670 (1971).

230. *Id.* at 668 (noting that those with a higher measure of political efficacy also had a higher sense of citizenry).

231. *Id.*

232. *Id.* at 668.

233. See Southwell, *supra* note 225, at 3 (stating that a citizen's belief that he has an impact on the political system builds a feeling of political loyalty).

to which a citizen feels efficacious.²³⁴ Research has demonstrated the correlation between involvement in campaigns and the perception of efficacy.²³⁵ Individuals who believe that they can effect change through participation in politics tend to be actively involved in politics, while those who perceive that political institutions and processes are unresponsive to them, become politically apathetic.²³⁶ As discussed above, *Buckley* mandated regulating the "appearance of corruption" because corruption creates a lack of trust in government, thus discouraging people from participating.²³⁷

Voting is the most basic and prevalent way Americans participate in political life. History demonstrates that Americans' perception of corruption affects their voting behaviors. For example, citizens are less likely to vote following political scandal. During the 1976 presidential election, with memories of Watergate still fresh, four million fewer people voted than did in 1972.²³⁸ The growing perception that increased independent spending by PACs and corporations leads to corruption similarly influences citizens' participation in elections. A report by the Brennan Center for Justice stated that "[a]n alarming number of Americans report that their concerns about the influence of donors to outside political groups make them less likely to engage in democracy."²³⁹ According to the report, sixty-five percent of Americans lack faith in government because of the power held by Super PACs compared to the average voter.²⁴⁰ Republicans and Democrats nearly equally exhibited this concern.²⁴¹ However, the Brennan Center's most concerning discovery was that twenty-six percent of Americans claim they are less likely to vote because of the unequal influence big donors have over elected officials through contributions to Super PACs.²⁴² Another study completed by Common Cause Minnesota examined the impact of campaign contributions on the perception of corruption and desire to participate

234. Joshua K. Harder, *Why Do People Vote? The Case for Political Efficacy*, THEPRESIDENCY, <http://www.thepresidency.org/storage/documents/Fellows2008/Harder.pdf> (last visited Aug. 12, 2014).

235. See, e.g., NATIONAL SURVEY, *supra* note 11, at 3.

236. Albert Bandura, *Exercise of Human Agency through Collective Efficacy*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 75, 78 (2000).

237. *Buckley v. Valeo*, 424 U.S. 1, 27 (1975) (per curiam). See also Virginia A. Chanley, Thomas J. Rudolph & Wendy M. Rahn, *The Origins and Consequences of Public Trust in Government*, 64 PUB. OPINION Q. 239, 239–40 (2000) (discussing what causes declining trust in government and the consequences of that declining trust).

238. See *Voter Turnout in Presidential Elections: 1828-2008*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/turnout.php> (last visited July 31, 2014) (demonstrating that in 1972, 55.21% of the voting age population voted, compared to the 53.55% that participated in the 1976 election).

239. NATIONAL SURVEY, *supra* note 11, at 3.

240. *Id.*

241. See *id.* (noting that sixty-seven percent of both Republicans and Democrats exhibited the concern).

242. *Id.*

in politics.²⁴³ One-third of respondents asserted they are now less likely to participate in politics because they believe those who donate to Super PACs influence the political process unfairly.²⁴⁴

Perceptions of corruption also influence attitudes towards lawmakers and political parties. Americans who believe their government is corrupt tend to attribute that corruption to the party in control of the presidency, regardless of whether a Democrat or Republican occupies the White House.²⁴⁵ Hence, perceptions can systematically undercut faith in the executive. Moreover, individual candidates are more vulnerable on Election Day if they campaign during a period when Americans perceive increased government corruption.²⁴⁶ This is true even for candidates who are innocent of suspicious activity. In other words, even an air of corruption casts a pall over all lawmakers and influences global judgments about government. Perhaps for this reason, the problem of fundraising and campaign spending has become a familiar theme on Capitol Hill, and in the American political discourse. As Lessig testified, politicians who are “forced into a cycle of perpetual fundraising, . . . become, or at least most Americans believe [they] become, responsive to the will of the funders.”²⁴⁷

V. THE 2012 PRESIDENTIAL ELECTION AND THE OBAMA CAMPAIGN

Given the rising cost of political elections and a growing dissatisfaction with government, the 2012 election cycle could have marked the beginning of a significant downturn in citizen engagement. However, some characteristics of the election, particularly Barack Obama’s campaign, may have muted the influence of burgeoning campaign spending. Specifically, Obama’s campaign strategy of personally engaging voters demonstrates the importance of political

243. Paulson & Schultz, *supra* note 23, at 466.

244. *Id.* at 469.

