CITIZENS UNITED, STATES DIVIDED: EVIDENCE OF ELASTICITY IN INDEPENDENT EXPENDITURES

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ABSTRACT

What effect has *Citizens United v. FEC* had on independent spending in American politics? Previous attempts to answer this question have focused solely on federal elections where there is no baseline for comparing changes in spending behavior. We overcome this limitation by examining the effects of *Citizens United* as a natural experiment on the states. Before *Citizens United* about half of the states banned corporate independent expenditures and thus were "treated" by the Supreme Court's decision, which invalidated these state laws. We rely on recently released state-level data to compare spending in "treated" states to spending in the "control" states that have never banned corporate or union independent expenditures. We find that while independent expenditures increased in both treated and control states between 2006 and 2010, the increase was more than twice as large in the treated states and nearly all of the new money was funneled through nonprofit organizations and political committees where weak disclosure laws and practices protected the anonymity of the spenders. Finally, we observe that the increase in spending after *Citizens United* was not the product of fewer, larger expenditures as many scholars and pundits predicted, and we note that people were just as likely to make smaller expenditures (less than $400) after *Citizens United* as they were before. This finding is particularly striking because it cuts against the conventional wisdom of spending behavior and also challenges the logic of those who disagree with the most controversial element of the *Citizens United* decision – the rejection of political equality as a valid state interest.

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TABLE OF CONTENTS

INTRODUCTION

The United States Supreme Court opinion in *Citizens United v. FEC*[1] sparked a national conversation about campaign finance laws[2] that included a multitude of predictions about the decision's effect on political spending. Most

[1] 130 S.Ct. 876 (2010).

[2] In the 27 months following the decision, the Wall Street Journal, USA Today, and Washington Post ran a combined 787 stories that mentioned *Citizens United* (an average of one every three days per paper) while the New York Times ran an astonishing 1,100 stories mentioning *Citizens United* (an average of 1.3 articles per day). Stories include columns and opinion pieces but not blog posts and the numbers are based on authors' search of individual newspapers' online archives. The numbers for all four newspapers are:

Newspaper	# of articles about CU
New York Times:	1,100
Washington Post:	372
USA Today:	220
Wall Street Journal:	195

of the commentary and related scholarship about the decision correctly anticipated that election-related spending would increase post-*Citizens United*: during the 2012 federal election cycle independent spending related to all federal races exceeded $1 billion, which was 3.5 times more than spending in 2008 and 5.3 times more than spending in 2004.[3] Independent spending has, in fact, increased in every federal election cycle since 1996.[4] Pundits and scholars have sharply disagreed, however, whether the *type* of increased spending warrants caution and/or a legislative response.[5] To date, nearly all academic and popular commentary has focused on federal elections, which, as we discuss below, severely limits any causal inferences about the effect of *Citizens*

[3] Independent spending includes electioneering communications, independent expenditures and other non-candidate and non-party communications. *See* Center for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OpenSecrets.org (last accessed Jan. 7, 2013) *at* http://www.opensecrets.org/outsidespending.

[4] *Id*.

[5] Compare, for example, Fred Wertheimer, *Supreme Court Decision in Citizens United Case is Disaster for American People and Dark Day for the Court*, ACSBLOG (January 21, 2010) http://www.acslaw.org/acsblog/node/15151 ("The decision will unleash unprecedented amounts of corporate 'influence-seeking' money on our elections and created unprecedented opportunities for corporate 'influence-buying' corruption.") with Bradley A. Smith, *Pure Science Fiction*, USA TODAY, January 22, 2010, at 8A ("the various 'doomsday' scenarios being floated by critics of the decision claiming that corporations will dominate American politics with billions of dollars in expenditures, are pure science fiction.").

Other critical responses include Bob Kerrey, *The Senator From Exxon-Mobil?,* HUFFINGTON POST (January 21, 2010) http://www.huffingtonpost.com/bob-kerrey/the-senator-from-exxon-mo_b_431245.html ("With $85 billion in profits during the 2008 election, Exxon Mobil would have been able to fully fund over 65,000 winning campaigns for U.S. House or outspend every candidate by a factor of 90 to 1. That's a scary proposition when you consider the health of our planet is at stake."); Richard L. Hasen, Citizens United: *What Happens Next?,* HUFFINGTON POST (January 21, 2010) http://www.huffingtonpost.com/rick-hasen/icitizens-unitedi-what-ha_b_431696.html (outlining four potential legislative responses and one constitutional amendment in response to "a very bad day for American democracy.").

Examples of arguments that *Citizens United* warrants no concerns include Ilya Shapiro, *Supreme Court Ruling on Hillary Movie Heralds Freer Speech For All Of Us,* CATO@LIBERTYBLOG (January 21, 2010) http://www.cato-at-liberty.org/supreme-court-ruling-on-hillary-movie-heralds-freer-speech-for-all-of-us/ ("Today's ruling may well lead to more corporate and union election spending, but none of this money will go directly to candidates—so there is no possible corruption or even 'appearance of corruption.' It will go instead to spreading information about candidates and issues. Such increases in spending should be welcome because studies have shown that more spending—more political communications—leads to better-informed voters."); Kenneth P. Doyle, *Ban On Corporate, Union Campaign Money Swept Aside By 5-4 Supreme Court Decision*, BNA MONEY AND POLITICS REPORT (January 21, 2010) (quoting Joseph Sandler that "the impact of the Supreme Court ruling would be 'more marginal than cataclysmic' to the current campaign finance system.").

United on spending. As with any analysis of federal-level behavior, there is no "control" group against which to compare changes in spending behavior before and after an event. As a result, it is very difficult to ascertain whether changes in political spending after *Citizens United* are attributable to changes in the law or to other factors. In this Article we examine the effects of *Citizens United* as a natural experiment on the states. Before *Citizens United* about half of the states banned corporate independent expenditures and thus were "treated" by the Supreme Court's decision, which invalidated these state bans. By comparing spending in states affected by the decision to spending in states that were not affected by the decision, we provide the first systematic estimates of the effect of *Citizens United* on independent political spending.

We begin in Part I by retracing the steps that led to the Supreme Court's decision in January 2010. Originally a relatively trivial challenge about disclosure, the case ultimately invalidated well-established laws at the federal level and in 20 states. The public backlash to the Court's opinion was swift and the response was generally negative. Barely one week after the decision was announced, President Obama argued in his State of the Union address that the opinion had "open[ed] the floodgates" for spending "without limits in our elections."[6] This Article is motivated by the President's remarks and is organized around the simple empirical question whether *Citizens United* actually "opened the floodgates" of independent spending.

In Part II we present our empirical findings. Using recently-released data from a sample of 18 states—the universe of states for which data on independent expenditures are currently available—we address three questions related to spending before and after *Citizens United*: (1) has spending increased after the decision and, if so, by how much? (2) has the distribution of spending shifted toward corporate and/or union expenditures? and (3) are spending increases disproportionately driven by large expenditures?

To analyze the first question, we utilize a difference-in-differences model to parse out the extent to which *Citizens United*—as opposed to other factors—is responsible for changes in political spending. We find that independent expenditures increased in both treated and control states between 2006 and 2010, but that the increase was more than twice as large in the pool of treated states. A closer look at the data reveals that the increase in spending was driven almost exclusively by 501c nonprofit organizations and 527 political committees, so named because of the tax code under which they are organized. Information about the donors to these groups is unavailable, meaning that we cannot empirically verify whether corporations and/or unions funneled money

[6] Remarks by the President in State of the Union Address. Transcript *available at*: http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

to them. However, we know that the most substantive changes to campaign finance laws between 2006 and 2010 eliminated prohibitions on corporate and union political spending, specifically on spending for the type of activities (independent expenditures) that are often managed by advocacy organizations and groups with political advertising expertise. In light of these facts, we interpret these findings as evidence that corporations and unions increased their political spending in response to laws that permitted them to do just that. This conclusion is neither surprising nor controversial, and our analysis provides the first systematic estimate of the magnitude of the response—a 100% spending increase—as well as the mechanism—an almost exclusive reliance on 501c and 527 organizations.

Finally, we examine the distribution of independent expenditures and find that the spending increase in treated states is not driven by the largest expenditures (i.e. larger than $55,000); rather the effect is most pronounced in the center of the distribution (20th to 70th percentile)—expenditures ranging from $1,000 to about $40,000. This finding is particularly striking because it cuts against the conventional wisdom of spending behavior and raises questions about the states' equality interest, generally framed as a problem of disproportionate changes in the "tails" of the spending distribution, which we do not observe.

In Part III, we provide some context for our analysis and consider the implications of our findings. First, we note that independent expenditures represent a fraction of overall campaign dollars at both the state and federal level. Campaign finance is still dominated by direct contributions to candidates and *Citizens United* did not change the rules governing contributions. Second, we note a disconnect between the political system that the Court envisions and the political system that actually exists. This disconnect, we argue, has transformed the judicial philosophy of "deregulate and disclose" into "cutback and conceal." As more and more political spending goes underground—40% of all outside federal spending in 2010 was by groups that do not disclosure their donors—it becomes increasingly difficult to measure the effects of campaign finance laws on the political process. Finally, we discuss the Supreme Court's decision to create a legal rule that defines away the risk of independent expenditures. In *Citizens United* the Court admits that it does not care whether independent expenditures <u>actually</u> corrupt the political process because, in the Court's view, independent expenditures <u>cannot</u> corrupt as a matter of law, any evidence to the contrary notwithstanding. We strongly disagree with the Court's reliance on this legal fiction. It is a blunt instrument for judging regulations of the political process. This is particularly true in cases that impact state campaign finance laws such as *Citizens United*. States have unique histories—unique from each other and unique from the

federal experience—and each has a different set of laws passed at different times for different reasons. Indeed, when the state of Montana produced evidence of a long history of *quid pro quo* corruption to justify its state law, the Supreme Court dismissed the case without a hearing. The Court's indifference to the empirical record in that case, as well as its general aversion to as-applied challenges and narrowing of acceptable evidence in campaign finance cases is, in our view, both short-sighted and imprudent.

I. CITIZENS UNITED

A. Background

The Supreme Court's sweeping decision in *Citizens United v. FEC* culminated a controversial case that was initially motivated by a very modest challenge. *Citizens United* is perhaps best known for extending First Amendment protections to the political speech of corporations. Yet the case had almost nothing to do with corporations or corporate identity. The opinion also reaffirmed the proposition, first articulated in *Buckley v. Valeo*,[7] that independent expenditures cannot corrupt the political process. Yet the legal challenge in *Citizens United* was not about independent expenditures (which are made independent of the campaign and advocate the election or defeat of a candidate), nor was it about alleged corruption or appearance of corruption. The plaintiff, a conservative nonprofit advocacy organization called Citizens United, wanted to broadcast a series of television commercials to promote a new political documentary it had produced and did not want to disclose the donors who funded the film or the television advertisements.

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA")[8] to regulate "sham issue ads," which are advertisements that look like a public service announcement about a political or social issue but that are intended to persuade listeners to vote for or against a particular candidate. As part of BCRA, Congress coined a term – "electioneering communication" – to precisely define the kind of ads that would be subject to regulations under the new law. As defined in the Act, an electioneering communication is (1) a broadcast ad on television or radio that (2) refers to a federal candidate that (3) airs within 30 days of a primary election or 60 days of a general election, and

[7] 424 U.S. 1, 45 (1976) ("We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [FECA] §608(e)(1)'s ceiling on independent expenditures.")

[8] Public Law No. 107-155.

that (4) reaches an audience of 50,000 or more.[9] This statutory creation was Congress's response to the Supreme Court's ruling in *Buckley* that any regulation of expenditures for ads that did not *expressly* advocate a candidate's election or defeat risked being void for vagueness.[10] Congress' bright-line definition of "electioneering communications" responded directly to the Court's concern about vagueness. Under BCRA, electioneering communications (i.e., clearly-defined ads that do not *expressly* advocate the election or defeat of a candidate) were subject to several regulations including, but not limited to:

1. **Disclosure** rules for identifying donors;[11]
2. A **disclaimer** requirement (e.g., "_____ is responsible for the content of this advertisement")[12] and;
3. A **prohibition** against corporations and unions from using general treasury funds to make electioneering communications.[13]

As the 2008 presidential primary heated up, Citizens United produced a documentary film about Hillary Clinton as well as several television spots advertising the film. Citizens United understood that the television commercials it wanted to air met the statutory definition of electioneering communications: they would be broadcast on TV, refer to a federal candidate without expressly advocating her defeat, air 30 days before the 2008 primary, and reach 50,000 or more households. Furthermore, among Citizens United long list of donors that had contributed more than $1 million to fund the film and its advertisements were two for-profit corporations that contributed a combined amount of $2,000 to the project.[14] Although BCRA prohibited all

[9] 2 U.S.C. 434(f)(3).

[10] *Buckley*, *supra* note 7 at 44.

[11] BCRA § 201, as codified in 2 U.S.C. §434(f).

[12] BCRA § 311, as codified in 2 U.S.C. §441(d)(2).

[13] BCRA § 203, as codified in 2. U.S.C. §441(b).

[14] Citizens United reported that it collected $1.2 million for the production and distribution of the film. *See* Brief for Appellant at 33, Citizens United v. FEC, 558 U.S. 50 (2010) (No. 08-205), *available at*: http://www.fec.gov/law/litigation/cu_sc08_cu_brief.pdf. Among its donors, Citizens United only refers to its "large donors," or those that gave at least $1,000 aggregate to Citizens United. It is possible the amount of corporate money backing the film was higher, contributed in small amounts (less than $1,000) by many corporations, though Citizens United only references the $2,000 figure in its briefs.

By accepting corporate contributions, Citizens United was not eligible for a "qualified nonprofit" exemption that the Court recognized in *FEC v. Mass. Citizens for Life*, 479 U.S.

electioneering communications created with corporate general treasury dollars, the Supreme Court had carved out an exemption in a 2007 case *Wisconsin Right to Life v. FEC* ("WRTL II").[15] Wisconsin Right to Life was a conservative nonprofit advocacy organization that, like Citizens United, accepted contributions from corporations and wanted to run television and radio advertisements that met the statutory definition of electioneering communications (they urged listeners to contact their Senators and ask them to stop filibustering President Bush's judicial nominees, but they did not urge listeners to vote against the Senators). Prior to 2007, BCRA §203 prohibited these advertisements from being broadcast because of the corporate dollars used to fund them. The Supreme Court had already upheld §203 against a facial challenge in 2003,[16] but the Court had held open the door for as-applied challenges, and Wisconsin Right to Life obliged in 2006.[17] The Supreme Court ultimately accepted Wisconsin Right to Life's argument that the definition for "electioneering communications" was overbroad.[18] In the Court's opinion, a ban on corporate and/or union expenditures is constitutional (per *Buckley*) when the expenditures expressly advocate the election or defeat of a clearly identified candidate. When there is no express advocacy, the constitutionality of a ban on corporate and/or union expenditures depends on whether the Court interprets the expenditure as a "genuine" issue ad or as a "sham" issue ad. In

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238 (1986) ("MCFL"). In order to qualify as an "MCFL corporation," and thus be exempt from regulation by the FEC, a nonprofit must (1) "be formed for the express purpose of promoting political ideas, and cannot engage in business activities" *Id.* at 264; (2) "ha[ve] no shareholders or other persons affiliated so as to have a claim on its assets or earnings," *Id*.; and (3) not be "established by a business corporation or a labor union" or "accept contributions from such entities," *Id*. The Court's reasoning for exempting MCFL organizations is that they pose no risk for corrupting the political process. "MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *Id*. at 259. *See also* 11 C.F.R. § 114.10.

