

Constitutionalizing Corruption: *Citizens United*, Its Conceptions of Political Corruption, and the Implications for Judicial Elections Campaigns

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Introduction

CITIZENS UNITED V. FEDERAL ELECTION COMMISSION invalidated a provision of the Bipartisan Campaign Reform Act (“BCRA”) that prohibited corporations and unions from spending money on “electioneering communication.”¹ The decision—which was written by Justice Anthony Kennedy, a former lobbyist²—was based on an exceedingly narrow definition of political corruption.³ This Article argues that the Court’s definition flies in the face of federal bribery laws, and that it fails to draw a meaningful distinction between corrupt and permissible political action. The Court’s poor reasoning is all the more unfortunate since, as this Article also explains, the *Citizens United* decision appears to be applicable to judicial elections as well.

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1. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §§ 441a-1, 441i, 441k, and 36 U.S.C. § 510 (2006). “Electioneering communications” is defined by the statute as “any broadcast, cable, or satellite communication” with a potential reach of 50,000 people or more that refers to a clearly identified candidate for federal office, in the thirty days prior to an election. 2 U.S.C. § 434(f)(3) (2006).

2. See Ill. Inst. of Tech. Chi.-Kent Coll. of Law, *Anthony M. Kennedy: Biography*, OYEZ, http://www.oyez.org/justices/anthony_kennedy (last visited January 10, 2012). Kennedy’s father was a lobbyist, and Kennedy continued his father’s work when he took over his father’s practice. See *id.*

3. See *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”).

Citizens United has been widely discussed and subjected to exhaustive criticism.⁴ My discussion, by contrast, would not offer a comprehensive analysis of the case; instead, I will focus on the specific issue of political corruption—which was of vital importance to the decision, and remains vital to the future of campaign finance regulations. The Article progresses as follows: Part I.A. analyzes the debate between the majority and the partial dissent (hereafter “dissent”) over the proper definition of political corruption.⁵ Part I.B. examines the definition of political corruption appearing in the federal bribery statute, and then re-examines the majority’s understanding of corruption in light of that definition. Part II explains why the Court is likely to regard the *Citizens United* decision as governing judicial elections. And the final Part is a short and gloomy conclusion that connects *Citizens United* to other Roberts Court campaign finance decisions, and explains the Court’s regrettable conception of the proper relation between money and election campaigns

I. Political Corruption

This section is divided into two parts: the first examines the debate between the majority and the dissent over the proper definition of political corruption; the second evaluates the majority’s definition in light of federal bribery laws, and the need to draw a meaningful line between bribery and legitimate financial support.

4. See, e.g., James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL’Y 673 (2011); Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2011); Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL’Y 311 (2010); Matthew A. Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29 (2010); Gene Nichol, *Citizens United and the Roberts Court’s War on Democracy*, 27 GA. ST. U. L. REV. 1007 (2011); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497 (2010); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365 (2010); Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>; Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/>.

5. The four justices who dissented from the invalidation of the BCRA’s ban on corporate and union electioneering communication concurred in the Court’s upholding of the BCRA’s disclaimer and disclosure provisions. See *Citizens United*, 130 S. Ct. at 913–16.

A. Defining Political Corruption

The *Citizens United* decision quickly dismissed two of the government's alleged interests in banning corporate and union electioneering communications. First, the Court rejected the anti-distortion, or equalizing, rationale—that is, the government's interest in equalizing the ability of individuals and groups to influence the outcomes of elections.⁶ That interest was endorsed by the Court in *Austin v. Michigan Chamber of Commerce*,⁷ but *Citizens United* overruled *Austin* and declared the anti-distortion rationale inconsistent with precedent and with established First Amendment principles.⁸ Second, the Court rejected the government's interest in protecting shareholders from having company funds expended on political campaigns against their will.⁹ The challenged provision, said the Court, was both underinclusive and overinclusive in regard to that interest: underinclusive because it forbade corporate expenditures only during certain time periods but not otherwise; overinclusive in that it also applied to single shareholder corporations.¹⁰

What remained was the government interest in the prevention of corruption and the appearance of corruption—an interest recognized as “sufficiently important” to justify campaign finance restrictions since *Buckley v. Valeo*, the seminal case on the subject.¹¹ However, *Citizens United* was a campaign *expenditures* case; and *Buckley* famously drew a distinction between campaign contributions and expenditures, and dismissed the anti-corruption interest in regard to the latter.¹² The opinion explained the distinction as follows:

Unlike contributions, . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate,

6. *Id.* at 904.

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

8. *Citizens United*, 130 S. Ct. at 904, 913.

9. *Id.* at 911.

10. *Id.*

11. *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976).

12. Indeed, *Buckley* is understood to require a stricter level of constitutional scrutiny for limitations on expenditures than for limitations on contributions. *See, e.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–60 (1986) (“We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.”). Under *Buckley*, expenditures coordinated with candidates' campaigns are treated as contributions. *See Buckley*, 424 U.S. at 46 (“[S]uch controlled or coordinated expenditures are treated as contributions rather than expenditures . . .”).

but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.¹³

These dubious propositions have been subjected to endless criticism, both from within and from without the Court.¹⁴ The idea that the spirited efforts of well-financed, well-informed, and well-advised organizations are often “counterproductive,” or that they go unappreciated by the candidates they support, seems implausible.¹⁵ Such organizations employ campaign strategists who are no less savvy than those working for the candidates themselves,¹⁶ and their efforts often

13. *Buckley*, 424 U.S. at 47. *Buckley* treated expenditures coordinated with candidates' campaigns as contributions for purposes of constitutional analysis. *Id.* at 46–47.