245. Tim Fackler & Tse-min Lin, *Political Corruption and Presidential Elections, 1929-1992*, 57 J. POL. 971, 988–89 (1995).

246. See generally Susan A. Banducci & Jeffrey A. Karp, *Electoral Consequences of Scandal and Reapportionment in the 1992 House Elections*, 22 AM. POL. Q. 3 (1994) (analyzing the effects of a corruption scandal on Congressional re-election). See also Michael Dimock & Gary Jacobson, *Checks and Choices: The House Bank Scandal’s Impact on Voters in 1992*, 57 J. POL. 1143, 1157 (1995) (concluding that voters did not think favorably of politicians with unclean records); Fackler & Lin, *supra* note 245, at 988–89 (discussing the impact of corruption scandals on presidential elections); James A. McCann & David P. Redlawsk, *As Voters Head to the Polls, Will They Perceive a “Culture of Corruption?”*, 39 POL. SCI. & POL. 797, 797, 801 (2006) (contemplating the effects of a perceived culture of corruption on elections); John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory, or If Political Corruption Is in the Mainstream of American Politics Why is it Not in the Mainstream of American Politics Research?*, 72 AM. POL. SCI. REV. 974, 982–84 (1978) (providing an analytical model on the effects of corruption on politics and elections).

247. *Taking Back Our Democracy Hearing*, *supra* note 1, at 18 (statement of Lawrence Lessig, Professor, Harvard Law School).

efficacy and provides insight into how candidates can run successful campaigns during the *Citizens United* era.

A. *Evidence of an Efficacy-Action Connection: The Backdrop to Obama's Success in 2012*

Barack Obama's 2008 presidential election is a case study of the relationship between voters' feelings of political efficacy and their political engagement. Obama's 2008 campaign tactics revolutionized the way candidates reach voters. His campaign utilized social media; his messages were personal, emotional, and designed to instill a sense of self-power in their audience. One study of 2008 voters reported that "both internal and external efficacy [were] positively related to a vote for Barack Obama in the 2008 election, suggesting that he was able to appeal to those who were more optimistic about their political influence."²⁴⁸ Research also shows a connection between emotional appeals and political involvement.²⁴⁹ The authors of one study found that "candidates who appeal to voters through the use of emotions are rewarded with increased support across a range of different types of participation."²⁵⁰ Hence, it is unsurprising that Obama's direct appeals increased participation. In fact, sixty-two percent of voters participated in the 2008 election, a level not seen since the 1950s and 60s.²⁵¹ He outpaced all other presidential candidates in the primary season in

248. Southwell, *supra* note 225, at 12.

249. Philip Edward Jones, Lindsay H. Hoffman & Dannagal G. Young, *Online Emotional Appeals and Political Participation: The Effect of Candidate Affect on Mass Behavior*, 15 *NEW MEDIA & SOC'Y*. 1132, 1143 (2012).

250. *Id.* at 1133.