In his *Citizens United* dissent, Justice Stevens argued that one possible (and narrower) solution to the case would have been "expand[ing] the *MCFL* exemption to cover *§ 501(c)(4)* nonprofits that accept only a *de minimis* amount of money from for-profit corporations. Citizens United professes to be such a group." 130 S. Ct. at 937. See text accompanying note 54.

[15] 551 U.S. 449.

[16] McConnell v. FEC, 540 U.S. 93 (2003).

[17] Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410 (2006 (per curiam) ("In upholding §203 against a facial challenge [in *McConnell*], we did not purport to resolve future as-applied challenges" at 411-12.).

[18] *Id.*

the case of genuine issue ads, a ban would be unconstitutional. In the case of a sham issue ad (what the court referred to as an advertisement that is "the functional equivalent of express advocacy") a ban on corporate and/or union expenditures would be constitutional.[19] In *WRTL II*, the Court established a standard for determining whether an advertisement is the functional equivalent of express advocacy: "only if the ad is susceptible of *no reasonable interpretation other than* as an appeal to vote for or against a specific candidate."[20] In the case of Wisconsin Right to Life's ads about the filibuster, the Court held that they "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, … they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell's* holding."[21]

Citizens United believed, correctly, that its ads could reasonably be interpreted as something other than an appeal to vote against Hillary Clinton; namely that they promoted a commercial product (the documentary film). Thus, Citizens United's motion for preliminary injunction did not mention §203 but took for granted that the ads could air under a *WRTL II* exemption. The goal of the preliminary injunction was to extend the *WRTL II* exemption to other provisions of BCRA, specifically §§201 and 311.[22] Section 201 would require Citizens United to disclose the "name and address of each donor who donated an amount aggregating $1,000 or more."[23] Citizens United argued that this disclosure requirement would put its donors in a position to suffer retaliation by political opponents.[24] Section 311 would require that each

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[19] "Resolving [this case] requires us first to determine whether the speech at issue is the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office, or instead a "genuine issue ad." *Id.* at 451 (citations omitted). "We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy." *Id.* at 452.

[20] *Id.* at 465 (emphasis added).

[21] *Id.* at 471.

[22] Citizens United's original prayer for relief was (1) "a declaratory judgment declaring BCRA §§ 201 and 311 unconstitutional as applied to (a) communications that may not be prohibited as electioneering communications under *WRTL II*, and (b) Citizens United's ads. (2) a preliminary and permanent injunction enjoining the FEC from enforcing BCRA §§ 201 and 311 as applied to (a) communications that may not be prohibited as electioneering communications under *WRTL II*, 127 S. Ct. 2652, and (b) Citizens United's ads." Verified Complaint for Declaratory and Injunctive Relief (December 2007), *available at*: http://fec.gov/law/litigation/citizens_united_complaint.pdf.

[23] 2 U.S.C. 434(f), *supra* note 11.

[24] Memorandum in Support of Preliminary Injunction Motion, Citizens United v. FEC, Civ. No. 07-2240 (D.D.C. 2007) at 8. *Available at*: http://www.fec.gov/law/litigation/

advertisement include a four-second disclaimer that "Citizens United is responsible for the content of this ad" where the disclaimer appears in a "clearly readable manner," or is "conveyed by an unobscured, full-screen view of a representative" from the sponsoring organization.[25] Citizens United planned to air two 10-second ads and one 30-second ad and it argued that the four-second disclaimer would ruin the 10-second ads and prevent the 30-second ad from communicating a substantive message.[26]

Citizens United's motion had clear practical goals: get its advertisements on television without a costly four-second disclaimer and without the need to disclose the identity of donors who presumably wanted to remain anonymous. However, it is clear that Citizens United had jurisprudential goals as well. As one of the original plaintiffs in the inaugural constitutional challenge to BCRA (consolidated with 10 other challenges as *McConnell v. FEC*)[27], Citizens United signaled that it did not agree with the trajectory of American campaign finance reform and that it was willing to take action to limit the effects of new regulations, specifically regulations that targeted expenditures.[28] However grand its ambitions, Citizens United's complaint was admittedly an incremental challenge that, at best, would chip away the scope of two provisions of a five-year-old law. A promising, though ultimately not very successful, business opportunity changed everything.

On the same day that Citizens United filed its initial motion for preliminary injunction, a national media consortium offered Citizens United a four-month Video on Demand (VOD) contract that would make its documentary film available to 32 million households nationwide for a fee of

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citizens_united_cu_motion_memo_supp_pi.pdf.

[25] 2 U.S.C. § 441(d)(2), *supra* note 12.

[26] PI Memo, *supra* note 24 at 6.

[27] 540 U.S. 93 (2003). Citizens United and its PAC, Citizens United Political Victory Fund, joined Congressman Ron Paul, the Gun Owners of America and its PAC, RealCampaignReform.org, and two Libertarian candidates for office in Massachusetts as plaintiffs challenging the constitutionality of BCRA on the grounds that it violates the First Amendment's guarantee of a free press. *See* Paul, United States Congressman, et al. v. FEC, et al., No. 02-1753.

[28] In 2004 Citizens United's President, David Bossie, formally submitted Comments to the FEC in response to proposed changes to the definition of "expenditure" strongly opposing "any changes to the Commission's rules that would broaden the definition of 'expenditure' … to encompass activities that fall short of express advocacy of the election or defeat of clearly identified federal candidates." *See* Comments of Citizens United Regarding Proposed Changes To the Definitions of "Expenditure," "Contribution," and "Political Committee" (FEC Notice 2004-6), April 5, 2004, *available at:* http://www.fec.gov/pdf/nprm/political_comm_status/boss.pdf.

$1.2 million.[29] With this offer on the table, the film itself became a potential electioneering communication. Citizens United recognized that the film, unlike the film's advertisement, might not qualify for a *WRTL II* exemption. With repeated direct attacks on Hillary Clinton's character and fitness for office, Citizens United feared that a court might interpret the film as the functional equivalent of express advocacy. Thus, Citizens United immediately amended its complaint to include an as-applied challenge to BCRA §203, hoping a *WRTL II* exemption for the documentary film would permit its broadcast on demand.[30] This amendment ultimately proved key to Citizens United's success. Though the VOD offer was never particularly lucrative,[31] Citizens United's constitutional challenge of §203 was the first of two gateways whose openings permitted the Supreme Court to significantly restrict BCRA's reach, and to overturn 22 years of precedent in the process.

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[29] Plaintiff's Summary Judgment Motion, Citizens United v. FEC, No. 07-2240 (May 16, 2008) *at*: http://fec.gov/law/litigation/cu_cu_mot_sj.pdf.

The national conglomerate, National Cable Communications (NCC) Media, is an advertising and marketing agency that develops media plans for clients that want to advertise on television, cable, satellite, and online. The agency is "jointly owned by three of the nation's largest cable system operators—Comcast, Cox Communications, Time Warner Cable—and represents virtually every other TV service provider in the country." *See* "Owners and Affiliates" at http://nccmedia.com/about/owners-affiliates.

[30] Citizens United legal strategy was almost entirely focused on *WRTL II*. Consider that *WRTL II* was invoked 134 times in Citizens United's original 38-page motion for preliminary injunction (on average 3.5 times per page), and 66 times in the 16-page amendment (on average 4.1 times per page).

[31] In its first 8 months, the "Election '08" on-demand channel on which *Hillary: The Movie* would have aired, just 500,000 segments split between all of the available programs and ads had been viewed. With more than 11 available ads and films on the "Election '08" station, each would have been viewed (on average) by less than 50,000 people, thus falling short of the statutory requirement for definition as an electioneering communication. As reported in the New York Times, "Neither traffic nor advertising on the election channel has been particularly strong." Stephanie Clifford, *Cable, Quietly, Introduces an Anytime Elections Channel*, N.Y. TIMES, Aug. 28, 2008, at C7. Citizens United had offered a similar, yet different explanation for why video-on-demand failed to meet the statutory definition of electioneering communication. "Because, unlike a broadcast, [video-on-demand] is sent only to the requesting converter box (as opposed to a geographic area), a Video On Demand transmission will generally be viewed only by the members of the household who requested the Video On Demand program. Unless the recipient converter box is located in a sold-out football stadium, the transmission will not be able to be viewed by 50,000 people." Brief for Appellant at 26 (n. 2), Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205).

B. In the Courts

A three-judge panel of the District Court for the District of Columbia unanimously denied Citizens United's motion for preliminary injunction.[32] The District Court determined that the documentary film was the functional equivalent of express advocacy because it "is 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."[33] Thus, the District Court concluded that Citizens United did not have a substantial likelihood of success on the merits. Note the court took for granted that VOD technology was covered by the definition of electioneering communication, pointing to an FEC Advisory Opinion in the footnotes.[34] Regarding the disclosure and disclaimer requirements, the District Court agreed with Citizens United that the advertisements were *not* the functional equivalent of express advocacy, but merely electioneering communications. However, the Court disagreed with Citizens United's interpretation that *WRTL II* protects electioneering communications against *any regulation*. The District Court did not believe that *WRTL II* went that far. "The only issue in [*WRTL II*] was whether speech that did not constitute the functional equivalent of express advocacy could be *banned* during the relevant pre-election period."[35]

Citizens United appealed this decision to the Supreme Court, but the Supreme Court dismissed the appeal for want of jurisdiction.[36] The parties

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[32] BCRA included a provision (§403) that set forth a jurisdictional process where initial actions are heard by a three-judge panel of the District Court for the District of Columbia, and appeals are made directly to the Supreme Court.

[33] Memorandum Opinion denying Citizens United's Motion for Preliminary Injunction, No. 07-2240, at 8. *Available at*: http://www.fec.gov/law/litigation/citizens_united_memo_opinion_pi.pdf.

[34] *Id.* at note 6, which reads: "The parties did not raise the issue of whether VOD was within the definition of "electioneering communication." However, a broadly worded FEC regulation defining "electioneering communications" indicates that VOD would be a "broadcast, cable, or satellite communication" because it is "disseminated through the facilities of a . . . cable television system." *See* 11 C.F.R. §§ 100.29(b)(1), (b)(3)(i) (indicating that "broadcast, cable, or satellite communications" include communications "aired, broadcast cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system") Though see *supra note* 31.

[35] *Id.* at 11 (emphasis added).

[36] BCRA §403(a)(3) states that a "final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States." The denial of a motion for preliminary injunction was not considered a "final decision" for purposes of appeal.

subsequently filed cross motions for summary judgment and the District Court granted the FEC's motion. Citizens United appealed once more.

By the time the parties reached the Supreme Court for the second time, Citizens United had replaced their lead attorney Jim Bopp (who had successfully litigated the *WRTL II* case two years earlier) with former Solicitor General Ted Olson who is a luminary litigator in his own right. This personnel change immediately wrought changes to Citizens United's arguments. Gone were the platitudes[37] and the strict reliance on *WRTL II*.[38] In their place were more direct challenges to the law and a more aggressive assault on the constitutionality of BCRA. Consider, for example, the first question presented in Olson's brief:

> "Whether the prohibition on corporate electioneering communications in BCRA can constitutionally be applied to a feature-length documentary film about political candidate funded almost exclusively through non-corporate donations and made available to digital cable subscribers through Video on Demand?"

This question raised issues that had not yet been considered, or fully fleshed out by either party or any court. For example, was §203 systematically overbroad because it encompasses expenditures where corporate involvement is *trivial*? If so, perhaps the Court should reconsider a facial challenge to the law. Is there something special about Video on Demand technology that makes it anomalous to §203? If so, perhaps the case can be resolved on narrow grounds. Olson also confronted *Austin v. Michigan Chamber of Commerce*[39] for the first time; the controlling precedent for corporate and union bans on independent expenditures that *expressly* advocate the election or defeat of a

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[37] In each of his briefs, Bopp had framed his arguments around the idea that "campaign finance laws may only regulate communications that are 'unambiguously related to the campaign of a particular federal candidate.'" *Buckley*, *supra* note 7, at 80 (1976). In his briefs for *WRTL II* a few years earlier, Bopp had rhetorically set the stakes as high as possible by introducing his argument with the following statement:

> "The deep roots of this case lie not in the Bipartisan Campaign Reform Act of 2002, the Federal Election Campaign Act of 1971, the Taft-Hartley Act of 1947, the Tillman Act of 1907, nor even the First Amendment, but in the struggle of the Anglo-American people to (a) establish themselves as sovereign and (b) curb the power of government officials to prevent the people from criticizing official actions." Brief for Appellee WRTL, Nos. 06-969 & 06-970 (March 2007).

[38] *See supra* note 30.

[39] 494 U.S. 652 (1990).

candidate. Until Olson's brief, both parties had taken corporate and union bans on express advocacy for granted. Olson, for his part, did not equivocate: "Austin was wrongly decided and should be overruled because it is flatly at odds with the well-established principle that First Amendment protection does not depend on the identity of the speaker."[40]

These novel arguments were not lost on the FEC. Responding to the possibility of a facial challenge on §203, the government pointed out that "although appellant previously sought to have BCRA Section 203 declared facially unconstitutional, it later abandoned that claim, and the district court ultimately ordered dismissal of the relevant count pursuant to the parties' stipulation."[41] Regarding the petition to overturn *Austin*, the government argued that "Appellant presents no basis for overruling this court's decision in *Austin*" and that in any case, "Appellant's argument is not properly before the Court."[42]

Posturing aside, both parties understood that this was primarily a case about the definition and breadth of electioneering communications. Did the documentary film qualify for a *WRTL II* exemption as an electioneering communication? Do *WRTL II* exemptions extend to additional provisions of BCRA that regulate electioneering communications (e.g., disclosure and disclaimer requirements)? Both parties addressed these questions in great depth: in Olson's 37-page brief, he refers to electioneering communications 78 times; the government's 55-page brief had 46 references to electioneering communications.[43]

The primacy of electioneering communications in the case evaporated at oral argument in about one minute. In the space of 62 seconds, Deputy Solicitor General (DSG) Malcolm Stewart, responding to a query by Justice Alito, argued that regulations on electioneering communications would be constitutional, even beyond the statutory limitation of electioneering

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[40] Brief for Appellant at 13-14, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205). *See also Id.* at 30.