14. See, e.g., Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 119–20 (2010) (“Academic commentary has long had a field day with the core expenditures-versus-contributions rationale of *Buckley*. The system of limited contributions but unchecked expenditures runs afoul of the animating logic of the 1974 campaign finance amendments, and is in fact a regulatory structure created by the Court. No rational regulatory system would seek to limit the manner by which money is supplied to political campaigns, then leave unchecked the demand for that same money by leaving spending uncapped. In the meantime, majorities drawn from varying voting blocs on the Court have persistently rejected the *Buckley* divide between contributions and expenditures, with only a division among the Justices on how to overturn *Buckley* serving to shore up a frayed body of law.” (footnotes omitted)); J. Robert Abraham, Note, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1091–92 (2010) (tallying half the Justices that have served since 1976 as opposed to the *Buckley* framework); see also *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 510–11 (1985) (White, J., dissenting) (“The distinction is not tenable. . . . [T]he reasons underlying limits on contributions equally underly [sic] limits on such ‘independent’ expenditures. The credulous acceptance of the formal distinction between coordinated and independent expenditures blinks political reality. That the PACs’ expenditures are not formally ‘coordinated’ is too slender a reed on which to distinguish them from actual contributions to the campaign. The candidate cannot help but know of the extensive efforts ‘independently’ undertaken on his behalf. In this realm of possible tacit understandings and implied agreements, I see no reason not to accept the congressional judgment that so-called independent expenditures must be closely regulated.”); *Randall v. Sorrell*, 548 U.S. 230, 266–67 (2006) (Thomas, J., joined by Scalia, J., concurring) (“I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits. . . . I would overrule *Buckley* and subject both . . . to strict scrutiny, which they would fail.” (quoting *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in part and dissenting in part))); *Davis v. FEC*, 554 U.S. 724, 750–51 (2008) (Stevens, J., joined by Souter, J., Ginsburg, J., and Breyer, J., concurring in part and dissenting in part) (“Justice White—who maintained his steadfast opposition to *Buckley*’s view of expenditure limits—was correct.” (citation omitted)).

15. Organizations engaged in independent expenditures may be classified as “political committees” so that their budgets may be subjected to statutory contribution limits. The constitutionality of these limitations has been challenged, and lower courts are divided over the issue. One principal question is whether such restrictions should be analyzed as limitation on expenditures or as limitations on contributions. See generally Abraham, *supra* note 14.

16. For example, Karl Rove, the architect of George W. Bush’s election campaigns, is one of the founders of American Crossroads, an organization that has raised and spent

complement candidates' campaigns even without any formal coordination—especially in their use of negative ads, which are said to be more effective when originating from independent sources rather than the candidate.¹⁷ Moreover, candidates are well aware of such efforts and appreciate them.¹⁸

There may be better justifications for the Court's expenditures/contributions distinction. For one thing, campaign contributions—where control over money is transferred directly to the beneficiary—constitute an added risk of corruption by that fact alone. Additionally, as the *Buckley* opinion also noted, while restrictions on expenditures “necessarily reduce[] the quantity of expression,” restrictions on contributions “involve[] little direct restraint on . . . political communication” because they still allow the frustrated contributor to spend money in support of her candidate.¹⁹ And although this has no bearing on whether expenditures pose a lesser danger of corruption than contributions, it does mean that restricting expenditures may constitute a heavier burden on First Amendment freedom.

However, given that the expenditures/contributions distinction has been subjected to persistent criticism from both sides of the ideological aisle,²⁰ and given its particular weakness in the context of corporations and unions (which possess vast coffers and narrow, easily identified interests), it was not surprising that the *Citizens United* opin-

tens of millions of dollars in independent expenditures to defend and elect conservative candidates to federal office. See Jim Rutenberg, *Rove Returns, With Team, Planning G.O.P. Push*, N.Y. TIMES, Sept. 25, 2010 at <http://www.nytimes.com/2010/09/26/us/26grove.html?pagewanted=all>.

17. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 623 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010). See also text accompanying note 33.

18. See, e.g., *id.* (“The record . . . indicates that Members [of Congress] express appreciation to organizations for the airing of . . . election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as ‘above the fray.’ Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate’s behalf, when they are being run, and where they are being run. Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress.” (citations omitted)); see also *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008) (noting the participation of leading elected officials, including former President Bill Clinton, in the events of independent expenditure committees).

19. *Buckley v. Valeo*, 424 U.S. 1, 19, 21–22 (1976).

20. The distinction has been criticized both by those who seek to extend the constitutionality of restrictions on contributions to expenditures and by those who seek to extend the unconstitutionality of restrictions on expenditures to contributions. See, e.g., Abraham, *supra* note 14, at 1091–92.

ion sought to bolster and supplement that distinction when rejecting the government's anti-corruption interest. It did so by offering an exceedingly narrow conception of what political corruption is.

According to the opinion, the anti-corruption interest was strictly limited to fighting explicit *quid pro quo* exchanges where campaign spending is made in exchange for a specific political favor: "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption," said the Court, "that interest was limited to *quid pro quo* corruption."²¹ In fact, added the opinion, "[t]he practices *Buckley* noted" in approving the anti-corruption interest "would be covered by bribery laws, see, e.g., 18 U.S.C. § 201, if a *quid pro quo* arrangement were proved."²²

In other words, the anti-corruption interest was limited to combating the sort of *quid pro quo* arrangements made criminal by federal bribery laws.²³ And this narrow view of political corruption meant that there was little relevant evidence of corruption before the Court: the record supporting the BCRA, said the Court, "was 'over 100,000 pages' long,"²⁴ "yet it 'does not have any direct examples of votes being exchanged for . . . expenditures.'"²⁵

21. *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

22. *Id.* at 908. The "practices *Buckley* noted" included a \$2 million campaign pledge by the dairy industry to President Nixon, who in turn overruled a decision of his Secretary of Agriculture and increased price support for dairy products. After that decision was made, but before it became public, Nixon's people contacted industry representatives to inform of the decision and seek a reaffirmation of the pledge. See *Buckley v. Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976), and *modified*, 532 F.2d 187 (D.C. Cir. 1976). That, indeed, was a paradigmatic example of an explicit *quid pro quo*, though *Buckley* did not seem to limit the anti-corruption interest to such *quid pro quos*. *Buckley* referenced the episode indirectly by simply referring to the Court of Appeals' discussion of it, and the Court of Appeals, in turn, explicitly stated that "[i]t is not material, for present purposes . . . whether the President's decision was . . . conditioned upon or 'linked' to the reaffirmation of the pledge." *Id.* Linked or not, said the D.C. Circuit Court of Appeals, the episode demonstrated the government's "clear and compelling interest in safeguarding the integrity of elections and avoiding the undue influence of wealth." *Id.* at 841. *Buckley* similarly stated that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Buckley*, 424 U.S. at 27–28.