251. Michael P. McDonald, *The Return of the Voter: Voter Turnout in the 2008 Presidential Election*, 6 *FORUM*, 1, 1 (2008). See also AM. UNIV. NEWS, AFRICAN-AMERICANS, ANGER, FEAR AND YOUTH PROPEL TURNOUT TO HIGHEST LEVEL SINCE 1960 1 (2008), available at <http://www.american.edu/spa/cdem/upload/2008pdfoffinaledited.pdf> (noting that 2008 voter turnout was also "the third highest turnout since women were given the right to vote in 1920"). Significantly, Obama "rais[ed] an unprecedented amount of cash from small donors who helped him shatter fundraising records." Kenneth P. Vogel, *The Myth of the Small Donor*, *POLITICO* (Aug. 7, 2012, 4:27 AM), <http://www.politico.com/news/stories/0812/79421.html>. In fact, one-third of Obama's 2008 campaign contributions came from small donors. Press Release, Campaign Fin. Inst., All CFI Funding Statistics Revised and Updated for the 2008 Presidential Primary and Gen. Election Candidates: New Figures Show that Obama Raised About One-Third of His Gen. Election Funds from Donors Who Gave \$200 Or Less; Obama's Gen. Election Money From Small Donors Alone Exceeded McCain's Pub. Funding Grant (Jan. 8, 2010) [hereinafter Press Release, Campaign Fin. Inst.], available at http://www.cfinst.org/press/releases_tags/10-01-08/Revised_and_Updated_2008_Presidential_Statistics.aspx. Obama's fundraising efforts were particularly important because he was the first candidate, and the only in the 2008 presidential election, to refuse public funds for the general campaign. Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, *N.Y. TIMES*, June 20, 2008, <http://www.nytimes.com/2008/06/20/us/politics/20obamaend.html?adxnnl=1&adxnnlx=1407873711/m8+cOBBeGk38f1YbObvOg>.

small donor donations, receiving almost half of all donations less than \$200.²⁵² In the general election, the percentage of donations from small donors rose to thirty-four percent.²⁵³ While the 2008 correlation between a historically high number of small donations and reports of feelings of high political efficacy is not conclusive, it does suggest that when average individuals perceive their contributions are making a difference in a political campaign, they have a greater sense of ownership and involvement in the election. Moreover, political efficacy research lends support to the notion that 2008 Obama voters felt “greater internal political efficacy than both McCain voters and nonvoters.”²⁵⁴

B. What Happened in 2012?

The run-up to the 2012 presidential and congressional elections made two things seem clear. First, the amount of money spent on political elections is growing quickly. Second, to the extent that American citizens are paying attention, they are unhappy about the trend and perceive negative consequences. Social science suggests the rapid growth of campaign spending and accompanying public anxiety may usher in a new era of disillusionment and disengagement from the political process. So, does the 2012 election cycle reveal evidence of a troubled democracy? All in all, the 2012 results were inconclusive. On the one hand, individuals committed to a particular candidate or political party donated and volunteered in greater numbers. On the other hand, voter turn-out was lower than in the past two presidential elections. Notably, the extraordinary success of the 2012 Obama campaign’s “Get Out the Vote” (GOTV) efforts likely prevented an even more substantial downturn in citizen participation.

1. Small Donations and Volunteering Were Up

Small donor activity in 2012 is measurable by looking at web-based and other Democratic fundraising efforts, because those activities were pivotal in the 2008 election cycle. In the months leading up to the 2012 election, the Democrats’ congressional fundraising arms experienced record success with small donors, surpassing their 2008 numbers. Contributions to the Democratic Congressional

252. The bipartisan website *OpenSecrets* reported: “Obama’s victory in the general election was aided by his tremendous fund-raising success. Since the start of 2007, his campaign relied on bigger donors and smaller donors nearly equally, pulling in successive donations mostly over the Internet.” Ctr. for Responsive Politics, *Barack Obama (D)*, OPENSECRETS, <http://www.opensecrets.org/pres08/summary.php?id=n00009638> (last visited July 31, 2014). See also Press Release, Campaign Fin. Inst., *supra* note 251 (announcing that the Obama campaign raised \$337 million in donations from individuals who gave \$200 or less).

253. Press Release, Campaign Fin. Inst., *supra* note 251.

254. Justin D. Hackett & Allen M. Omoto, *Efficacy and Estrangement: Effects of Voting*, 9 ANALYSES SOC. ISSUES & PUB. POL’Y 297, 309 (2009).