[41] Brief for Appellee at 33. Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205) (internal citations omitted).

[42] *Id*.

[43] Compare these numbers to the number of references to independent expenditures or express advocacy. Citizens United's brief mentioned independent expenditures 10 times and express advocacy 2 times. The government's brief mentioned independent expenditures just 9 times. This is worth noting, given that the eventual holding changed regulation of independent expenditures. As a reminder to the reader, independent expenditures advocate election or defeat of a candidate. Electioneering communications do not.

communications to "broadcast, cable, and satellite communications."[44] DSG Stewart suggested that the Constitution does not prohibit the government from banning corporate electioneering communications on other media, such as books, so long as the electioneering communications were the functional equivalence of express advocacy. This idea elicited spirited responses from Justices Alito, Roberts, and Kennedy with Justice Alito pointing out that "most publishers are corporations."[45] In defense of his argument, DSG Stewart offered a reminder that proved key in broadening the scope of the ultimate decision. He said

> "And it's worth remembering the preexisting Federal Election Campaign Act restrictions on corporate electioneering which have been limited by this Court's decisions to express advocacy."[46]

The comment ultimately paved the way for the Court to reevaluate its decisions regarding the regulation of express advocacy. And reevaluate these decisions it did. On the last day of the 2009 term, the Court announced that they would rehear arguments in the case. In this relatively rare announcement,[47] the Court directed both parties to file supplemental briefs and address the following question:

> "For the proper disposition of this case, should the Court overrule either or both *Austin*, and the part of *McConnell*, which addresses the facial validity of Section 203 of BCRA, 2 U.S.C. §441(b)."[48]

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[44] Audio of the oral argument is *available at*: http://www.oyez.org/cases/2000-2009/2008/2008_08_205. The referenced exchange happens from 29:03 to 30:05.

[45] *Id.*

[46] *Citizens United*, *supra* note 1, transcript of oral argument (No. 08-205) at 27 online, *at*: http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

[47] Between 1946 and 2010, the Supreme Court called for reargument in just 2.3% of its cases (172 of 8,330). *See* Harold Spaeth, et al. *The Supreme Court Database, at* http://scdb.wustl.edu/index.php (we tabulated the number of cases in the subset of "Cases Organized by Supreme Court Citation" with an entry in the vector "dateRearg"). *See also* Valerie Hoekstra and Timothy Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Reargument*s, 56 POL. RES. Q. 351 (2003) (pointing out that many of the Supreme Court's most famous cases, including *Brown v. Board of Education* and *Roe v. Wade* were decided after postponements for reargument).

[48] Order in Pending Case, Citizens United v. FEC, No. 08-250 (June 29, 2009) (internal citations omitted), *at*: http://www.fec.gov/law/litigation/citizens_united_sc_08_order_rearg.pdf.

With that, the case took on an entirely new mandate. Instead of clarifying the relationship between BCRA and *WRTL II*, the Court announced that it would revisit more than 20 years of established campaign finance precedent. Both parties responded with force in their briefs. Scattered through its arguments, the government traced the long history of well-accepted regulations on the political behavior of corporations and unions, from the Tillman Act's 1907 ban on direct contributions to candidates and Taft-Hartley's 1947 ban on corporate and union independent expenditures, to the fact that 22 states passed bans on corporate independent expenditures throughout the 20th century.[49] Citizens United smelled blood. Twenty pages of the 23-page brief were devoted to *Austin*, the bigger prize. Citizens United painted *Austin* as an outlier[50] from the trajectory of campaign finance jurisprudence that started in *Buckley*[51] and spelled out the weaknesses inherent in the "antidistortion" and "equality" rationales that motivated *Austin*.[52]

The longer Citizens United kept its case in front of the Court the less it resembled anything close to its initial complaint. Perhaps sensing this transfiguration during the oral reargument, Justice Sotomayor remarked, "wouldn't we be doing some more harm than good by a broad ruling in a case that doesn't involve more business corporations and actually doesn't even involve the traditional nonprofit organization?"[53]

Ultimately, the Supreme Court decided that it would not do more harm than good to issue a broad ruling in the case. Pushing to the side more narrow

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[49] Supplemental Brief for the Appellee, *Citizens United v. FEC* 558 U.S. 50 (2010), *available at*: http://www.fec.gov/law/litigation/citizens_united_sc_08_fec_supp_brief.pdf.

[50] *See* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, *supra* note 55. Hasen points to C.J. Robert's opinion that portrays *Citizens United* as a doctrinally unifying opinion, restoring coherence to campaign finance law by invalidating the "outlier" *Austin* case. Hasen argues that the decision merely created an *illusion* of coherence "because it is unlikely that the Court will follow [*Citizens United*] to its extreme, for example to allow spending by foreign nationals to influence candidate elections, to treat spending in judicial elections the same way as spending for other races, or to strike down reasonable limits on campaign contributions made directly to candidates." *Id.* at 585.

[51] Supplemental Brief for the Appellant, *Citizens United v. FEC*, 558 U.S. 50 (2010) ("*Austin* was a poorly reasoned departure from *Buckley,*" at 5 and "*Austin* is simply a jurisprudential outlier", at 10.), *available at*: http://electionlawblog.org/archives/Citizens %20United--Supplemental%20Brief.pdf.

[52] *Id.* at 15-21.

[53] *Citizens United*, 558 U.S. 50 (2010), transcript of oral argument (rehearing) (No. 08-205) at 33-34 online, *available at* http://www.supremecourt.gov/oral_arguments/argument _transcripts/08-205%5BReargued%5D.pdf.

constructions of constitutionality and statutory interpretation[54] the Court, in a 5-4 decision, held that Citizens United's documentary film, though clearly the functional equivalent of express advocacy, should be permitted to be broadcast On Demand because the federal provision banning corporate and union independent expenditures on express advocacy (2 U.S.C. §441b) violated the First Amendment.[55] Section 441b was a creature of the 1974 amendments of the Federal Election Campaign Act (FECA) and had been specifically upheld against a constitutional challenge in *Austin*.[56] Section 441b was amended by BCRA §203 to include electioneering communications as well. The Court invalidated the *entire* section, incorporating corporate and union bans on both electioneering communications and independent expenditures.[57]

On the question whether the *WRTL II* exemption extended beyond corporate and union spending bans (i.e., Citizens United's original complaint), the Court said no. By a margin of 8-1, the Court upheld BCRA's disclosure and disclaimer requirements as applied to *any* electioneering communication whether the functional equivalent of express advocacy or not.

C. The Aftermath

Like the many legal analysts that would later comment on the outcome of the case, the Supreme Court justices had almost no idea what the practical

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[54] 130 S.Ct. at 937 (J. Stevens dissenting) ("First, the Court could have ruled that, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an "electioneering communication" under §203 of BCRA…Second, the Court could have expanded the *MCFL* exemption to cover 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations…Finally, let us not forget Citizens United's as-applied constitutional challenge.").

[55] As Rick Hasen points out, there is some irony that Roberts so easily applied the "functional equivalence" test of *WRTL II*, though one of his primary complaints in his *WRTL II* dissent was the unworkable standard for determining functional equivalence. *See* Richard L. Hasen, Citizens United *And The Illusion Of Coherence*, 109 MICH. L. REV. 581 (2011) (n. 80).

[56] Before *Austin* the Court had explicitly upheld the corporate ban on independent expenditures (i.e. electioneering that expressly advocates the election or defeat of a candidate) in 2 U.S.C. §441(b) in *Buckley v. Valeo*, 424 U.S. 1 (1976). In addition, the Court had implicitly upheld the corporate ban in several other cases; for example, *FEC v. Mass. Cit. for Life*, 479 U.S. 238 (1986), *McConnell v. FEC*, 540 U.S. 93 (2003) and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("WRTL II").

[57] Citizens United's complaint against §203 (and later §441b) concerned corporate funding directly and not unions. However, both §203 more narrowly and §441b more generally applied equally to corporations and unions. Because the Court did not distinguish corporations from unions but ruled the entirety of §441b as unconstitutional, the holding applies to unions as well.

implications of their decision would be. They understood very well the legal implications of overturning 20 years of precedent and they could almost certainly predict how the political spin-doctors would portray their decision. But it is unlikely that they understood the impact of their decision on incumbency rates, on the composition of candidate pools, on political participation, or on the behavior of corporations and unions. Commentators and scholars were quick to make their predictions.

Less than one week after the *Citizens United* decision was announced, President Barack Obama addressed the decision during his State of the Union. With six of the nine justices sitting a few feet away, the President accused them of "revers[ing] a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[58] He concluded his attack by arguing that American elections should not be "bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people."[59] These American people, as it turned out, were also disappointed by the decision. Less than three weeks after the ruling, 80% of respondents to a Washington Post/ABC News survey said they were opposed to the decision (with 65% expressing "strong" opposition).[60] This negative opinion was shared by Democrats (85%), Republicans (76%), and Independents (81%) alike. As recently as January 2012 (the two-year anniversary of *Citizens United*) the Pew Research Center reported that 65% of respondents to their nationwide poll who had heard about *Citizens United* said the opinion was having a negative impact on the 2012 presidential election.[61]

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[58] Remarks by the President in State of the Union Address. Transcript *available at*: http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

This statement elicited one of the great Freudian slips of all time in Congress. No sooner had President Obama finished his sentence that the Supreme Court had "open[ed] the floodgates for special interests…to spend without limit in our elections" than Congress began applauding and audibly cheering. Justice Alito was caught on camera during this applause muttering "simply not true." Video of the exchange is *available at*: http://www.cbsnews.com/video/watch/?id=6154907n (at 0:20 mark), last accessed July 1, 2012.

[59] *Id.*

[60] Jennifer Agiesta, *Campaign Finance Ruling Sparks Bipartisan Agreement*, WASH. POST (February 17, 2010), in "Behind the Numbers" *available at:* http://voices.washingtonpost.com/behind-the-numbers/2010/02/campaign_finance_ruling_sparks.html?sid=ST2010021702073.

[61] PEW RESEARCH CENTER FOR PEOPLE AND THE PRESS, SUPER PACS HAVING NEGATIVE IMPACT, SAY VOTERS AWARE OF 'CITIZENS UNITED' RULING, January 17, 2012, *available at* http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf

Perhaps the most notorious consequence of *Citizens United* was the emergence of "Super PACs" or independent expenditure-only PACs that are able to amass unlimited pots of money from corporations and unions (a direct result of *Citizens United*) as well as from individuals (*Speechnow.org v. FEC*, which adopted the rationale of *Citizens United*)[62] and then spend unlimited amounts in support of, or against candidates. Though Super PACs are prohibited from contributing directly to candidates or from even coordinating their expenditures with a campaign, six of the top eight Super PACs have been endorsed by major presidential candidates as their "official" Super PAC, dedicated to their success and often run by their former staffers.[63] As a result, Super PACs have become sidecars to each campaign's motorcycle: ostensibly separate entities, but comprising one vehicle.[64] In addition, as it turns out, despite *Citizens United*'s green light for corporate and union spending, the bulk of Super PAC money has come from individuals,[65] which creates the sense that Super PACs are merely conduits around individual contribution limits.[66]

Perhaps more controversial, however, is the emergence of non-profit political activism, specifically the increase in political spending by 501c organizations that do not have to disclose their donors. According to the Center for Responsive Politics, not a single dollar was spent by 501c organizations on independent expenditures or electioneering communications in 2006 federal election cycle. During the 2010 election cycle (the first post-*Citizens United*

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[62] Two months after *Citizens United* the D.C. Court of Appeals invalidated various limits on *individual* contributions to independent expenditure groups, citing *Citizens United* which, in the words of the court, "resolves this appeal" because "after *Citizens United*, independent expenditures do not implicate [*quid pro quo* corruption]." *SpeechNow.org v. FEC*, 599 F.3d 686 at 689, 693 (D.C. Cir. 2010) (footnote 3).

[63] *See*, for example Kenneth P. Vogel, *Debate Shows Super PACs Strength*, POLITICO (Jan. 8, 2012), www.politico.com/news/stories/0112/71217.html (reporting that Mitt Romney admitted, with regards to the staff of his Super PAC, "of course they're former staff of mine".).

[64] This metaphor originated from an unnamed GOP operative who predicted to the L.A. Times that "everybody will have [a Super PAC] – there will be a sidecar for every motorcycle." Melanie Mason, *Jon Huntsman Latest Hopeful to be Backed by 'Super PAC,'* L.A. TIMES (Aug. 30, 2011), http://articles.latimes.com/2011/aug/30/news/la-pn-huntsman-super-pac-20110830.

[65] According to an analysis of Super PAC filings by USA Today, "less than $1 out of every $5 flowing into Super PACs' coffers came from corporations." Fredreka Schouten, et al. *Individuals, Not Corporations, Drive Super PAC Financing*, USA TODAY, Feb. 9, 2012, at A7.

[66] For an in-depth overview of Super PACs—their use and possible abuse—s*ee* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1629 (2012).

election), 42% of all outside spending was made by 501c organizations.[67] This is particularly impressive considering that 501c groups are limited with respect to their permissible political activity; it cannot be their primary purpose.[68]

Interpreting all of these facts is quite complicated, despite the detail of available information and the clarity of comparisons across time. Proper evaluation requires an accurate expectation of the law's effect *ex ante*. We draw our expectation from the history of modern campaign finance laws.

D. Research Hypotheses

Modern campaign finance laws are rooted in the Progressive Era of the early 1900s and were part of a broad political reform movement to limit the power of corporate interests (e.g., railroad "robber barons" in California and "copper kings" in Montana) over state legislatures and in Congress. In 1907, the U.S. Congress passed the Tillman Act, which prohibited corporations from making campaign contributions directly to political candidates, a prohibition that survives today.[69] Though not explicitly articulated at the time, the Tillman Act raised four important constitutional questions that are still being debated today:

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[67] Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape,* OpenSecrets.org (May 5, 2011) *at*: http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

[68] In other words, when a donor gives to a 501c, over half of that money cannot be used to support political activity.

[69] The federal ban on direct contributions by corporations was most recently validated by the Supreme Court in *FEC v. Beaumont*, 539 U.S. 146 (2003). Several circuits have addressed the viability of corporate contribution bans since *Citizens United* and all have ruled that *Beaumont* is the controlling authority for the regulation of direct contributions to candidates. The Second Circuit upheld New York's "Pay-to-Play" contribution limits, *Ognibene LLC v. Parkes*, 671 F.3d 174 (2d Cir. 2011) (petition for writ of certiorari denied on June 25, 2012); the Fourth Circuit overturned a Federal District Judge who had argued that *Citizens United* "may have eroded *Beaumont's* reasoning *U.S. v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012) (at p. 2). The Circuit Court wrote that "*Citizens United*, a case that addresses corporate independent expenditures, does not undermine *Beaumont's* reasoning" (*Id*.); the Eighth Circuit unanimously upheld a state ban on direct contributions by corporations in Minnesota and specifically distinguished *Citizens United* by arguing that *Beaumont* is the controlling authority for the regulation of direct contributions to candidates. *Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (taken *en banc* and pending); the Ninth Circuit also relied on *Beaumont* to uphold a city-level ban on corporate contributions in the same year, *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011).