23. See *Citizens United*, 130 S. Ct. at 909–10.

24. *Id.* at 910 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (per curiam), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled by Citizens United*, 130 S. Ct. 876).

25. *Id.* (omission in original) (quoting, *McConnell*, 251 F. Supp. 2d at 560 (Kollar-Kotelly, J., concurring in part and dissenting in part)). The fact that the record was devoid of such instances of corruption, added the opinion, "confirms *Buckley's* reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption." *Id.* But of course, this narrow conception of corruption would make it equally difficult to find evidence of corruption in campaign contributions as well.

And yet, as the dissent pointed out, “It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members.”²⁶ Remarkable indeed, given that “such behavior” is a federal felony punishable by fifteen years of imprisonment.²⁷ Moreover, as the dissent also observed, “[p]roving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote.”²⁸ In short, it was only to be expected that the record would have no examples of such explicit exchanges, and it was therefore unjustified to limit government action only to containing such instances:

[W]e have never suggested that such *quid pro quo* debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.²⁹

In other words, instances that did not violate bribery laws could still constitute the sort of corruption that the government could seek to prevent. Bribery was the most extreme but not the most dangerous form of corruption that campaign finance regulations could prohibit: “There are threats of corruption that are far more destructive to a democratic society than the odd bribe.”³⁰ And one of those was defined by the notion of “undue influence”:

On numerous occasions we have recognized Congress’ legitimate interest in preventing the money that is spent on elections from exerting an “undue influence on an officeholder’s judgment” and from creating “the appearance of such influence”³¹

This form of political corruption was rampant and well documented: “[T]he record Congress developed in passing BCRA . . .” read the dissent, stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs³² The district court that

26. *Citizens United*, 130 S. Ct. at 965 (Stevens, J., concurring in part and dissenting in part).

27. 18 U.S.C. § 201(b)(4) (2006).

28. *Citizens United*, 130 S. Ct. at 965 (Stevens, J., concurring in part and dissenting in part).

29. *Id.* at 964 (citing *McConnell v. FEC*, 540 U.S. 90, 143 (2003), *overruled by Citizens United*, 130 S. Ct. 876).

30. *Id.* at 962.

31. *Id.* at 961 (quoting *McConnell*, 540 U.S. at 150).

32. *Id.*

adjudicated the initial challenge to the BCRA described that record as follows:

[C]orporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as "above the fray." Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress.

. . . After the election, these organizations often seek credit for their support. . . . [A] large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations.³³

The dissent therefore opted for a broader conception of political corruption based on the idea of "undue influence":

Our "undue influence" cases have allowed the American people to . . . ensure, to some minimal extent, "that officeholders will decide issues . . . on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"—or expenditures—"valued by the officeholder." When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly "from what is pure or correct" in the conduct of Government, Webster's Third New International Dictionary 512 (1966) (defining "corruption"), that it amounts to a "subversion . . . of the electoral process" . . .³⁴

For a former lobbyist, this definition of corruption may have struck too close to home. Justice Kennedy's majority opinion would have none of it:

The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

33. *Id.* at 961–62 (second alteration in original) (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 623–24 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled by Citizens United*, 130 S. Ct. 876).

34. *Id.* at 962 (second alteration in original) (citations omitted) (quoting *McConnell*, 540 U.S. at 153, *overruled by Citizens United*, 130 S. Ct. 876, and *United States v. UAW*, 352 U.S. 567, 575 (1957)).

Favoritism and influence are not . . . avoidable in representative politics It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.³⁵

The democratic process consists of individuals and groups vying to influence elected representatives, and those attempts—claimed the majority—may legitimately take the form of spending money on candidates' campaigns.³⁶ And since it is perfectly legitimate for individuals or entities to provide financial support to a candidate with the expectation "that the candidate will respond by producing those political outcomes the supporter favors,"³⁷ it is presumably equally legitimate for the candidate, once elected, to produce the expected responsiveness.³⁸

The majority recognized, of course, that elected officials may act inappropriately in the face of such influence; but such deplorable actions, it said, did not necessarily amount to political corruption:

If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.³⁹

35. *Id.* at 910 (majority opinion) (first alteration in original) (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

36. *Id.*

37. *Id.* (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

38. This was not the first time the Supreme Court advanced such a view. See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("The fact that candidates and elected officials may alter . . . their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.")

39. *Citizens United*, 130 S. Ct. at 910–11 (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 555–57 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part)).

In short, political supporters may legitimately seek to win influence over elected officials through campaign contributions and expenditures, and elected officials may legitimately be responsive to these forms of support.⁴⁰ And while these responses may not assume the form of a *quid pro quo* exchange, if officials merely “succumb to improper influences from independent expenditures [or] surrender their best judgment [or] put expediency before principle” their conduct is not the sort of political corruption belonging to the anti-corruption rationale.⁴¹

All this sounded like so much hairsplitting. But the Court sought to support this conception of political corruption by relying on federal bribery laws, stating, as we saw, that corruption was limited to the practices “covered by bribery laws, see, *e.g.*, 18 U.S.C. § 201, if a *quid pro quo* arrangement were proved.”⁴² However, as we shall now see, the conception of political corruption reflected in that federal statute goes well beyond the *Citizens United* understanding of that concept.

B. Federal Bribery Laws and the Majority’s Definition of Political Corruption

18 U.S.C. § 201 divides into two main parts: one criminalizing “bribery” and the other criminalizing “gratuity.”⁴³ Committing gratuity does not require a *quid pro quo* (a requirement similarly omitted from many state bribery laws).⁴⁴ The statute’s conception of political corruption is therefore, by that fact alone, broader than the Court’s.⁴⁵

40. *Id.* at 910 (“[A] substantial and legitimate reason . . . to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.”).