Campaign Committee (DCCC) of \$200 or less totaled \$21.5 million.²⁵⁵ Similarly, the National Republican Congressional Committee (NRCC) experienced an eighteen percent increase in donations from small contributors, with donations rising “from \$10.7 million through the first [eleven] months of 2009 to \$12.6 million during the same period in 2011.”²⁵⁶ However, as was true in 2008, the Democrats had the most success in the realm of 2012 small-donor fundraising.²⁵⁷ As one observer put it: “[i]n raising money from those giving less than \$200, Obama is a major league slugger while Romney is still waiting to be called up from the minor leagues. And that has made an enormous difference to the campaigns’ bottom lines.”²⁵⁸

Democratic volunteer numbers were also strong in 2012. Days before the election, Obama’s campaign manager, Jim Messina, announced the existence of 5,100 GOTV stations in battleground states. About 700,000 volunteers committed to assist the Obama campaign’s GOTV effort. In July 2012, a *Huffington Post* article noted that in a time of record-low confidence in the federal government, the 2012 election volunteers were outliers of the American electorate.²⁵⁹

Many experts estimate that the 2012 Obama campaign was an aberration.²⁶⁰ In a substantially closer race, turnout was a vital part of the strategy, and on Election Day 2012, the Democrats’ turnout efforts were impressive (perhaps even historic).²⁶¹ The month before the election, the Obama campaign released a memo in which it reported it registered 1,792,261 voters in key battleground states, a figure that represented a nearly one-hundred percent increase in voter registration over Obama campaign registrations in 2008.²⁶² CNN reported that “[t]he . . . voter contacts the Obama team claimed were more than twice the Republican total The hundreds of Democratic field offices outnumbered

255. Bob Biersack & Viveca Novak, *Big Growth in Democrats’ Small Donors*, OPENSECRETS (Jan. 5, 2012, 1:20 PM), <https://www.opensecrets.org/news/2012/01/the-bigger-role-of-small-donors/>.

256. *Id.*

257. See Paul Blumenthal, *Barack Obama Must Thank Small Donors For Fundraising Lead*, HUFFINGTON POST (Sept. 27, 2013, 1:39 PM), http://www.huffingtonpost.com/2012/09/27/barack-obama-small-donors_n_1917521.html (stating that, of Obama’s then-\$157 million lead over Romney, \$142.3 million derived from small donors).

258. *Id.*

259. Fouhy, *supra* note 25.

260. For example, “Obama’s 2008 campaign set an unprecedented standard for grass-roots involvement” *Id.* Campaign managers created the online platform *MyBarackObama*, to which Obama attracted record numbers of volunteers with the phrase: “[t]his election is not about me, it’s about you.” *Id.* Obama was later able to up the ante in 2012.

261. See *supra* note 29 and accompanying text.

262. Sam Stein, *Obama Campaign: We’ve Contacted One Out of Every 2.5 People In The Country*, HUFFINGTON POST (Nov. 3, 2012, 6:34 PM), http://www.huffingtonpost.com/2012/11/03/obama-voter-contact_n_2069289.html.

GOP outposts by greater than 2-1 or 3-1 in key swing states.”²⁶³ In early November, a memorandum from the Obama camp “claim[ed] that the campaign ha[d] made 125,646,479 personal phone calls or visits.”²⁶⁴ That number represented contact with one out of every 2.5 people in the U.S. population.²⁶⁵ That figure also dwarfed the 50 million voter contacts the Romney campaign has claimed, particularly given that the Romney total also included mailers left at voters’ doors.²⁶⁶ Susan Page of *USA Today* observed that “Obama’s campaign [was] spending millions of dollars on the most elaborate field operation in U.S. political history, aimed at delivering both core supporters and reluctant ones to the polls.”²⁶⁷

Obama’s well-publicized strategy led to Romney redoubling his campaign efforts. In early November, the Romney campaign stepped up efforts to keep early polling from leaving the Republican presidential candidate behind, as it did with John McCain in 2008.²⁶⁸ In early November 2012, CBS reported that the NRCC was hyping an aggressive early campaign strategy that included a plan to make two million contacts on election day²⁶⁹ and open more field offices in battleground states.²⁷⁰

2. Voter Turnout Was Down

Despite the candidates’ efforts, 2012 voter turnout was lower than in the past two presidential contests.²⁷¹ A Center for the Study of the American Electorate and the Bipartisan Policy Center report “put 2012 voter turnout at 57.5% of all eligible voters, compared to 62.3% who voted in 2008 and 60.4% who cast ballots in 2004.”²⁷² An estimated 126 million people voted in the 2012 election,

263. Rebecca Sinderbrand, *Analysis: Obama Won with a Better Ground Game*, CNN (Nov. 7, 2012, 7:00 AM), <http://www.cnn.com/2012/11/07/politics/analysis-why-obama-won>.