(1) To what extent may Congress ban (or regulate) the participation of individuals or groups in the political process?
(2) What "state interests" justify an acceptable ban or regulation?
(3) Are there different standards for evaluating regulations targeting individuals versus those targeting groups of individuals (e.g., unions and corporations)?
(4) Are there different standards for evaluating regulations that target different *types* of groups of individuals (e.g., unions vs. PACs vs. nonprofits vs. corporations, etc.)?

The Tillman Act singled out corporations as special creatures that warranted strict regulation because of the state's compelling interest in curbing widespread and well-known corruption at the hands of large corporate contributors. Unions (in 1943)[70] and foreign organizations (in 1966)[71] have since joined corporations with direct contribution bans of their own, both justified by an anti-corruption interest. In the mid-1940s Congress treaded into the murky waters of independent expenditures. In 1947, Congress passed the Taft-Hartley Act over the veto of President Harry Truman. This post-New Deal, anti-union law statutorily prohibited unions (and by extension corporations) from making any expenditures "in connection with federal campaigns."[72] Unlike the Tillman Act's ban on direct campaign contributions, the regulation of independent expenditures has proven trickier for courts to interpret, due in large part to the state interests that courts have accepted as justifiable (and perhaps due in larger part to the state interests the courts have *not* accepted as justifiable). The Supreme Court has upheld the Tillman Act and other statutes regulating contributions to candidates on the basis that that they prevent corruption or the appearance of corruption.[73] The Court's logic is

[70] War Labor Disputes Act ("Smith-Connally") of 1943; 57 Stat. 163.

[71] *See* 1966 Amendments to the Foreign Agents Registration Act, later incorporated into the 1974 amendments to the Federal Election Campaign Act, 22 U.S.C. §611 *et seq*. For a short history and discussion the prohibition on foreign nationals (defined as individuals without "green cards" or with foreign citizenship, or foreign corporations, or foreign governments or foreign political parties), see "Foreign Nationals" *at http://www.fec.gov/pages/brochures/foreign.shtml*.

[72] The Labor Management Relations Act ("Taft-Hartley") of 1947; 61 Stat. 159.

[73] The clearest articulation of the Court's respect for preventing corruption or the appearance of corruption is *Buckley v. Valeo*, *supra* note 7 ("…Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated," at 30, and "[s]ince the danger of corruption and the appearance of corruption apply with equal force to challengers and incumbents, Congress had ample justification for

predicated on the proposition that contributions to candidates may stimulate *quid pro quo* arrangements that violate fundamental principles of representative democracy. Using this same logic, the Supreme Court has invalidated some limits on independent expenditures because, the Court reasons, independent expenditures are, by definition, independent of candidates and thus cannot give rise to *quid pro quo* corruption.[74] It is this logic that motivated the Court to invalidate the ban on corporate independent expenditures in *Citizens United*. We draw the reader's attention to the fact that the Court does not believe independent expenditures "do not" corrupt, but that they "cannot" corrupt as a matter of law. We address this tension in Part III below. In this section we note that while the logic of *Citizens United* has broad implications for campaign finance jurisprudence more generally, the scope of the decision is somewhat narrow. Our expectations for how *Citizens United* will impact spending behavior are driven by the fact that the decision was limited to the use of corporate or union general treasury funds to engage in political speech. We formulate our inquiry in the language of economics, where changes to campaign finance laws are interpreted as changes to individual demand curves and the effect of the law is captured by the elasticity of demand for the relevant actors.[75] In other words, we credit *Citizens United*

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imposing the same fundraising constraints upon both," at 33.)

[74] See, for example, *Buckley v. Valeo*, *supra* note 7 at 46 ("the independent advocacy restricted by the [FECA] does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions"). *See also Citizens United, supra* note 1, at 45 (noting that a lack of examples where votes were exchanged for expenditures "confirms *Buckley's* reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption." The Court continued, "In fact, there is only scant evidence that independent expenditures even ingratiate," and "Ingratiation and access, in any event, are not corruption"). Finally, see *SpeechNow.org v. FEC*, *supra* note 62, where the D.C. Circuit extended the holding of *Citizens United* to the case of *individual* contributions to independent expenditure-only groups by writing that "…the only interest we may evaluate to determine whether the government can justify contribution limits [to PACs] as applied to *SpeechNow* is the government's anti-corruption interest. Because of the Supreme Court's recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has *no* anti-corruption interest in limiting independent expenditures" (at 692-93, emphasis in original). Therefore, "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption," at 14.

Not all observers agree with the Court. *See*, for example, Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 244 (2010) (calling this distinction "the greatest absurdity of campaign finance law—that independent expenditures pose no threat of campaign finance corruption.")

[75] For a broad discussion of laws as transactions costs, *see* JAMES M. BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL

with eliminating a major cost for firms. Before *Citizens United*, if firms wanted to make independent expenditures they had to clear legal hurdles in the form of setting up a PAC and convincing employees to contribute, or giving to outside groups like 527s and 501c organizations which, before *Citizens United* and its extension in *Speechnow.org*, had limits in many states. *Citizens United* eliminated that price for political participation. Assuming that no other election laws and regulations change (which we know to be false—see Hypothesis 2b below) we would, as President Obama (and others) predicted, expect an increase in the amount of independent spending after this transaction cost has been removed.

> *Hypothesis 1: Citizens United "opened the floodgates" of independent expenditures generally.*[76]

More specifically, because the scope of *Citizens United* is limited to bans on corporate and union independent expenditures, we would expect to see an increase in the amount of independent expenditures made from the general treasuries of corporations and unions relative to other sources of independent expenditures.

> *Naive hypothesis 2(a): Because Citizens United eliminated the transaction costs for corporations and unions, corporate/union independent expenditures will be larger as a share of all independent expenditures after* Citizens United.

DEMOCRACY (1962); JAMES M. BUCHANAN AND ROGER D. CONGLETON, POLITICS BY PRINCIPLE, NOT INTEREST: TOWARDS NONDISCRIMINATORY INTEREST (1998); IAN AYRES AND JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

Cast as a public choice problem, all of the actors in the campaign finance ecosystem—incumbents, candidates, lobbyists, bundlers, donors, supporters, and regulators—simultaneously pursue their own self-interest. *See generally* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber and Anne Joseph O'Connell, eds., 2010), and DANIEL A. FARBER AND PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991). This hypothesized premise led John Samples to argue against campaign finance "reform," which he writes is code for "incumbency protection" inasmuch as no incumbent would vote for reform unless it benefited him or her. *See* JOHN C. SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM (2006).

[76] President Obama referred to an opening "floodgate." This metaphor characterizes campaign finance laws as a blockage or barrier to political spending. Strict campaign finance laws are like dams, and when spending restrictions are lifted, the "floodgate theory" predicts that money will pour into political campaigns like flooding after a dam breaks.

As we point out above, nonprofit organizations that do not contribute funds directly to campaigns or coordinate their expenditures with a campaign (i.e., 501c and 527 groups) may solicit unlimited sums of money from corporations and unions among other sources. Because 501c nonprofits are not required to disclose their donors, and because we might predict that corporations, like people, typically prefer to remain anonymous when spending money on political activities, we might expect the amount of independent expenditures made by nonprofit organizations to increase substantially after 2010.[77]

> *Strategic hypothesis 2(b): Facing a lower price for political action after* Citizens United*, strategic corporations and unions will funnel their independent expenditures to nonprofit organizations that have weaker disclosure requirements.*

Finally, we explore the possibility that *Citizens United* had an effect on the distribution of individuals and groups of individuals that make independent expenditures. If it is true that *Citizens United* "opened the floodgates" to corporate and union spending in elections (whether via the general mechanism in *Hypothesis 1* or the more specific mechanism(s) in *Hypothesis 2*), and if it is true that corporations and unions spend large amounts of money on independent expenditures, then we might expect to see smaller spenders crowded out as the probability that their expenditure is pivotal shrinks. At some threshold, the cost of spending will outweigh the expected benefit and rational would-be spenders will opt out.

> *Hypothesis 3: If* Citizens United *opened the floodgates to corporate and union spending, then small spenders, behaving rationally, will be less likely to participate after* Citizens United*.*

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[77] Some scholars, expanding on the water metaphor of "floodgates," have called this the "hydraulic theory", which characterizes campaign finance laws as large mallets in a political game of "whack-a-mole." *See*, for example, Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999); Raymond J. La Raja, *Will* Citizens United v. FEC *Give More Political Power to Corporations?* Paper presented at the 2010 annual meeting of the American Political Science Association. According to this theory, targeted laws, like bans on independent expenditures, may have a marginal effect on their target, but ultimately money will flow into campaigns one way or another and any marginal effect of a law will be offset by increased spending elsewhere. As an example, a ban on direct contributions may lead to increased independent expenditures. Or a law that bans spending by corporations from their general treasuries may lead to increased spending by corporations via PACs, or earmarked (and anonymous) contributions to other nonprofit organizations.

One major limitation on the ability to answer these questions comes from an almost universal focus by both academic and popular commentators on spending at the federal level. As with any analysis at the federal level, the lack of a control group makes causal inference extraordinarily difficult;[78] without a control group there is no counterfactual baseline against which to compare changes in spending patterns after *Citizens United*. We overcome this limitation by turning our attention to the states where two important features existed at the time of the *Citizens United* decision. First, about half of the states had an analogous ban on corporate independent expenditures and thus were "treated" by the decision that also invalidated their state laws. Second, nearly every state held a statewide election in 2010. We treat *Citizens United* as a natural experiment on the states—an exogenous shock to half of the state's laws. By measuring state-level spending over time, we are able to exploit the variation in campaign finance laws between states and better estimate the extent to which *Citizens United*, as opposed to other interventions or general time trends, is responsible for changes that we observe.

II. STATES DIVIDED

In January 2010, twenty states prohibited corporations and/or unions from making independent expenditures to state campaigns.[79] Although most of these bans were passed after the federal independent expenditure ban that the Court overturned in *Citizens United*, a handful of states had enacted bans earlier, including Wisconsin and West Virginia, which enacted bans in 1905 and 1908, respectively. A full chronology of state independent expenditure bans is found in Table 1. As Justice Stevens pointed out in his *Citizens United* dissent, all of these state laws were implicated by the Court's holding,[80] though none were implicated as clearly as Michigan's. The dispute at the center of *Austin v. Michigan Chamber of Commerce* was Michigan's state independent expenditure ban. Thus, by overruling *Austin* the Court directly invalidated Michigan's ban, something the Michigan Secretary of State acknowledged one week later in a public statement.[81] By July 2010, nine more states had passed

[78] At a minimum, a federal-only analysis is threatened by history and maturation effects. *See* Donald T. Campbell, *Reforms As Experiments*, 24 AM. PSYCHOLOGIST 409 (1969).

[79] One additional state, New Hampshire, had repealed its ban on corporate independent expenditures in 2000.

[80] *See* 130 S. Ct. at 933 (Stevens, J., concurring in part and dissenting in part) ("the Court operates with a sledge hammer rather than a scalpel" and "compounds the offense by implicitly striking down a great many state laws as well.")

[81] *See* "Independent Expenditures by Corporations, Unions and Domestic Dependent

legislation that explicitly repealed their bans on corporate independent expenditures, and the chief campaign finance board or official in eight additional states had adopted an emergency rule or published an advisory opinion that *Citizens United* invalidated their state ban, which would go unenforced until the legislature acted.[82] The fate of corporate independent expenditure bans in the two remaining states was not determined for several more months. The North Carolina state legislature passed HB 478 on August 2, 2010 striking the independent expenditure ban from its state code (among other things). Because North Carolina is a covered jurisdiction under Section 5 of the Voting Rights Act, however, the new law could not take effect until the Department of Justice "precleared" the changes, which took nearly 8 months.[83] Montana's independent expenditure ban hung in limbo for much longer, as the state defended its law against multiple legal challenges for two years.

A. The Case of Montana

Montana Attorney General Steve Bullock had originally led an effort to author an amicus brief in *Citizens United* on behalf of twenty-six Attorneys General that urged the Court to rule narrowly on just the federal issues and to either uphold or ignore *Austin* as it represented the jurisprudential bedrock of many states' regulations on corporate campaign spending.[84] Less than two weeks after *Citizens United* was decided, Bullock appeared before the U.S. Senate Committee on Rules and Administration and lamented that he "didn't want this fight in Montana, but the *Citizens United* decision will likely invite a

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Sovereigns; U.S. Supreme Court Decision Issued January 21, 2010 Citizens United v. Federal Election Commission," *available at*: http://www.michigan.gov/sos/0,1607,7-127-1633_8723_15274-230880--,00.html.

[82] *See* Table A in the Appendix for a state-by-state breakdown of legal responses to *Citizens United*.

[83] North Carolina submitted three separate petitions for preclearance: 2010-3057, 2010-3059, and 2010-3090. *See* "Archive of Notices of Preclearance Activity Under the Voting Rights Act of 1965, as Amended," *available at*: http://www.justice.gov/crt/about/vot/notices/vnote080910.php. The three preclearance submissions were approved on April 5, 2011.

[84] *See* Brief of the States of Montana, Arizona, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia as *Amici Curiae* Addressing June 29, 2009 Order for Supplemental Briefing and Supporting Neither Party *at* http://www.fec.gov/law/litigation/citizens_united_sc_08_tsac_facmontana.pdf.

challenge to the people's law of 1912."[85] It took just one month for that challenge to materialize.

Table 1: State independent expenditure bans

	State	Year ban took effect
1	Wisconsin	1905
2	West Virginia	1908
3	Montana	1947
4	Tennessee	1972
5	North Carolina	1973
6	Kentucky	1974
7	Massachusetts	1975
8	Michigan	1976
9	Wyoming	1977
10	Arizona	1978
11	New Hampshire	1979
12	Pennsylvania	1979
13	Texas	1987
14	Minnesota	1988
15	Alaska	1996
16	Connecticut	2000
17	Oklahoma	2000
18	Colorado	2003
19	Iowa	2003
20	Ohio	2005
21	South Dakota	2007

In March 2010, two corporations (later joined by a third) sued Bullock and asked the court to permanently enjoin him and all county attorneys from enforcing Montana's corporate independent expenditure ban.[86] The trial court declared the state law unconstitutional, citing *Citizens United*, and granted the plaintiffs motion for summary judgment. Quoting a United States District Judge who had held Minnesota's corporate independent expenditure ban unconstitutional several months earlier,[87] the trial court wrote that the "Supreme Court's decision in *Citizens United* is unequivocal: the government may not prohibit independent and indirect corporate expenditures on political speech."[88] The court concluded that Montana's law "favors some speakers over corporations" and thus "abridges Plaintiffs' right to engage in political speech…and is not narrowly tailored to meet any interest claimed to be compelling."[89] One year later, the parties argued their case on appeal before the Supreme Court of Montana. In a surprise decision, the Supreme Court

[85] *See* "Testimony of Montana Attorney General Steve Bullock, United States Senate Committee on Rules and Administration, February 2, 2010," *available at*: http://www.rules.senate.gov/public/index.cfm?a=Files.Serve&File_id=60a8bdb2-9112-47c9-a9d1-4be283039ac1.