41. *Id.* at 908–09, 911.

42. *Id.* at 908 (citing *Buckley v. Valeo*, 519 F.2d 821, 839–40 (D.C. Cir. 1975)).

43. Compare 18 U.S.C. § 201(b) (2006) (“Whoever . . . directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent . . . to influence any official act” (defining bribery)), with 18 U.S.C. § 201(c) (“Whoever . . . directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official” (defining gratuity)). Both sections contain equivalent provisions punishing the recipients of such gifts.

44. See generally Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 787 (1985) (“Most American bribery statutes and many of the judicial decisions interpreting them do not require a *quid pro quo* . . .”).

45. 18 U.S.C. § 201(c) makes it a felony for anyone to “directly or indirectly give[] . . . anything of value to any public official . . . for or because of any official act performed or to be performed by such [person].” 18 U.S.C. § 201(c)(1)(A) (emphasis added). As with the

Nevertheless, my discussion will deal exclusively with the bribery section since the applicability of the gratuity section to campaign finances—although upheld by courts⁴⁶—involves complicated definitional issues that are superfluous to our point.⁴⁷

The bribery section makes it a federal crime for any person or entity to “directly or indirectly, corruptly give[], offer[] or promise[] . . . anything of value to any public official . . . with intent . . . to influence any official act.”⁴⁸ An equivalent provision makes it a similar offense for a public official to “directly or indirectly, corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act.”⁴⁹ The elements of the crime therefore include:

- a public official;
- giving directly or indirectly;
- receiving or accepting;
- corruptly;
- anything of value;
- with intent to influence or be influenced in the performance of an official act.

Thus, 18 U.S.C. § 201(b) also does not require proof of a “*quid pro quo* arrangement,” and there is no reason why it could not be violated by means of a campaign expenditure.⁵⁰

bribery provisions, the gratuity provisions also provide for punishments for recipient public officials who “otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act.” *Id.* § 201(c)(1)(B). The Supreme Court did read the provision as requiring the Government to “prove a link between a thing of value conferred upon a public official and a specific ‘official act.’” *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999). Thus, giving merely with the intent to build a reservoir of goodwill, as yet unattached to any specific official act, would not do. But the Court explicitly recognized that no proof of a *quid pro quo* was necessary—there is no requirement of giving “*in exchange* for an official act.” *Id.* at 404–05. Evidence of intent to reward past or future favorable acts is sufficient to sustain a conviction. *See, e.g.*, *United States v. Ring*, 768 F. Supp. 2d 302, 310 (D.D.C. 2011). Since proof beyond a reasonable doubt of an explicit *quid pro quo* may be very difficult to obtain, the gratuity provision appears to function often as a fallback crime for typical bribery cases. *See, e.g.*, *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974).

46. *See, e.g.*, *Brewster*, 506 F.2d at 77; *United States v. Tomblin*, 46 F.3d 1369, 1381 (5th Cir. 1995).

47. *See generally* Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451 (1978).

48. 18 U.S.C. § 201(b)(1).

49. *Id.* § 201(b)(2).

50. *Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010).

First, the term “public official” is defined in the statute to include any “Member of Congress . . . either before or after such official has qualified.”⁵¹ Hence, the bribee may be a candidate running for office, whether incumbent or not.

Second, as the statutory language makes clear, there is no requirement that the bribe be given directly to the candidate: indirect giving suffices. Similarly, there is no requirement that the candidate affirmatively accept anything: the statutory language speaks of accepting *or receiving*, thereby allowing for the passive reception of a benefit.⁵² Accordingly, courts allowed prosecutions based on giving to third parties, so long as the intended bribee derived a benefit from the giving. In *United States v. Williams*, for example, a lobbyist for a poultry producer was charged with violating § 201 based, in part, on travel expenses and educational assistance given to the girlfriend of the Secretary of Agriculture.⁵³ Another case involved scholarships given to a congressman’s son.⁵⁴ Thus, one could “give” or “receive” a benefit not offered or accepted directly, and thus could give or receive a campaign expenditure as a bribe.

The requirement that the giving or receiving be done “corruptly” elicited the following remark from a scholar of bribery law:

Certainly the bribery statutes are intended to proscribe corrupt activity, but it is not easy to discern what, if anything, the concept of acting “corruptly” adds as an *element* of the crime of bribery. If the other elements are present, a public official is offered, seeks, or accepts an individual benefit that is intended to influence the re-

51. 18 U.S.C. § 201(a)(1).

52. *Id.* § 201(b)(2); *see, e.g.*, *United States v. Williams*, 7 F. Supp. 2d 40 (D.D.C. 1998), *vacated in part as moot by United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001); *United States v. McDade*, 827 F. Supp. 1153 (E.D. Pa. 1993), *aff’d in part, appeal dismissed in part*, 28 F.3d 283 (3d Cir. 1994).

53. *Williams*, 7 F. Supp. 2d at 43, 52 (“The indictment describes various interests of Tyson-Foods that were pending before USDA while Secretary Alphonso Michael (‘Mike’) Espy was Secretary of Agriculture and charges that gifts . . . were given to or for the benefit of the Secretary [and] his girlfriend [D]efendants argue . . . [that the] benefits must have been given *to* a covered official in order to be unlawful. . . . [However,] this indictment does not charge that defendants provided the Secretary with [gifts, but] . . . that they provided his girlfriend with travel expenses and educational assistance [T]he argument fails: . . . the indictment . . . sufficiently charges that the gifts were given ‘to’ the Secretary, at least as a matter of pleading. It is for the jury to determine whether Secretary Espy placed any value on the provision of gifts to his girlfriend.” (citation omitted)).