264. Stein, *supra* note 262.

265. *Id.*

266. *Id.*

267. Page, *supra* note 29.

268. Madison, *supra* note 28.

269. *Id.*

270. Alex Sanz, *Obama, Romney Campaigns Step Up Florida Ground Operations*, WPTV (Oct. 24, 2012, 7:18 PM), <http://www.wptv.com/dpp/news/political/obama-romney-campaigns-step-up-florida-ground-operations>.

271. *Election Results 2012: Voter Turnout Lower Than 2008 and 2004, Report Says*, ABC (Nov. 8, 2012, 3:21 PM) [hereinafter *Election Results 2012*], <http://www.abc15.com/dpp/news/national/election-results-2012-voter-turnout-lower-than-2008-and-2004-report-says#ixzz2KRzUf4c3>.

272. *Id.* Some groups turned out in greater numbers. For example, record numbers of Latinos turned out to vote and chose President Obama by a wide margin. Julia Preston & Fernanda Santos, *A Record Latino Turnout, Solidly Backing Obama*, N.Y. TIMES, Nov. 7, 2012, at P13. The *New York Times* reported that “[o]ver all, according to exit polls . . . , Mr. Obama won [seventy-one] percent of the Hispanic vote while Mitt Romney won [twenty-seven] percent.” *Id.*

meaning that 93 million eligible voters did not go to the polls.²⁷³ In fact, with the exception of Iowa and Louisiana, the 2012 turnout of eligible voters decreased from 2008 levels in every state and the District of Columbia.²⁷⁴ Curtis Gans, director of American University's Center for the Study of the American Electorate, concluded that: "Beyond the people with passion, we have a disengaged electorate."²⁷⁵ Surveys of non-voters support this conclusion. In a poll conducted by Suffolk University and *USA Today*, fifty-four percent of eligible voters that refrained from voting in 2012 described politics as "corrupt."²⁷⁶ Gans was pessimistic about future voter turnout trends, lamenting that the people lack faith and trust in political leaders and institutions.²⁷⁷

3. *What Obama's 2012 Success and Low Voter Turnout Tells Us*

The uncommon success of the Obama campaign in getting voters to the polls likely disguised what would have been an even more significant downturn in voting among American citizens. Although the 2008 and 2012 Obama campaigns moved the art of campaigning into the twenty-first century, whether the success of the Obama campaign can be duplicated remains to be seen. Part of President Obama's strength as a campaigner was his ability to connect with voters by evoking in them a sense of personal efficacy; that factor helped propel him to victory in 2008 and 2012. A combination of the Obama campaigns' unique ability to engage voters and the historic significance of the Obama presidency make it likely that depressed voter turnout will continue because those factors are not easily replicable. While 131 million people voted in the 2008 presidential election, only about 129 million people voted in the 2012 election.²⁷⁸ That difference of 2 million voters may have been substantially larger absent the unique features of the 2012 election.

VI. CONCLUSION

By allowing unlimited corporate campaign spending, the *Citizens United* Court left an indelible footprint on American politics. The opinion was less notable for its immediate impact than for its symbolic significance and the door it opened for the creation of Super PACs capable of amassing large sums to spend on political communication. Much debate centers on the opinion's

273. *Election Results 2012*, *supra* note 271.

274. *Id.*

275. Josh Lederman, *Voter Turnout Shaping Up to Be Lower Than 2008*, HUFFINGTON POST (Nov. 7, 2012, 5:22 PM), http://www.huffingtonpost.com/2012/11/07/voter-turnout_n_2088810.html.