[86] *Western Tradition P'ship, Inc. et al. v. Attorney Gen.,* No. BDV-2010-238 (Oct. 2010).

[87] The federal district court did not wait for the state legislature to act in ruling the law unconstitutional, even though the legislature was in conference on a repeal that it had debated for three months. The legislature ultimately passed SF 2471 one week after the district court opinion (though without reference to the opinion). *See https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF2471&ssn=0&y=2010*.

[88] *Western Tradition P'ship* at 7 (citation omitted) (quoting *Minn. Chamber of Commerce v. Gaertner*, 710 F.Supp.2d 868, 873 (D.Minn. 2010))

[89] *Id*. at 5.

reversed the lower court ruling that had, in the Supreme Court's eyes "erroneously construed and applied the *Citizens United* case."[90] After expressing skepticism that the plaintiff-appellees were at risk of any material harm, the Court sought to distinguish the facts of the case by writing that "unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history."[91] The Court noted that the burden of establishing a PAC was much less "onerous" in Montana than at the federal level (referencing one of the arguments by the *Citizens United* majority). The Court also traced out the history of serious corruption in Montana politics that had prompted the state to enact its Corrupt Practices Act in 1912, now in question. Finally, the Court honed in on the potential negative effects of corporate money in state judicial elections, something the U.S. Supreme Court had acknowledged, and worried about in *Caperton v. A.T. Massey Coal Co., Inc.*[92] Two justices dissented. Both expressed sincere sympathy with the majority's opinion, yet felt constrained to follow what they saw as a clear application of a broad United States Supreme Court ruling.[93]

On June 25, 2012 the United States Supreme Court summarily reversed Montana's high court without a hearing. The Court's statement was simple and clear: "There can be no serious doubt that [*Citizens United* applies to the Montana state law]."[94] Four Justices voted to deny the petition for writ of certiorari by *American Tradition Partnership* (as the corporation was now called) though they argued, in dissent, that Montana's clear history of political corruption warranted, an as-applied review of *Citizens United*.[95]

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[90] *Western Tradition P'ship., et al. v. Attorney Gen.*, 271 P.3d 1 (Mont. 2011).

[91] *Id*. at 6.

[92] 556 U.S. 868 (2009).

[93] *Western Tradition P'ship*, *supra* note 90 at 18 (J. Nelson dissenting) ("I have never had to write a more frustrating dissent. I agree, at least in principle, with much of the Court's discussion and with the arguments of the Attorney General. More to the point, I thoroughly disagree with the Supreme Court's decision in *Citizens United*. I agree, rather with the eloquent and, in my view, better-reasoned dissent of Justice Stevens. As a result, I find myself in the distasteful position of having to defend the applicability of a controlling precedent with which I profoundly disagree. (fn 3. The task is all the more distasteful in light of Western Tradition Partnership's questionable tactics and blatant hypocrisy.)" (citations omitted)). *Id.* at 14 (J. Baker dissenting) ("the State of Montana made no more compelling a case than that painstakingly presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United.*")

[94] *Am. Tradition Partn. et al. v. Bullock*, 132 S.Ct. 2490 (2012) (*per curiam*) (citing to the Supremacy Clause). *Available at*: http://www.supremecourt.gov/opinions/11pdf/11-1179h9j3.pdf.

[95] *Id.* at 2.

The Montana case raises important questions about the relevance of empirical facts in American campaign finance jurisprudence. Taken together, *Citizens United* and *American Tradition Partnership* stand for the proposition that independent expenditures cannot corrupt as a matter of law, any facts to the contrary notwithstanding. We take up the implications of this legal fiction in Part III below.

B. Citizens United As A Natural Experiment

As of June 25, 2012, corporations and unions were free to spend unlimited amounts of money from their general treasuries on independent expenditures for every election in every state. The exogenous shock of *Citizens United* on the laws of twenty states provides a natural setting to measure the effects of an independent expenditure ban on the spending behavior of corporations and unions. We do so by relying on recently compiled state-level reports of independent expenditures, which have been accumulated by the National Institute on Money in State Politics.[96] Independent expenditure data are currently available for 18 states between 2006 and 2011—twelve states whose independent expenditure bans were invalidated by *Citizens United* ("treatment") and six states that never had an independent expenditure ban ("control"). Our primary model, a difference-in-differences design, compares spending related to all state races (gubernatorial, other statewide races, judicial, and state legislative) in treatment and control states between 2006 and 2010. This design requires us to drop two states from our sample for which there are available data: North Carolina (a "treated" state) because, as we describe above, the state's repeal of their independent expenditure ban did not take effect until 2011, and Florida (a "control" state) because the only reported independent expenditures are on ballot measures, and corporate independent expenditures in support of or opposition to ballot measures has always been legal.[97] For the remaining 16 states in our sample, which comprise 48.9% of the population of the United States (see Figure 1 map on the next page), information is available about the name of each spender, the type of spender (e.g., union, party, nonprofit, etc.), the recipient of the expenditure, the target candidate, the targeted elected office, and the amount of each expenditure.

Because *Citizens United* was decided three-quarters of the way into the 2010 election cycle, and because state responses to the decision took effect

[96] The National Institute on Money in State Politics is a nonpartisan, nonprofit organization in Helena, Montana that maintains a "comprehensive and verifiable" database of political spending in all 50 states, freely available to the public at http://followthemoney.org.

[97] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

even later in the year, we first test our assumption that treatment states in our sample were indeed "treated" in a meaningful way. For statewide seats with four-year terms the 2010 election cycle began on the day immediately following the 2006 gubernatorial election and was already three years old when the Supreme Court ruled in *Citizens United*.[98] However, we note that almost all of the independent expenditures during the 2010 election cycle were made after every state in our sample had changed their law. In fact, 96.4% of all independent expenditures in our sample were made after the individual states passed their bans (and 100% of all independent expenditures in seven of the 11 treated states).[99] We drop all expenditures that were made before the law changed in order to validly test the difference in spending in states with and without a prohibition on corporate independent expenditures. However, we note that the data are still vulnerable to various sources of confounding bias—factors that may jointly impact the likelihood that a state had imposed a spending ban *and* the level of independent expenditures. We include several variables in our models below to control for this bias. A summary of our covariates appears in the Appendix (Table C).

One of the most important potential confounding variables is the level of political competition in a given election year. Increased political competition could result in increased amounts of money going toward campaigns and election efforts, independent of the legal status on independent expenditures at the state level. We measure political competition as the percent of Democrats in the upper and lower house, lagged by one year[100] and whether the state is under divided or unified government. We also note the number of seats that were closely contested in each house, meaning the winner received less than 55% of the vote, as well as the lagged turnover in the upper and lower house.[101]

Finally, we include demographic information about each state's population including the percent of residents with a bachelor's degree or more, median income, the percent of employees that are represented by unions, and the sum of all payrolls for firms with more than 100 employees.

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[98] Similarly for seats up for election every two years, the 2010 election cycle was well underway when *Citizens United* was decided.

[99] See Figure B in the Appendix.

[100] The measure is |0.5 – (# Democrats in each house / size of house)|.

[101] We build upon Dean W. Burnham's "Partisan Division of American State Governments Series" dataset (ICPSR Study #16, 1996), updated in Ernesto Dal Bo, Pedro Dal Bo, and Jason Snyder, *Political Dynasties*, 76 REV. OF ECON. STUD. 115 (2009), Stephen Ansolabehere, et al. *More Democracy: The Direct Primary and Competition in U.S. Elections*, 24 STUD. IN AM. POL. DEV. 190 (2010), and now by ourselves.

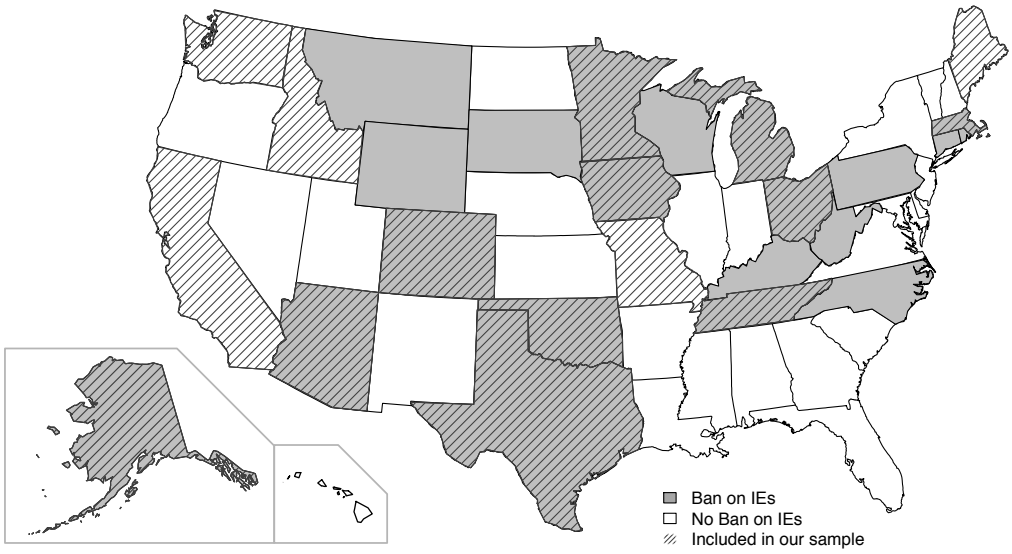

Figure 1. States' corporate independent expenditure ban status at the time *Citizens United* was decided. Shaded states had a ban. Diagonal stripes represent the states included in our sample. Note that data for Florida and North Carolina are also available, though we exclude them from our sample.

1. Overall Spending

Our primary hypothesis is that overall independent spending will increase after *Citizens United*. We address this hypothesis using a difference-in-differences model of independent expenditure spending over time where '*c*' represents each election cycle and '*L*' represents the law in each state with respect to independent expenditure bans for corporations and/or unions (= "ban" in treated states and = "no ban" otherwise). The difference-in-differences estimator 'τ' can be written:

$$\tau = \{E[Y_i \mid c = 2010, L = ban] - E[Y_i \mid c = 2006, L = ban]\} - \{E[Y_i \mid c = 2010, L = no\ ban] - E[Y_i \mid c = 2006, L = no\ ban]\}$$

or, in other words, the observed outcome is the difference between states before and after a ban among those *that have a ban* and states before and after a ban among states *without a ban*. In Figure 2, we plot the raw independent expenditures in treatment and control states before and after *Citizens United*. Because the number of states in the treatment and control conditions is not

equal—eleven treatment and five control—we plot independent expenditures on a per capita basis, where there is more balance between the two groups (treated states comprise 28% of the U.S population, control states 22%).[102] In Figure 2 we see that when the corporate independent expenditure bans were still in effect, independent expenditures were smaller, per capita, in states affected by the bans than in states that did not have a ban. In 2010, after the repeal of all state independent expenditure bans in the sample, the relationship changed: independent expenditures in states whose bans had been repealed was *higher* per capita than independent expenditures in control states.

In a difference-in-differences design, the "treatment effect" is the difference between total independent expenditures in treated states and independent expenditures in a hypothetical counterfactual state that parallels the control states (marked with a gray dotted line in Figure 2). We address the limitations of this parallel time trends assumption below, but here note that the parallel counterfactual baseline provides context to the change that we observe in the treated states. If we just compared spending in treated states before and after *Citizens United* we would over-estimate the impact of the legal change. Conversely, if we just compared the difference in independent expenditures between treated and control states in 2010 we would under-estimate the impact of the legal change. In real dollars, independent expenditures increased from $40 million to $72 million in our sample of states that had a corporate independent expenditure ban in 2006, and independent expenditures also increased from $38 million to $51 million in our sample of states that never had a corporate independent expenditure ban. In other words, with an assumption of parallel time trends, we would have expected to see about 35% more spending in the treated states whether or not they repealed their corporate bans on independent expenditures.

With this information we can generate a more precise estimate of the change in spending attributable to changes in campaign finance law. This crucial information is missing for those who attempt to estimate the effect of *Citizens United* on federal spending, though careful commentators who recognize this have offered theoretical counterfactuals to bolster their claims.[103]

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[102] The average population in treated states between 2006 and 2010 was 82,343,434 and in control states was 64,518,787. *See* "Population Estimates," U.S. Census Bureau *at* http://www.census.gov/popest/data/historical/index.html.

[103] *See*, e.g., Matt Bai, *How Much Has* Citizens United *Changed the Political Game?*, N.Y. TIMES MAGAZINE (July 17, 2012) http://www.nytimes.com/2012/07/22/magazine/ how-much-has-citizens-united-changed- the-political-game.html.

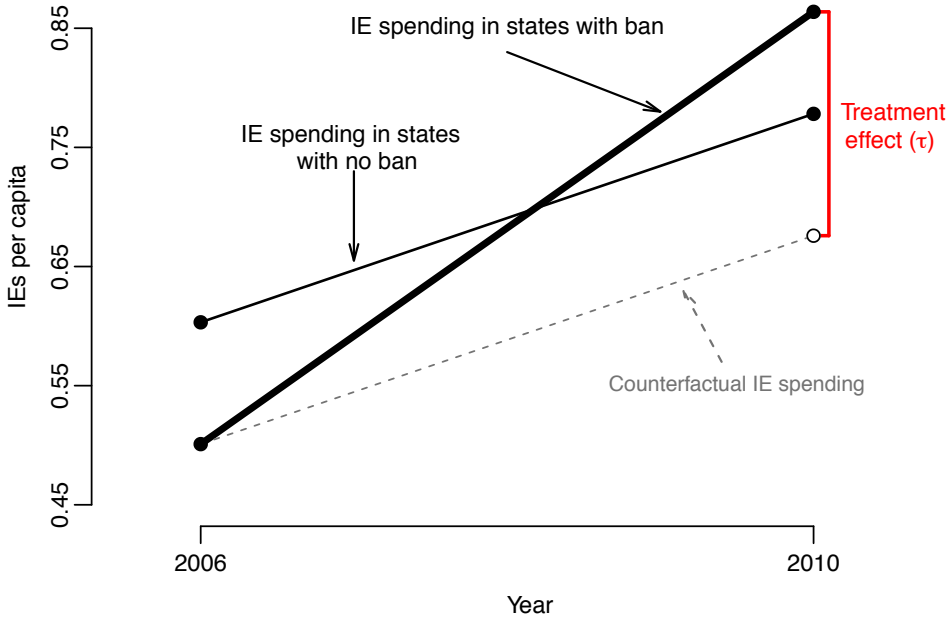

Figure 2. Difference-in-differences between per capita independent expenditures in 2006 and 2010 and between states with a corporate independent expenditure ban and states without a ban. This approach assumes a parallel time trend between treated states and control states. The "treatment effect" or difference between spending in states in the treatment condition and the hypothetical counterfactual is 18.8 cents per person. *Data source: National Institute on Money in State Politics 2012*.