54. *See McDade*, 827 F. Supp. at 1174–75 (“Mr. McDade points out that the government charges that [a scholarship] was provided to his son, not to him. The government argues that the evidence will show that Mr. McDade benefitted personally from the scholarship The government has alleged that Mr. McDade received some sort of personal benefit from the scholarship. It will be up to the jury to determine whether he actually did.”).

ipient's official actions. What more is needed to make the offering, seeking, or accepting "corrupt"? . . . No judicial decision that I have found contains a definition or explanation of "corruptly" that adds significantly to the other elements of bribery⁵⁵

Indeed, federal courts have read the term "corruptly" not as a substantive requirement but as pertaining to the "degree of criminal knowledge and purpose" with which the giving or receiving must be done.⁵⁶ The crime of bribery is therefore one of specific rather than general intent.⁵⁷

It has been suggested that the "corruptly" requirement should function as a substantive limitation that denotes "being wrongful or contrary to the public interest."⁵⁸ Such an approach could, in theory, block the applicability of the statute to campaign expenditures. But this would be a big shift from the standing interpretation of the statute. And it is difficult to see why campaign expenditures could never function as a predicate for a bribery conviction, given the obvious intent to penalize the exchange of financial and political favors.

"Anything of value" is a phrase clearly meant to be read broadly, and courts have done so. "[T]he term 'thing of value' is to be broadly construed to encompass intangible benefits, so long as . . . the donee placed any value on the intangible gifts."⁵⁹ Thus, aiding a person in obtaining an elected office is certainly something "of value" under the statute.⁶⁰

Finally, the "official acts" intended to be influenced "are extremely broad in scope."⁶¹ Section 201(a) defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."⁶² Many actions

55. Lowenstein, *supra* note 44, at 798–99.

56. *See* *United States v. Brewster*, 506 F.2d 62, 71 (D.C. Cir. 1974); *United States v. Tomblin*, 46 F.3d 1369, 1380 (5th Cir. 1995).

57. *See Brewster*, 506 F.2d at 72.

58. Lowenstein, *supra* note 44, at 802.

59. *Williams*, 7 F. Supp. 2d at 52, *vacated in part as moot by Schaffer*, 240 F.3d 35; *see also* *United States v. Williams*, 705 F.2d 603, 622–23 (2d Cir. 1983); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979); *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986); *United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1262, 1269–70 (D.D.C. 1996), *rev'd*, 138 F.3d 961 (D.C. Cir. 1998).

60. *See, e.g., Gorman*, 807 F.2d at 1305 (noting that a promise of a job is a "thing of value" under the statute).

61. *See United States v. Parker*, 133 F.3d 322, 325–26 (5th Cir. 1998).

62. 18 U.S.C. § 201(a)(3) (2006).

undertaken by elected representatives, in legislative capacity and otherwise, qualify under this broad definition.⁶³

Campaign contributions have long formed the basis for prosecutions under the federal bribery statute.⁶⁴ Given the elements of the crime, there is no reason why independent campaign expenditures could not do the same. While the distinction between contributions and expenditures may be significant for some First Amendment purposes, it plays no role in the language, purpose, or judicial construction of this federal bribery law. Indeed, if given or received with the intent to influence a specific official act, both contributions and expenditures can equally corrupt good government. In fact, we should be particularly wary of bribes in the form of campaign expenditures since campaign finance laws regulate these to a far lesser degree on the assumption (correctly or wrongly) that they do not implicate serious bribery concerns.

Is the conception of political corruption reflected in the bribery statute too broad? After all, don't people make contributions and independent expenditures precisely in order to influence the performance of official acts? And then, how can we reconcile this bribery law with the recognition of the legitimacy of—indeed the constitutional protection for—making contributions and expenditures in support of political candidates?

It is true, of course, that all legitimate contributions and expenditures are made with the intent to influence official acts, but the statute, to be sure, does not penalize all such donations. The statute only forbids donations accompanied by the intent that they, themselves, would induce the bribee to take a specific official action. In other words, what is forbidden is the intent to produce a direct causal chain between the contribution or the expenditure, through the beneficiary's awareness of the gift, to the beneficiary's performance of a specific official act. Most contributions and expenditures are not accompanied by such nefarious intent. Rather, they are accompanied by an intent to influence official acts by way of getting one's preferred

63. See Lowenstein, *supra* note 44, at 828 (arguing that *granting access* may be an "official act" under the bribery statute) ("[A] legislator's time is so limited that the decision to listen to one person's arguments and information on an issue and not another's is itself an official action." (footnote omitted)).

64. *E.g.*, *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974); *United States v. Head*, 641 F.2d 174 (4th Cir. 1981); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982); see *United States v. Tomblin*, 46 F.3d 1369 (5th Cir. 1995).

candidate elected or, at most, by the intent to win the general good will of the beneficiary.⁶⁵

My point here is not to provide a comprehensive defense of the conception of political corruption reflected in the federal bribery statute—that would take a treatise in political theory. My purpose is limited to the claim that the statute and its scope represent a reasonable conception of corruption. And so it might be true, as one scholar had put it (speaking of both the federal and state bribery laws), that “[u]nder most bribery statutes as they have been interpreted by most courts, most *special interest* campaign contributions are bribes.”⁶⁶ But this should not necessarily undermine our faith in our bribery laws rather than our faith in our existing campaign finance practices.

The *Citizens United* decision, in any event, articulated a very different understanding of political corruption than the one appearing in the federal bribery statute. “It is well understood,” wrote Justice Kennedy for the majority (quoting his own partial dissent in *McConnell v. Federal Election Commission*), “that a substantial and legitimate reason . . . to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”⁶⁷ 18 U.S.C. § 201 is in direct tension with this facile grouping of voters and contributors.⁶⁸ The statute makes it a felony punishable by fifteen years in prison to give financial support with the intent that it would influence a specific official act, or to receive such support with the intent to respond with such official act.⁶⁹ At least in theory, our democracy is premised on responsiveness to voters, *not* to financial supporters—and a good thing it is too! What vision of democracy endorses the idea that “the candidate will respond by producing those political outcomes the [financial] supporter favors”?⁷⁰ That’s called plutocracy, not democracy. After all, there is no “one person—one vote” principle in the financial realm.