276. Page, *supra* note 31.

277. Lederman, *supra* note 275.

278. Sean Sullivan, *President Election Turnout Ticked Down from 2008*, WASH. POST (Nov. 8, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/08/presidential-election-turnout-ticked-down-from-2008-estimate-shows/>.

legitimacy and the desirability of its effects.²⁷⁹ However, little attention is given to its potential to shape Americans' attitudes about the political election process. Whether the trigger was the publicity *Citizens United* received, the controversy surrounding Super PACs, or simply a growing distaste for the proliferation of campaign ads, Americans are expressing record levels of dissatisfaction with the current state of campaign financing.²⁸⁰

Opponents of *Citizens United* propose liberal disclosure rules. The DISCLOSE Act, passed in the House of Representatives but filibustered in the Senate, may return in some form, particularly if the American public exhibits sustained dissatisfaction with the post-*Citizens United* situation. Of course, many consider the notion that disclosure is a complete panacea naïve.²⁸¹ Even assuming source of funding disclosure is the perfect solution to combat actual corruption, the appearance problem persists. Although having access to donor lists may reassure some citizens, this information may have counterproductive effects. Measures to combat actual corruption, such as liberal disclosure of campaign funding, may worsen the *appearance* of corruption problem. The more American people know about the extent of financial might exercised by extremely wealthy individuals and groups with easily identifiable agendas, the more likely it is Americans will deem their government corrupt. As this Article illustrates, a widespread loss of confidence in the political system has serious negative repercussions. With perfect disclosure and maximum benefit from disclosure—namely complete accountability—we could eliminate actual corruption while leaving intact a robust perception of corruption.²⁸² This conundrum has no easy escape, save restoring campaign finance laws to their pre-*Citizens United* state.

In *Citizens United*, the Court put an exclamation point on its previous rejection of a “level playing field” rationale for campaign funding regulations.²⁸³ Whether

279. Scholars argue that *Citizens United* has the potential to muddle the law more than it clarifies it. See Hasen, *supra* note 85. See also Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, 35 N.Y.U. REV. L. & SOC. CHANGE 681, 704 (2011) (referring to “a long history of cases that recognize that undue influence could constitute corruption and create the appearance of corruption”)

280. See *supra* Part III.C.

281. See, e.g., Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 664 (2012) (expressing the tongue-in-cheek sentiment that citizens have “[n]o need to worry about limiting money[.] [T]he Court seems to think[] disclosure will take care of everything”).

282. Robert Bauer believes that “[i]f the appearance of corruption undermines, to a ‘disastrous extent,’ citizen confidence in government, then it does so regardless of whether it can be linked persuasively to actual corruption.” Bauer, *supra* note 101, at 93 (responding to Samaha, *supra* note 101, at 1600). Further, with respect to foreign spending, election law expert Richard Hasen notes that “[i]f such spending is significant and it is disclosed, voters could believe that foreign nationals are improperly influencing either the outcome of U.S. elections (through pursuit of an electoral strategy) or the legislative decisions made by elected officials (through pursuit of a legislative strategy).” Hasen, *supra* note 85, at 609.

283. See *Buckley v. Valeo*, 424 U.S. 1, 26–29, 26 n.26 (1975) (per curiam).

or not Americans have read the case, or even understand the reasoning, its effects are palpable. Polls reveal that many Americans are concluding that the political election process is corrupt.²⁸⁴ Further, they believe that they are losing their voice, and that wealthy interests are hijacking political elections.²⁸⁵ As one commentator put it, "[i]t is no wonder . . . that an egalitarian vision of democratic politics is lacking in the United States. The U.S. Supreme Court has made it impossible to articulate such a vision."²⁸⁶ In *Shrink Missouri*, Justice Breyer articulated reforms that would "seek to build public confidence in the [election] process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes."²⁸⁷ So long as Super PAC spending dominates the political campaign scene, that vision will never be realized, and increasing numbers of Americans will stay home on Election Day.

284. See *supra* Part III.C.

285. See *supra* Part III.C.

286. Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 382 (2011).

287. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400–01 (2000) (Breyer, J., concurring) (citation omitted).