Based on raw spending numbers in our sample, of the $32 million increase in spending in treated states, $13 million is explained by the counterfactual trend and the remaining $19 million increase, or 19 cents per person in Figure 2 (identified as the "treatment effect" or τ), can be attributed to external effects such as *Citizens United*, unique features of the states, or randomness.

One of the limitations of the parallel time trends assumption is that all time-varying predictors of the outcome are considered to be equal in both control and treated states across the entire time period. We know this is *not* true in our sample; in fact we know that our units of analysis (the states) vary in important ways that are related to the amount of independent expenditures we observe in treated (T) and control (C) states. For example, some states experienced periods of divided government while others did not. In some states, e.g., Colorado (T) and Ohio (T), the incumbent Governor was term-limited in 2006. In other states, e.g., Maine (C), Michigan (T) and Oklahoma

(T), the incumbent Governor was term-limited in 2010. Some states in our sample are heavily populated, e.g., Texas (T) and Ohio (T), and some are sparsely populated, e.g., Alaska (T) and Maine (C). Some states are heavily Democratic, e.g., California (C) and Massachusetts (T) and some are heavily Republican, e.g., Idaho (C) and Tennessee (T). Some states have high rates of union membership, e.g., Michigan (T) and Washington (C). In short, the states in our sample vary in many important respects that may be related to the amount of independent expenditures made in a particular election and which may undermine the assumption of parallel time trends between treatment and control states. Regression analysis is helpful for dealing with this problem.

In Table 2 we present the results of OLS estimations of the difference between treated and control states, with and without a set of control variables. The outcome variable is the natural log of independent expenditures. When we control for state-level measures of political competition and demographics, the differences between the states in both the pre- and post time periods shrinks slightly, but the difference-in-difference estimator is exactly the same. In fact, the entire model with controls, though less precisely measured, is nearly identical to the model without controls.[104] This suggests that the treatment effect (i.e., the difference spending between treated states and a control-parallel counterfactual) is not being driven by confounders that we model, but by the treatment itself.[105]

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[104] Other control variables we modeled include Democratic percentage of the state upper house (highly correlated with percentage in the lower house), lagged turnover in the upper house, the number of incumbents running, the number of seats in both houses, the size of legislative districts in both houses, the number of contested seats in both houses, divided government, number of firms in the state, payroll of all large firms, percent of workforce that belongs to a union, and the percent of population with a B.A. or more.

Because our model includes so few observations (32 state-years), we risk saturation by including too many variables in any one model. We ran multiple iterations of the difference-in-differences model:

$$log(independent\ expenditure)_{sy} = \alpha_{sy} + \beta_1(2010)_y + \beta_2(independent\ expenditure\ ban)_s + \beta_3(2010*ban)_{sy} + \beta_4(controls)_{sy} + \varepsilon_{sy}$$

and the treatment effect was robust to every covariate that we included singly as well as nearly every combination of covariates (as the number of covariates exceeded five the model became unstable). In these models, the interaction term fluctuated from as low as 1.14 to as high as 1.35.

[105] Our model is limited to observable and measurable covariates. This means that we cannot control for variation in state culture, unmeasured attitudes toward political spending or other unobservable confounders. By assumption, these confounders are considered to be time-invariant.

	(A) Without controls	(B) With controls
States with Bans	–1.40	–1.12
	[–3.89, 0.71]	[–3.74, 1.03]
Post Citizens United	0.36	–0.22
	[–1.88, 2.37]	[–2.17, 1.44]
Bans * Post CU	1.28	1.27
	[–1.36, 4.33]	[–0.88, 3.93]
N	32	32
Adj. R^2	0.02	0.34

95% bootstrap confidence intervals in brackets (10,000 resamples)

Table 2. Logged independent expenditures in 2006 and 2010. One observation per state year (N = 32). Model (A) represents a simple OLS interaction model with no control variables. In model (B) we include the following covariates: Democratic percentage of state lower house, number of contested seats in the current election, lagged turnover rates in lower house, state median income, and state population. Due to our low statistical power for this part of the analysis, these models are not statistically significant.

These observed changes in overall spending implicate *Citizens United* but cannot tell the whole story. If *Citizens United* caused an increase in spending, then that increase will have been driven by corporate and/or union independent expenditures. In Figure 4 we plot spending by the known identity of the spender to see whether, as hypothesized above, we see an influx of corporate and union dollars after 2010. In theory we should observe no change in levels of corporate/union spending in the control states across the entire time period and low (or no) levels of corporate/union spending in the treatment states in 2006, with convergence to control state levels in 2010. The data do not support this hypothesis. Corporate and union spending increase after *Citizens United*, but only in the control states.[106] In addition, there is no convergence between treated and control states in 2010; treated states look less similar to the control states in 2010.

[106] Union spending in the 2010 California gubernatorial race accounted for 62% of the increase in control state spending between 2006 and 2010. Without California, union spending was $4 million higher in 2010.

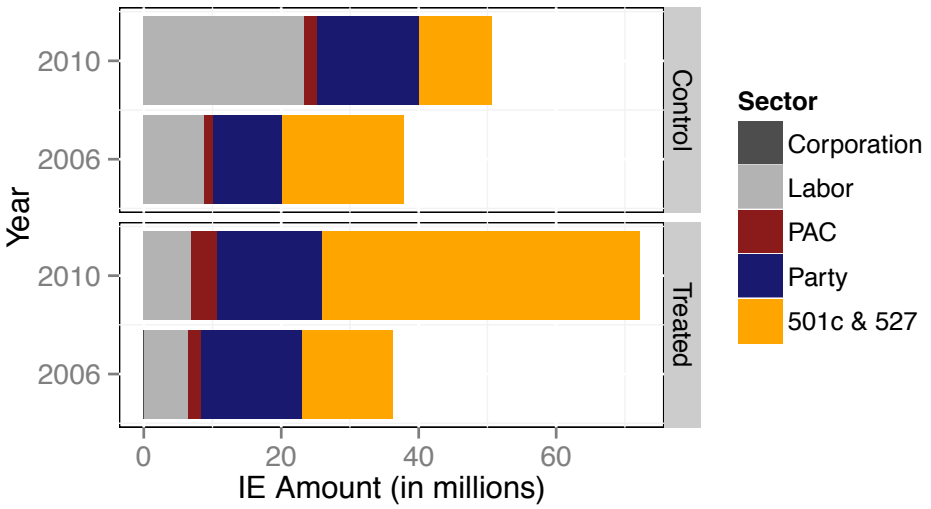

Figure 4. Raw independent expenditures, in millions of dollars, by spender. We exclude spending by individuals (three-tenths of one percent of spending) and spending categorized as "Other" (four-tenths of one percent) by the National Institute on Money in State Politics (NIMSP). The largest category of spending is coded by the NIMSP as "Single Issue" and comprises spending by both 501c organizations and 527 political committees.

We observe very little corporate spending. Among all of the control states one corporation (Stolar Partnership LLP in Missouri) spent $1,300 in 2006 and two corporations (Koch Industries in Washington and Energy Horizon Technologies in California) spent $1,400 in 2010. Among all of the treated states one corporation (Deloitte & Touche LLP in Texas) spent $3,000 to cater a meal at an event supporting the state Comptroller candidate in 2006,[107] and one corporation (Lutak Lumber & Supply Inc. in Alaska) spent $100 in 2010. Unions spent far more than corporations, but the difference between 2010 and 2006 in treated states was very small (4%).[108] This is hardly a floodgate of spending by corporations and unions, as some pundits and scholars predicted.

We do observe one significant change in the treated states: spending by outside groups, both 501c nonprofit organizations and 527 political committees

[107] This independent expenditure appears to have been made in violation of the corporate independent expenditure ban.

[108] Note that Iowa, Massachusetts, Minnesota, and Washington (all treated states) banned independent expenditures by corporations but not by unions. The $6.5 million of reported spending by unions in these states in 2006 were thus completely legal. Union expenditures in these four states increased $300,000 or by 5% in 2010.

(references to the tax code that governs their behavior) nearly doubled both in terms of actual dollars ($25 million increase) and as a share of all spending (77% increase). Unfortunately, we do not know the source of contributions to these groups. 501c organizations are not required by law to disclose the identity of their donors meaning we may never know who backed these groups. 527 political committees are required to disclose their donors; however, the information is not easily accessible. State officials that we contacted said this information could be obtained through formal public records requests. We have begun this process but are unable to report any findings in this Article.

One possible explanation for the observed divergence between treated and control states in 2010 is variation in political culture. In control states, tolerance for spending by unions and corporations is likely higher than in treated states. If states had corporate/union bans, particularly long-held bans, then the public's perception that corporate/union money can corrupt politics might provide an extra incentive for corporations/unions in treated states to make independent expenditures through 501c and 527 organizations, as we hypothesize above. In states that had no bans, this incentive may be much less powerful or nonexistent.

In summary, we observe a disproportionate increase in overall independent expenditures in states affected by *Citizens United* that is driven by 501c and 527 group spending. Although we cannot empirically verify that corporations and/or unions increased their political activity, we know that the most substantive changes to campaign finance laws between 2006 and 2010 eliminated prohibitions on corporate and union political spending, specifically on spending for the type of activities (independent expenditures) that are often managed by advocacy organizations and groups with political advertising expertise. In light of these facts, we view the findings in this section as evidence that corporations and unions increased their political spending in response to laws that permitted them to do just that. This conclusion is neither surprising nor controversial. We note, moreover, that our analysis provides the first systematic estimates of the magnitude of the response—a 100% spending increase—as well as the mechanism—an almost exclusive reliance on 501c and 527 organizations.

2. Distributional Effects

In addition to our analysis of aggregate spending above, we evaluate how the distribution of independent spending changed over time. Our interest in the distribution of spending is motivated by concerns about equality, a concern about which judges have shown mixed interest. In 1990, the Supreme Court recognized equality as a legitimate state interest when it upheld Michigan's

Campaign Finance Act. In *Austin v. Michigan Chamber of Commerce*, the Supreme Court admitted concern about 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."[109] Although the idea of equality, or what is sometimes referred to as "antidistortion," has historically focused on the corporate form, the logic applies to non-corporate entities as well; to the extent that the wealthy spend large stockpiles of money in support of candidates, the Court recognized a state interest in preventing that money from distorting the public's access to information or from distorting legislation and judicial decisions in favor of the spender.[110] In *Citizens United*, the Court held that the antidistortion concern was not sufficiently compelling to justify limits on First Amendment speech and one year later the Court explicitly rejected the antidistortion rationale altogether when the majority opined that

> "'leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the "unfettered interchange of ideas"—not whatever the State may view as fair."[111]

The rejection of the antidistortion rationale has proven controversial, in large part because the Court itself has acknowledged that disproportionate spending may create bias in favor of the spender and violate the Constitution's guarantee of due process.[112] In addition, for several decades political scientists have reported high rates of political inequality—the affluent are politically active and the less advantaged are not—and policy outcomes that benefit those

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[109] *Austin*, 494 U.S. at 659-60, *supra*. note 39.

[110] For example, the Court upheld an aggregate limit on contributions to candidates, political committees, and parties in *Buckley*. Note that at the time of this writing, the Court has agreed to hear a case challenging these aggregate limits. *See McCutcheon v. Federal Election Commission*, 2012 U.S. Dist. LEXIS 139651 (D.D.C., Sept. 28, 2012) (on appeal, docket 12-536).

[111] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 611 F.3d 510 (2011) (internal quotation marks and citations omitted).

[112] *Caperton v. A.T. Massey Coal, Co.*, 556 U.S. 868, 884 (2009) ("We conclude that there is a serious risk of actual bias 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.")

whose voices are heard.[113] One hypothesis about the rise of overwhelmingly large expenditures is that it will drown out the voices of smaller donors, or crowd them out altogether. We cannot directly test this hypothesis because we cannot observe individuals or groups who contemplate making independent expenditures, but ultimately decide not to. We can, however, test whether smaller spenders are more elastic to changes in campaign finance law, which may be instructive on this point, and we do so in tow ways. First we analyze the entire distribution of independent expenditures and compare the relative share of large and small spenders per year. If smaller spenders are getting crowded out then we should observe a shift toward larger independent expenditures. Second, we compare the incidence of repeat spenders to see whether those who have made independent expenditures in the past continue to do so after *Citizens United*.[114]

The distribution of all independent expenditures in our sample is shown in Figure 5. Because many spenders make repeated expenditures during one election, we aggregate spending to the level of the spender. The average (median) spender amount in 2006 and 2010 was $7,545. Thirty-six spenders in the dataset (of 843 total) spent $1 million or more in a state in a given year.

[113] *See* KAY LEHMAN SCHOLZMAN, SIDNEY VERBA AND HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY (2012); MARTIN GILENS, AFFLUENCE AND INFLUENCE (2012); JACOB S. HACKER AND PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2011); SIDNEY VERBA, KAY LEHMAN SCHLOZMAN AND HENRY E. BRADY, VOICE AND EQUALITY: CIVIL VOLUNTARISM IN AMERICAN POLITICS (1995).

[114] It is theoretically possible that individuals who get crowded out of the independent expenditure market choose to contribute money directly to candidates. In practice however, independent expenditures are almost exclusively made by those who have already maxed out their direct contributions to candidates. *See* Briffault, *supra* at note 66. We provide a plot in the Data Appendix of direct contributions to gubernatorial candidates before and after independent expenditure bans were passed in 19 states that suggests that there is no relationship between independent expenditure bans and direct contributions (see Figure F).