65. See Lowenstein, *supra* note 44, at 827 (“The most common assertion is that a contributor to a legislator seeks nothing more for the contribution than assured access to a legislator when important issues arise.”).

66. *Id.* at 828 (emphasis added).

67. *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by Citizens United*, 130 S. Ct. 876).

68. *Id.*

69. 18 U.S.C. § 201 (2006).

70. *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part), *overruled by Citizens United*, 130 S. Ct. 876).

Naturally, the Court did recognize a point where campaign support and official responsiveness become corrupt. But its distinction between corrupt and uncorrupt practices is intellectually and practically untenable. The Court believes it is perfectly legitimate—indeed a laudable aspect of democracy—for people or entities to provide candidates with financial support with the expectation that the candidate will *respond* by producing the political outcomes they desire.⁷¹ And the Court also believes that elected officials who “surrender their best judgment . . . and . . . put expediency before principle” in response to financial support are not necessarily corrupt.⁷² Such practices turn corrupt only in the presence of a “*quid pro quo* arrangement”⁷³—that is, an agreement to exchange money for a political act. In the absence of such “*quid pro quo* arrangements,” these practices are not instances of political corruption, and the Court therefore refuses to recognize any important government interest in preventing them. But why should it matter for campaign finance purposes whether an official act is a mere “surrender of judgment” in response to financial support or the result of an explicit exchange agreement? Insofar as democracy is concerned, there is no difference to be had here. Either way, money is allowed to exert power that it should not exert in a healthy democracy. (Or, put differently, if responsiveness to financial support is a laudable aspect of democracy, why is it a felony to engage in exchange agreements?) Moreover, the distinction makes little practical sense: What could the evidentiary difference between a *quid pro quo* arrangement and a mere “succumb[ing] to . . . influence” or “surrender of judgment” be? Since only the most crude or stupid need ever resort to an explicit verbal agreement (given that such verbalization would constitute all a prosecutor would need), such external manifestations are not likely to exist, or to ever be found even if they did.

Unlike the Court’s conception of political corruption, the federal bribery statute does not require proof of a “*quid pro quo* arrangement.” As a recent decision put it, the statute does not “require simultaneous proof of § 201(b)(1) [which penalizes the giving] and (b)(2) [which penalizes the receiving] [It] does not require proof of a ‘bribery agreement’”⁷⁴ Intent to influence or be influenced suffices.⁷⁵

71. *Id.* at 910.

72. *Id.* at 911.

73. *Id.* at 908.

74. *United States v. Ring*, 768 F. Supp. 2d 302, 308–09 (D.D.C. 2011).

75. This incompatibility may mean that, contrary to some federal circuit court decisions, *see, e.g.*, *United States v. Tomblin*, 46 F.3d 1369, 1380–81 (5th Cir. 1995); *United States v. Brewster*, 506 F.2d 62, 77 (D.D.C. 1974), the application of the statute to cam-

Bribery can be committed without an actual agreement by those who give—if they do so with the intent to influence an official act, or by those who receive—even if they do so merely with the intent to “succumb to influence or surrender their best judgment.”⁷⁶

In short, the claim that the government has a sufficiently important interest in combating exchanges backed by explicit arrangements, but not in combating exchanges that do not, makes little theoretical and practical sense and is incompatible with the federal bribery statute. Moreover, the claim is particularly weak given that the government’s anti-corruption interest is not limited to combating corruption but extends to combating the *appearance* of corruption even where no actual corruption exists.⁷⁷

Given these difficulties, it is not surprising that supporters of the *Citizens United* decision wish to put in some reassuring words. In his keynote address at this symposium, Mr. James Bopp—the lead counsel on *Citizens United* until it reached the Supreme Court—berated those willing to believe that their elected representatives would “sell their souls” (as he dramatically put it) to financial supporters.⁷⁸ The argument, apparently, is that political corruption from campaign support is not a serious concern, and therefore preventive measures restricting campaign expenditures (or perhaps contributions)⁷⁹ are unjustified given the price they exact from First Amendment freedoms.

For my part, I am less sanguine than Mr. Bopp about our elected representatives; but the argument is silly not solely for its sanctimoniousness but also for its bogus understanding of politics. After all, politicians are in the legitimate business of selling their principles: Politicians are *supposed* to bargain over their beliefs—when striking

paign spending may be declared unconstitutional—either as a matter of First Amendment jurisprudence or under the vagueness doctrine of the Due Process Clause. In the recent *Skilling v. United States*, the Court restricted the reach of another federal bribery statute by finding some of its applications to be unconstitutionally vague in violation of the Due Process clause. *Skilling v. United States*, 130 S. Ct. 2896 (2010). The *Skilling* opinion relied, in part, on the validity of § 201, stating that there is “no significant risk that the . . . [narrowed] statute, as we interpret it today, will be stretched out of shape . . . [since its] prohibition on bribes and kickbacks draws content . . . from federal statutes proscribing—and defining—similar crimes.” *Id.* at 2933. But as we now know, the Court is not as familiar with 18 U.S.C. § 201 as it may think.

76. *Citizens United*, 130 S. Ct. at 910–11.

77. *Id.* at 901.

78. James Bopp, Jr., Keynote Address at the University of San Francisco Law Review Symposium (Feb. 25, 2011), *available at* <http://www.ustream.tv/recorded/12935740>.

79. At least one federal district judge has already extended the *Citizens United* decision to the context of corporate contributions. *See United States v. Danielczyk*, 791 F. Supp. 2d 513 (E.D. Va. 2011).

legislative compromises, when abandoning positions that turn unpopular, when horse-trading legislative support, or when representing the interests of their constituencies. To claim that politicians would not compromise their principles in exchange for increased chances to win elections is not only to ignore human nature, it is also to ignore the essence of politics. At any rate, is there anything more un-American than suggesting we should simply rely on the integrity of our representatives? And isn't the First Amendment based on precisely the opposite creed?