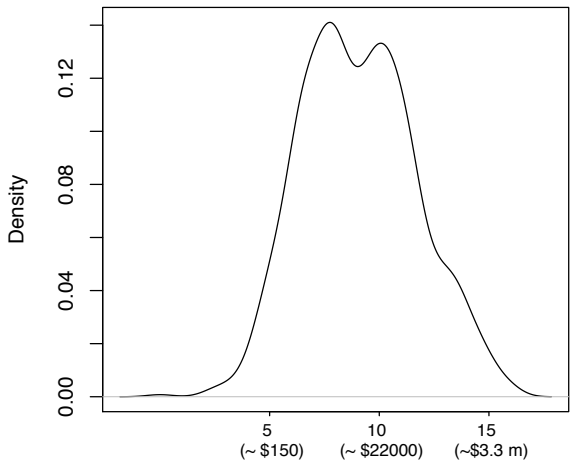

Figure 5. Logged amount spent by each unique spender in 2006 and 2010. Logged amounts "translated" into dollar amounts in parenthesis. The data includes 843 reported spenders from 16 states. Note that reported spenders are simply those that report independent expenditures pursuant to campaign finance requirements, and these reported spenders could all be spending money received by the same "root" spender or donor, which goes unreported.

Our first statistical approach is to compare changes in spending between treatment and control states by percentile. We present quantile-quantile (QQ) plots for 2006 and 2010 in Figure 6. Control states are black circles, treatment states are red Xs, and the 45° line represents equal spending in 2006 and 2010. As Figure 6 illustrates, there was very little change in the amount spent per spender in the control states in 2010 compared to 2006. The change in the treatment states was much more pronounced. Two, two-sample Kolmogorov-Smirnov tests, one on treatment and one on control, confirm that the difference is larger and more precisely measured among treatment states (D = 0.24, p-value = 0.00) than among control states (D = 0.07, p-value = 0.40).[115] We also observe a slight downward departure from the line among treatment states at the lower percentiles indicating that at least at some part of the distribution, spending in 2006 was higher than 2010. The most prominent effect, however, is an increase in spending in treatment states after *Citizens United* in the middle of the distribution.

[115] We present two-sample KS tests, though we think a one-sample test is justified since we are testing for crowding out. For a one-sample test the estimates would be identical but the p-values would be halved.

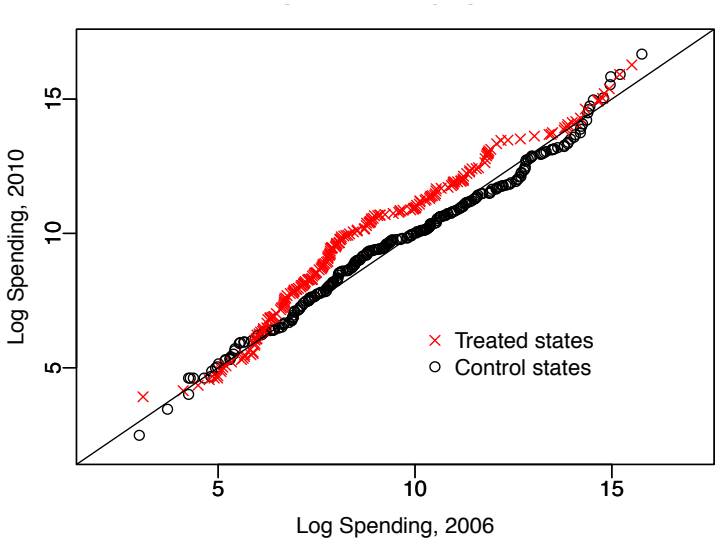

Figure 6. Quantile-quantile plots for treatment and control states between 2006 and 2010. Each dataset (treatment and control) are broken into 100 equally sized quantiles, or percentiles. Black circles represent percentiles in control states and red Xs represent percentiles in treatment states. The 45° line represents equal spending in 2006 and 2010.

We explore the robustness of this effect by running the same differences-in-differences analysis presented in the previous section on every percentile in the data.[116] Figure 7 illustrates which parts of the distribution drive the differences between the states, helping us gain traction on the question of whether smaller spenders are affected differently than larger spenders. We observe that spending increased more in absolute dollar terms in the treated states than in the control states across nearly every percentile, with the most significant difference in the middle of the distribution and not the tails. In other words, the treatment effect that we identified in the previous section is not driven by the largest expenditures.

[116] We estimate the equation

$$Y = \alpha + \beta_1 Post + \beta_2 Treatment + \beta_3 (Post * Treatment) + \gamma State + \varepsilon,$$

on each percentile of the data, where the coefficient of interest is β_3, and γ State is a state fixed effect, which controls for state-specific confounding. β_3 estimates the difference between two quantities: the pre-post difference among treated states and the pre-post difference among control states. Because we showed earlier that Citizens United seems to have had an effect on independent expenditure spending, we expect the former quantity (difference among treated states) to be greater than the latter quantity (difference across control states) across most of the distribution. Therefore, we expect to observe that most of the points in the data, each of which represents 1/100 of the distribution, will be above zero.

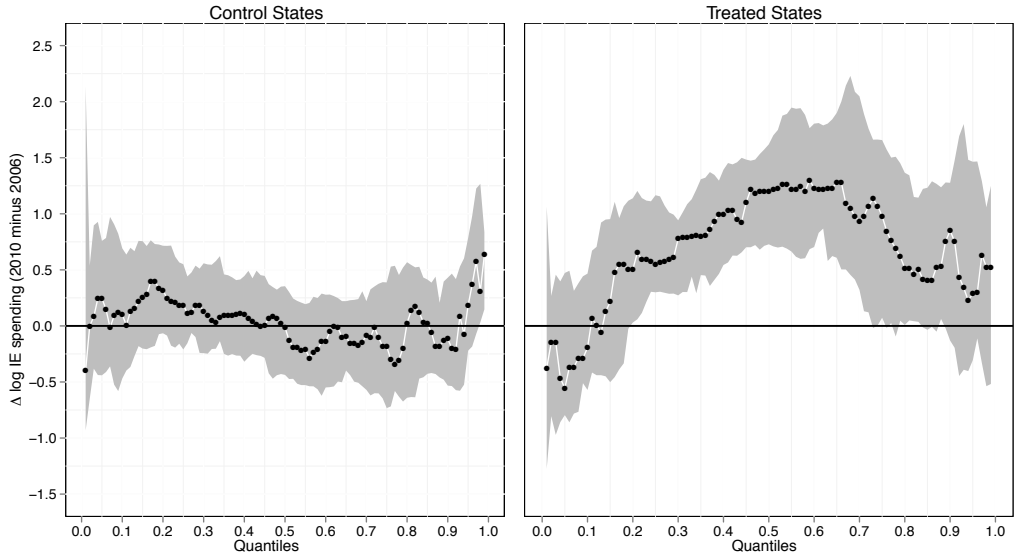

Figure 7. Quantile regression (on 100 quantiles) by control and treated states, including state fixed effects. Each dot is the difference between spending in that percentile for 2010 and spending in that percentile for 2006 in both treatment and control states. The grey region is a 95% confidence interval.

Rather, the increase in post-*Citizens United* spending is the result of more independent expenditures in amounts between approximately $1,000 (20th percentile) and $40,000 (70th percentile).[117] We observe that spending in the lowest percentiles of the treated states is indistinguishable between 2010 and 2006 meaning that the smallest spenders were relatively inelastic to the changes in overall spending. Similarly, spending differences in the highest percentiles are indistinguishable from zero. These findings are particularly striking because they cut against the conventional wisdom of spending behavior and raise questions about the states' equality interests, which presume significant activity in the "tails" of the spending distribution. The findings also challenge the characterization of political spending as an investment that is more valuable as the probability increases that spending will be pivotal in securing a candidate's victory. In this model, those who spend the very most and the very least are most elastic to changes in the law that regulate spending.

[117] A quantile plot for the difference-in-differences estimator is plotted in Figure D of the Appendix.

Those who can afford to spend large amounts of money should positively respond to a law that permits unlimited expenditures as each additional dollar increases the likelihood of playing a pivotal role. In response, those who spend the least—whose expenditures become relatively smaller and smaller—withdraw from the game altogether. We do not observe this behavior. Instead, we see evidence, at least for expenditures in the lowest five percentiles (less than $420), that the decision to spend money on political advocacy might be modeled more precisely as an act of consumption, where the utility of political participation is greater than the size of the expenditure.[118] No existing theory, nor any that we can conjure, predicts that this kind of consumptive behavior would be altered by a decision like *Citizens United*.

What about the largest spenders? Is it possible that the "consumption value" theory explains the inelasticity of those who spend in the top third of the spending distribution? We are skeptical. First, though we acknowledge that the consumption value of political participation is subjective, we are not convinced that the value exceeds $40,000, which is the size of expenditures in the 70th percentile. Second, we think it is more likely that the most sophisticated political operatives—individuals and groups that, in our opinion, are also likely to spend the most money on political advocacy—find ways to influence the process in spite of regulations on different types of spending. In other words, it may be the case that the largest, most sophisticated spenders were already engaged in political advocacy at an efficient level. Removing the ban on corporate and union independent expenditures may have changed the <u>way</u> that independent expenditures are made and managed but not the <u>amount</u> of independent expenditures overall.

With regards to our statistical approach, we acknowledge two features that limit the inferences we are able make. The first is that we cannot distinguish between spenders. Thus, large spenders may be making one large expenditure or they may make several smaller expenditures. For example, suppose that Google wants to spend $1 million to support conservative candidates. After *Citizens United* it can either make expenditures from its general treasury, which we could track, or it could give money to several other politically active groups, many of which would not disclose Google's donation. Because we do not know the source of funds for the 501c and 527 organizations in our sample, we cannot distinguish between a world where Google gives its entire $1 million to a single organization and a world where Google gives $10,000 to

[118] *See* Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, *Why Is There So Little Money in U.S. Politics?* 17 J. ECON. PERSPECTIVES 105 (2003) ("It doesn't seem accurate to view campaign contributions as a way of investing in political outcomes. Instead, aggregate campaign spending in the United States, we conjecture, mainly reflects the consumption value that individuals receive from giving to campaigns.")

each of 100 groups.[119] This severely limits our interpretation of the quantile regression model. However, if corporations and unions are giving money to just one or two political advocacy groups or charities, then Figure 7 is suggestive that this corporate and union money did not overwhelm the entire distribution of expenditures.

The second limitation of our model is that spending amounts are not weighted by their relative importance. Politics is more expensive in some states and less expensive in others. For example, all Arizona gubernatorial candidates combined spent $2.3 million in 2006. In that same year gubernatorial candidates in California spent $12.9 million. In 2010, all candidates for state legislative office in Maine spent $3.3 million while spending in California reached $102.4 million. Thus, a $50,000 independent expenditure during the 2006 Arizona gubernatorial election or the 2010 Maine state legislative election would be far more important than the same amount given in California in those years. We investigate whether relative spending amounts change the interpretation by weighting each expenditure by the total amount of money in that state's campaigns. Because legislative races—even aggregated—typically have much less money spent than gubernatorial races, we weight them separately.[120] Each spender, then, is represented by the ratio of her expenditures to the total spending in that race. These "spender ratios" are very small percentages, ranging from 0.0000001 to 0.26. In the former case, the spender's independent expenditures comprised one ten millionth of the amount spent in the race. In the latter, the spender's independent expenditures comprised over one quarter of the amount spent in the race. The quantile regression of spender ratios (plot not presented) looks nearly identical to the model with raw spending numbers. Control states are uniform and indistinguishable from zero and treated states have a distinct hump in the middle of the distribution.

In our final analysis, we subset the data to just those spenders who appear in both 2006 and 2010 and we observe that the repeat players were much more

[119] We think it is less likely for corporations, unions, and/or wealthy individuals to spread out their expenditures in this way, even for the benefit of anonymity; as with any principal-agent relationship, every donation to an organization comes with a risk that the organization or charity will expropriate the funds for other purposes.

[120] There are two ways in which a spender's ratio can change. The first is a change in the numerator (amount spent in a given state-year-election type) and the second is a change in the denominator (total amount spent in a given state-year-election type). Because we are interested in changes to the numerator, we weight each spender by the total amount of campaign spending—candidate spending and independent expenditures. We include candidate campaign spending because it is relatively predictable year-to-year than just independent expenditures. Therefore, the denominator changes very little across our sample.

likely to increase their spending in 2010 relative to 2006, especially at the lowest end of the expenditure distribution (see Figure E in Appendix). Perhaps the more important observation about repeat spenders is that there are only 94 in the entire dataset (7% of all spenders). We do not think this is evidence that independent expenditures are a one-shot game. Quite the contrary; as we describe in the previous section, the independent expenditure market is largely driven by nonprofit organizations and political committees. These groups notoriously enter and exit the market (e.g. "National Security PAC" in 1988, "Swift Vets and POWs for Truth" and "And For the Sake of the Kids" in 2004, "American Crossroads" in 2012, etc.) while the administrators and donors behind the groups remain in the market for future elections. In other words, understanding the behavior of these groups is only the beginning. Without more robust disclosure laws, we are limited in the inferences that we can draw from these empirical findings.

III. DISCUSSION

A. Independent Expenditures As Share of All Spending

A full discussion of the implications of our findings requires some context. Independent expenditures have been the central focus of campaign finance news since the *Citizens United* decision. Indeed, in the two years since the decision, the term "Citizens United" has become a ubiquitous catchphrase for all of America's campaign finance ills, though it is just one of several deregulatory decisions under the Roberts Court.[121] With all of this attention on independent expenditures, it might be easy to forget that independent expenditures represent just a fraction of overall campaign dollars. In the sixteen states that we analyze in this paper, nearly $140 million was spent independently in gubernatorial races between 2006 and 2010. Direct contributions to gubernatorial candidates in those same states over that same time period exceeded $1 billion, a ratio of more than $7 to $1 in favor of contributions.[122] At the federal level the ratio is smaller but still dominated by direct contributions: $641 million of independent expenditures in the 2012 presidential race compared to $1.4 billion contributed directly to the candidates, a ratio of more than $2 to $1.[123] This relationship is often obscured

[121] *See* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064 (2008).

[122] *See* Gubernatorial Campaign Expenditures Database, compiled by Thad Beyle and Jennifer M. Jensen *at* http://www.unc.edu/~beyle/guber.html.

[123] For IE data *see* Independent Expenditures, Opensecrets.org *at*

by the media both because of sloppy reporting as well as an overreliance on *Citizens United* to frame nearly every story related to money in politics. Missing from most stories is a careful attention to the important distinctions—contributions vs. spending, spending by candidates vs. spending by others, express advocacy vs. issue advertisements, etc., that determine whether, and the extent to which, regulations on political money are tolerable.

The logic of *Citizens United* is arguably very broad and has implications for contribution limits, the regulation of foreign money, and political equality in general. Indeed, much of the public backlash against the opinion stems from opposition to its logic and its signal that the Roberts Court is skeptical about campaign finance regulations more generally.[124] The actual holding, however, is limited to bans (not limits) on corporations and unions making independent expenditures from their general treasuries. *Citizens United* is not responsible for Sheldon Adelson,[125] it did not prohibit corporate contributions to PACs,[126] and it does not permit corporations and unions to directly contribute to candidates.[127] There is no doubt that *Citizens United* has changed the campaign finance landscape in important ways—both the jurisprudence and the way that

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http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=R&pty=N&type=A. For contributions information, s*ee* Stats at a Glance, Opensecrets.org *at* http://www.opensecrets.org/overview/index.php.