II. Judicial Elections

The vision of democracy articulated in *Citizens United* is unpersuasive and disturbing. But there is even more cause for alarm: The decision, it seems, is equally applicable to judicial election campaigns. In other words, corporations and unions may have a First Amendment right to spend money from their general treasuries on electioneering communications in support of, or in opposition to, candidates running for judicial office.

At first blush, the application of *Citizens United* to judicial elections seems wholly unwarranted. After all, even if you think that politicians act legitimately when they “respond” to financial supporters, surely the same cannot be said about judges. Well, not so fast

To begin with, when given the chance to distance the *Citizens United* decision from judicial elections, the majority explicitly refused to do so.⁸⁰ The occasion arose when Justice Stevens, concerned with the implications of the decision, accused the majority of endangering the integrity of judicial elections and being inconsistent with *Caperton v. A. T. Massey Coal Co., Inc.*,⁸¹ decided a mere seven months earlier.⁸² In *Caperton*, the chief executive officer of a corporation whose case was pending before West Virginia's highest court spent three million dollars in support of a candidate running for a seat on that court.⁸³ The candidate won the election, and then refused to recuse himself when it came time to decide the case.⁸⁴ He proved the decisive vote in overturning a lower court ruling that had found the company liable for

80. *Citizens United*, 130 S. Ct. at 910.

81. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

82. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part).

83. *Caperton*, 129 S. Ct. at 2257.

84. *Id.* at 2257–58.

fifty million dollars.⁸⁵ The United States Supreme Court reversed, holding it was a due process violation for the judge to sit on a case involving his principal financial supporter.⁸⁶

Justice Stevens' dissent claimed that *Citizens United* flew in the face of *Caperton* since “[i]n *Caperton* . . . we accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption.”⁸⁷ Moreover, wrote Stevens, “the consequences of today’s holding will not be limited to the legislative or executive context [T]he Court today unleashes the floodgates of corporate and union general treasury spending in [judicial] races.”⁸⁸

Stevens’ prediction went uncontroverted. Instead of pointing to the obvious difference between legislative or executive elections and judicial elections, Justice Kennedy’s opinion simply responded that *Caperton* was about judicial recusal requirements, not about campaign finances regulations.⁸⁹

There is a reason why the Court’s conservative majority regards *Citizens United* as applicable to judicial elections. That reason was articulated in the 2002 case *Republican Party of Minnesota v. White*.⁹⁰ *White* involved a challenge to a Minnesota regulation that forbade judicial candidates from announcing their views “on disputed legal or political issues” during their election campaigns.⁹¹ This so-called Announce Clause therefore prohibited judicial candidates from running for judicial office on political platforms. Candidates were prohibited from campaigning for a seat on the bench by declaring, for example, that

85. *Id.* at 2258.

86. *Id.* at 2265, 2267.

87. *Citizens United*, 130 S. Ct. at 967 (Stevens, J., concurring in part and dissenting in part).

88. *Id.* at 968.

89. *Id.* at 910 (majority opinion) (quoting *Caperton*, 129 S. Ct. at 2263–64) (“*Caperton* held that a judge was required to recuse himself ‘when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.’ The remedy of recusal was based on a litigant’s due process right to a fair trial before an unbiased judge. *Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.” (citations omitted)).

90. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

91. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000), declared unconstitutional by *Republican Party of Minn.*, 536 U.S. 765. The regulation was borrowed from the 1972 Model Code of Judicial Conduct. See MODEL CODE OF JUDICIAL CONDUCT Canon 7(B) (1972).

banning same sex marriage was constitutional, or by staking a position on the constitutionality of abortion or gun control.

The Supreme Court, in another 5-4 conservative majority decision, ruled that the Clause violated the First Amendment. “If the State chooses to tap the energy and the legitimizing power of the democratic process,” said the Court, “it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”⁹² Campaigning judicial candidates could not be prohibited from announcing their controversial legal or political opinions.

Justice Ginsburg’s dissent, joined by three other justices, objected that judges should not be allowed to run political campaigns:

Judges . . . are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency . . . They must strive to do what is legally right, all the more so when the result is not the one “the home crowd” wants.⁹³

“Thus,” wrote Ginsburg, “the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public’s ability to choose agents who will act at its behest—does not carry over to campaigns for the bench.”⁹⁴

But the majority in *White* took issue with this characterization of the judicial role. “Justice Ginsburg,” said the opinion:

[G]reatly exaggerates the difference between judicial and legislative elections. She asserts that “the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public’s ability to choose agents who will act at its behest—does not carry over to campaigns for the bench.” This complete separation of the judiciary from the enterprise of “representative Government” might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to “make” common law, but they have the immense power to shape the States’ constitutions as well . . . Which is precisely why the election of state judges became popular.⁹⁵

Since judges “make law” (“In fact . . . judges . . . *often* ‘make law’”), they, like legislators, can be elected on the basis of their disputed po-

92. *Republican Party of Minn.*, 536 U.S. at 788 (alteration in original) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (internal quotation marks omitted).

93. *Id.* at 806 (Ginsburg, J., dissenting) (citing William H. Rehnquist, *Dedictory Address: Act Well Your Part: Therein All Honor Lies*, 7 *PEPP. L. REV.* 227, 229–30 (1980)).

94. *Id.*

95. *Id.* at 784 (majority opinion) (citation omitted).

litical or ideological beliefs.⁹⁶ Indeed according to the Court this is precisely what judicial elections are about: Ensuring the political or ideological accountability of law-making judges. In other words, “responsiveness” to campaign supporters is as much a feature of judicial elections as of political elections, and the political philosophy underlying the *Citizens United* decision may be equally applicable to judicial election campaigns.

The conservative majority in *White* included Chief Justice Rehnquist and Justice O’Connor, who were since replaced by Chief Justice Roberts and Justice Alito; but that change is not likely to make a difference in the Court’s position on the matter.⁹⁷ Roberts and Alito have shown what they think about judicial elections when they dissented in *Caperton*, where they believed it was perfectly constitutional for a judge to rule on a case involving his biggest financial supporter.⁹⁸

Conclusion

Citizens United was another manifestation of the deep rift within the Court over the role that money could play in representative democracy. For the dissent, a political system that allowed individuals or entities to gain exceptional influence over elected officials solely by virtue of spending money on their election campaigns was sufficiently suspicious to allow Congress to curb the electioneering communications of the wealthiest and most narrowly interested of those influence-seekers—corporations and unions.⁹⁹ For the majority, by contrast, gaining influence over elected officials by financially aiding

96. *Id.* at 784–85 n.12.

97. Justice O’Connor has since expressed public regret over her vote in the case. See Matthew Hirsch, *Swing Voter’s Lament: At Least One Case Still Bugs O’Connor*, LAW.COM (Nov. 8, 2006), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1162893919695>.

98. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009) (Roberts, C.J., dissenting).

99. In his dissenting opinion, Justice Stevens commented that:

Corporations, as a class, tend to be more attuned to the complexities of the legislative process and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes. Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and singleminded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.

Citizens United v. FEC, 130 S. Ct. 876, 965 (2010) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

their election campaigns was nothing short of democracy in action; and Congress' attempt to ban corporate and union electioneering communications went far beyond its power to battle *quid pro quo* bribery arrangements.¹⁰⁰

The debate between these different conceptions of political corruption has far reaching consequences to campaign finance regulations. Indeed, these conceptions pertain not only to campaign expenditures but also to campaign contributions: the narrower the Court's understanding of the anti-corruption interest, the smaller the government's ability to regulate *all* campaign finances. Objecting to the majority's narrow conception political corruption, this Article has argued that that conception is in tension with federal bribery laws and that it offers no meaningful distinction between political corruption and legitimate democratic "responsiveness" (as the majority put it).¹⁰¹

Unfortunately, this conception is part of a larger understanding of the relationship between money and politics that the Roberts Court has been busy implementing. In 2009, the Court reviewed a challenge to the so-called "Millionaire's Amendment,"¹⁰² a campaign finance provision that increased the amount of allowed contributions for a political candidate whose opponent spent more than \$350,000 from his personal funds.¹⁰³ The Court, with the same five-Justice majority of *Citizens United*, invalidated the provision after calling it a "penalty," a "potentially significant burden," and a "drag on First Amendment rights."¹⁰⁴ The partial dissent objected that far from being a "drag" or a "burden," the provision only *increased* First Amendment activity:

The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign. Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles And the self-funding candidate's ability to engage meaningfully in the political process is in no way undermined by this provision.¹⁰⁵

100. *Id.* at 908, 910 (majority opinion).

101. *Id.* at 910 (quoting *McConnell v. FEC*, 540 U.S. 90, 297 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by Citizens United*, 130 S. Ct. 876).

102. 2 U.S.C. §§ 441a-1(a)(1)(A)-(C), *invalidated by Davis v. FEC*, 554 U.S. 724 (2008).

103. *Davis*, 554 U.S. 724.

104. *Id.* at 739, 743-44.

105. *Id.* at 753-54 (Stevens, J., concurring in part and dissenting in part).

The point was well taken: It is difficult to see how the statute imposed a burden on the freedom of speech.

But the decision can be better understood if we see it as another manifestation of the *Citizens United* vision of democracy. After all, if campaign contributions and expenditures are constitutionally protected activities almost on par with voting, then the state may have no business putting its thumb on the financial scales so as to benefit, encumber, or equalize candidates' campaign finances. Indeed, in describing the challenge to the statute, the Court stated that:

[Section] 319(a) unconstitutionally burdens [Davis'] exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures that create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of Davis' own speech.¹⁰⁶

This conception of democracy was made even clearer in the post-*Citizens United* case *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, which involved Arizona's system of public financing for political campaigns.¹⁰⁷ The law at issue granted publicly funded candidates additional funds when certain spending thresholds were crossed by privately funded candidates or by outside groups making independent expenditures on their behalf.¹⁰⁸ Arguing before the Court, the attorney challenging the law claimed that the statute "turn[s] my speech into the vehicle by which my entire political message is undercut."¹⁰⁹ This argument does not describe any burden on candidates' freedom of speech but instead complains of government tampering with the expected impact of campaign finance spending. The Supreme Court agreed with the argument.¹¹⁰ The problem with the statute, said the Court, was that it made campaign spending by privately funded candidates "less effective": "[A]n advertisement . . . that goes without a response is often more effective than an advertisement that is directly controverted."¹¹¹ The Court invalidated the law.¹¹² An astute *New York Times* editorial described these arguments as the view that "what mat-

106. *Id.* at 736.

107. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

108. ARIZ. REV. STAT. ANN. § 16-952 (2006 & Supp. 2010), *declared unconstitutional by Ariz. Free Enter.*, 131 S. Ct. 2806 (2011).

109. Transcript of Oral Argument at 25, *Ariz. Free Enter. Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (No. 10-238), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-238.pdf.

110. *Ariz. Free Enter.*, 131 S. Ct. at 2828–29.

111. *Id.* at 2824.

112. *Id.* at 2828–29.

ters most for [campaign] money and speech is their ‘fair market’ impact.”¹¹³

This vision of democracy, which elevates the slogan “Money Talks” to the status of a constitutionally protected privilege, also lies at the foundation of the *Citizens United* decision. The Roberts Court seems bent on granting financial supporters a constitutional right to influence election campaigns in accordance with their financial prowess, free from government efforts to curb or mitigate or equalize their influence. Corporations and unions, with their big money reservoirs, get full participation rights, and the whole scheme is likely applicable to judicial elections as well. What a frightening constitutional vision! This is nothing less than the constitutionalization of political corruption.

113. Editorial, *Unfettered Money: There Is a High Cost to the Supreme Court’s Belief That Money Is, Literally, Speech*, N.Y. TIMES, Apr. 12, 2011, at A24 (alteration in original).