[124] *See* Adam Skaggs, *Thanks, Citizens United, For This Campaign Finance Mess We're In*, ATLANTIC MONTHLY (July 27, 2012) ("those criticizing the critics of *Citizens United* miss the forest for the trees. Their myopic focus on debunking overstatements about the case downplays the major role *Citizens United* played in ushering in current conditions—and how it fits with the Roberts Court's ongoing project to put our democracy up for auction.") and Bill Allison, *Yes Virginia (and Dan and Wendy),* Citizens United *Opened the Door to Unlimited Money*, SUNLIGHT FOUNDATION BLOG (Feb. 27, 2012) ("*Citizens United*, along with subsequent court decisions and FEC rulings stemming from it, has radically broadened the means available to well-heeled individuals, not to mention labor unions and corporations, to influence federal elections.")

[125] *See* Nicholas Confessore and Eric Lipton, *For Gingrich, A Rich Friend and Big Lift*, N.Y. TIMES (Jan. 10, 2012) at A1 (Sheldon Adelson's "last-minute interjection underscores how [*Citizens United*] has made it possible for a wealthy individual to influence an election.")

[126] *See* Todd Ruger, *'Citizen Conventions' Should Respond to* Citizens United*, Harvard Law Professor Suggests*, NAT'L LAW JOURNAL (July 24, 2012) ("In *Citizens United*, the Court found that corporations and unions cannot be banned from making independent expenditures to political action committees or candidates.") *at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564277666&slreturn=20120630041247*.

[127] *See* Charles Lane, Editorial, *Split Decision on Health Care Would Not Be a Disaster*, WASH. POST (April 23, 2012) (citing *Citizens United* which "overturned an Act of Congress limiting corporate and union campaign contributions.")

campaigns are actually run. There is little value in responding to exaggerated claims about *Citizens United* with claims that undersell its importance. The truth is that *Citizens United* is both a very narrow decision about corporate accounting practices and also the first case to significantly chip away at the underlying logic of *Buckley v. Valeo* that each individual voter should have an equal voice.[128] With regard to the empirics, regardless of the political activity of corporations and unions, political candidate campaigns are still dominated by direct contributions and *Citizens United* did not change the rules governing contributions.

B. The Supreme Court's Disclosure Disconnect

One of the most overlooked aspects of the *Citizens United* decision was the nearly unanimous vote (8-1) upholding the disclosure provisions of BCRA. The Court explained that "disclosure is a less restrictive alternative to more comprehensive regulations of speech."[129] A few months after *Citizens United* Justice Scalia articulated perhaps the Court's strongest endorsement of disclosure on record when he opined that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed…[Anonymous campaigning] does not resemble the Home of the Brave."[130] In light of this rhetoric it appears that the Supreme Court did not foresee that so much political spending would go underground. According to the Center for Responsive Politics, $0 were spent by 501c organizations (those groups that are not required to disclose their donors) on federal political advocacy in 2006,[131] whereas 40% of *all outside spending* in 2010 was by 501c organizations.[132] The disconnect between the political system the Court envisions and the political system that actually exists has transformed the judicial philosophy of "deregulate and disclose" into "cutback and conceal."

As a result, one of the most difficult challenges in judging campaign finance regulations is a lack of data. Lack of quality data prevents an

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[128] For a more thorough discussion of the scope of the *Citizens United* decision, *see* Justin Levitt, *Confronting the Impact of* Citizens United*,* 29 YALE L. & POL. REV. 217 (2010).

[129] 130 S.Ct. at 915.

[130] *Doe v. Reed*, 130 S.Ct. 2811, 2837 (2010) (concurrence). Note this case addressed the disclosure of petition signatures for those opposed to same-sex marriage.

[131] *Supra* note 67.

[132] *See* Center for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OpenSecrets.org (last accessed Feb. 20, 2013) *at* http://www.opensecrets.org/outsidespending.

evaluation of both assumptions underlying campaign finance laws and the effects of the laws and decisions that emerge based on those assumptions. Some opacity is by construction: many disclosure laws are tailored specifically to protect the identity of political donors (both to candidates and to outside groups) and to mask the size of the contribution or expenditure. And sometimes collecting data is not considered to be worth the benefit gained by public accessibility of the data; most disclosure laws have a floor below which reporting is not required because the cost of disclosure outweighs the benefit of the information. Some opacity, however, is not by design but is rather the result of bureaucratic incompetence and/or poor data accessibility. In some cases, where publicly-reported spending could offer valuable data, access issues pose a challenge for collection. For example, the independent spending data in this paper was collected by the National Institute on Money in State Politics, which reported data accessibility limitations in at least seventeen states.[133] Many of those states were not included in our sample because the data were incomplete or inaccessible. Without data, statutes and judicial opinions are limited to justifications and conclusions based on anecdotes. This has important consequences. As Heather Gerken has argued, "pure political compromise can be produced without coming to grips with the empirics; a sound decision cannot."[134] As we highlight above, we lack important information necessary to estimate the effect of *Citizens United* on the federal level because there is no counterfactual spending trend against which to compare observable changes in spending. At the state level, the subject of this paper, the information exists, but the data are incomplete: we are limited to a subset of states in just a handful of years. Yet even with data from a handful of states for only a few years we are able to estimate the magnitude of changes in independent spending and observe differences between states, expenditure types and expenditure amounts.

There are certainly many values that outweigh the benefits of evaluating and optimizing public policy. For example, anonymity is important for protecting the privacy, and therefore safety, of people who choose to donate to unpopular candidates or causes.[135] We do not consider our advocacy of an empirically-grounded campaign finance jurisprudence (below) at odds with these values. We do believe that the government has a legitimate state interest in understanding the effects of campaign finance on the functioning of the

[133] Personal correspondence between authors and Denise Roth Barber, Managing Director of the National Institute on Money in State Politics (Mar. 8, 2011).

[134] THE DEMOCRACY INDEX (2009), p. 40.

[135] *See*, for example, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

democratic process, and that this interest justifies stricter disclosure requirements than the status quo. Broad disclosure of all independent expenditures, regardless of the source, would enable researchers to better understand the role of money in politics: its effect on agenda setting, policy outcomes, recruitment of candidates, and even the quality of governance. This state interest of research is distinct from the traditional rationale for disclosure rules that informs the voter about who is funding individual candidates. The traditional "informational" rationale requires disclosure at a very fine-grained level, which implicates the First Amendment, raises important privacy concerns, and suffers from the problem of infinite regress: everybody gets their money from somebody else. Instead, we join the chorus of campaign finance reformers calling for aggregate "semi-disclosure."[136] As described by Richard Briffault, campaign finance reports should be used "more like Census data or income tax returns, with the focus for the most part not on the activities of specific individual donors and more on the behavior of demographic or economic aggregates."[137] By understanding the effect of various campaign finance regimes—and the states are currently good laboratories, with a variety of laws—legislative bodies and judges will be in a better position to set up rules that promote political participation, protect free speech, and ensure fair and equal opportunities for self-expression as necessary for our democratic republic.

C. Political Equality: Legal Rules vs. Empirical Evidence

The political equality rationale of *Austin* that the Court rejected in *Citizens United* was intimately tied to corporate identity. The compelling governmental interest in *Austin* was to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated *with the help of the corporate form*."[138] The Court in *Austin* distinguished corporations from wealthy individuals by virtue of the "special advantages" available only to corporations "such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."[139] In its supplemental brief on *Citizens United* the government argued that the "use of corporate treasury

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[136] *See* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273 (2010), Bruce Cain, *Shade From the Glare: The Case for Semi-Disclosure*, CATO UNBOUND, Nov. 8, 2010, and Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. LEGIS. 75 (2010).

[137] *Campaign Finance Disclosure 2.0* at 276.

[138] 494 U.S. at 660, *supra,* note 39 (emphasis added).

[139] *Id.* at 658-59.

funds for electoral advocacy is inherently likely to corrode the political system."[140]

The Court in *Citizens United* flatly rejected the distortion *qua* corporate dominance rationale in *Austin*[141] as well as its broader implication "that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'"[142] The Court warned that "it is a dangerous business for Congress to use the election laws to influence the voters' choices"[143] and concluded that "the rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[144]

Although the importance of political equality has fallen into disfavor as a jurisprudential theory, it remains a central tenet of democratic theory and a "time-honored goal in American constitutional thought" according to Cass Sunstein who articulated the political equality rationale in this way:

> "People who are able to organize themselves in such a way as to spend large amounts of cash should not be able to influence politics more than people who are not similarly able…. Of course economic inequalities cannot be made altogether irrelevant for politics. But the link can be diminished between wealth or poverty on the one hand and political influence on the other. The 'one-person-one-vote' rule exemplifies the commitment to political equality. Limits on campaign expenditures are continuous with

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[140] Supplemental Brief for the Appellee at p. 5, *Citizens United v. FEC* 558 U.S. 50 (2010), *available at*: http://www.fec.gov/law/litigation/citizens_united_sc_08_fec_supp_brief.pdf. Note that the government abandoned its reliance on the antidistortion rationale in its supplemental brief, despite favoring strict restrictions (including a ban on IEs) on corporate political activity. For a discussion of the government's strategy to orphan the antidistortion rationale, and the possible consequences of this strategy, *see* Richard L. Hasen, Citizens United *and the Orphaned Antidistortion Rationale*, 27 GA. L. REV. 989 (2011).

[141] 130 S.Ct. at 913 ("Due consideration leads to this conclusion: *Austin* should be and now is overruled.")

[142] *Id.* at 904 (citing *Buckley*, *supra* note 7 at 48).

[143] *Id.* at 904-05 (quoting *Davis v. FEC*, 554 U.S. 724, 753-54 (2008) ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I § 2, and it is a dangerous business for Congress to use the election laws to influence voters' choices"))

[144] *Id*.

that rule."[145]

This political equality rationale and its narrow articulation as corporate distortion are both predicated on empirical assumptions about the underlying distribution of political spending and the behavior of corporations in the political marketplace. We test these assumptions in this paper and observe spending patterns that are not consistent with the distortion hypothesis at the state level, whether narrowly applied to corporate behavior or broadly defined as political inequality. Direct spending by corporations in the sample we analyze was very rare between 2006 and 2010, accounting for just $5,800 of the $140 million spent on state races. And while it is almost certain that corporate dollars funded the independent expenditures of some advocacy groups, the *relative* significance of groups that spent more than $40,000 across the entire 2010 election cycle was no greater than these groups in 2006 when the law prohibited the use of corporate funds to finance their independent expenditures. In other words, even if *all* of the top 20% of spenders were corporations, or funded entirely by corporate money, there was no observable distortion brought about by *Citizens United* in treatment states; the size of independent expenditures by this group was the same in 2010 as in 2006.

This finding has important implications for both campaign finance jurisprudence and legislative strategies that aim at political equality. If the election years in our sample are representative of larger trends then spending, while skewed toward larger amounts, is relatively continuous. There are no big gaps in spending amounts between the "spenders" and the "big spenders." More importantly, the spenders who were the most elastic to the removal of the corporate IE ban were *not* the largest spenders but those in the middle of the spending distributions (20th to 70th percentiles of expenditures). It is quite possible that these same "middle spenders" are the most elastic to *stricter* campaign finance rules; a possible unintended consequence of laws targeting the largest expenditures. With respect to the Court's view on distortion, *Citizens United's* rejection of the political equality rationale may correctly reflect an underlying empirical distribution of spending that is continuous and not the victim of corporate distortion. (Our data do not speak to this directly as they are limited to state elections). However, we note that the Court was not interested in the empirical distribution of spending; rather, it rejected the view that equality is a valid state interest with an *ipse dixit* that distortion is an unsuitable proxy for corruption.[146] In the process, the Court created a legal rule

[145] Cass R. Sunstein, *Political Equality and Unintended Consequences* 94 COLUM. L. REV. 1390, 1392 (1994).

[146] 130 S.Ct. at 939 (J. Stevens dissenting) ("The Court proclaims that '*Austin* is

to define away a problem that it later admitted was serious enough to warrant judicial intervention.[147] In other words, the Court admitted that it did not care whether independent expenditures actually corrupt the political process because, in the Court's eyes, independent expenditures cannot corrupt as a matter of law, any evidence to the contrary notwithstanding.

We strongly disagree with the Court's reliance on this legal fiction; it is the bluntest of all possible instruments for judging regulations of the political process. This is particularly true for cases that impact state campaign finance laws as *Citizens United* did. States have unique histories—unique from each other and unique from the federal experience—and each has a different set of laws passed at different times for different reasons. Indeed, when the state of Montana produced evidence of a long history of *quid pro quo* corruption to justify its state law, the Supreme Court dismissed the case without a hearing. The Court's indifference to the empirical record in that case, as well as its general aversion to as-applied challenges and narrowing of acceptable evidence in campaign finance cases is both short-sighted and imprudent. Although current disclosure laws prevent analysis of individual-level data (see above), even aggregate spending numbers lend themselves to insights that would significantly improve the jurisprudence on political spending if permitted. As it turns out, the empirical evidence presented in this Article seems to support the Court's skepticism that corporate independent expenditures distort the political process. Nevertheless, we do not believe that the end justifies the means in this case. Campaign finance statutes and jurisprudence relies heavily on assumptions about the effects of money on the political process. Many of these effects are empirically testable. To the extent that judges sincerely care about preventing corruption and protecting First Amendment speech they ought to rely on empirical evidence over arbitrary legal rules to determine whether the political process is *actually* corrupted and whether political speech has *actually* been chilled.

A better understanding of the underlying distribution of spending and the elasticity of demand for political participation is central to the debate about the

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undermined by experience since its announcement.' This is a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its *ipse dixit* that the real world has not been kind to *Austin*. Nor does the majority bother to specify in what sense *Austin* has been 'undermined.' Instead it treats the reader to a string of non sequiturs: 'Our Nation's speech dynamic is changing'; '[s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages'*;* '[c]orporations…do not have monolithic views." How any of these ruminations weakens the force of *stare decisis*, escapes my comprehension.") (internal citations omitted)

[147] *See supra* note 112.

role of money in politics and the responsibility of governments to regulate the political process. This paper contributes to that understanding and in doing so joins a growing empirical literature that challenges some of the basic assumptions about campaign finance.[148]

CONCLUSION

In this Article, we retraced the steps that led to the Supreme Court's decision in *Citizens United* and systematically examined the effect of this decision on spending at the state level. We find that independent spending increased at twice the rate in states whose laws were affected by the decision. When we decompose the sources of independent expenditures, it does not initially appear that the predicted onslaught of independent spending by corporations materialized. However, we observed that spending by 501c and 527 organizations dramatically increased in the treated states, which we interpret as evidence of strategic behavior by firms to hide behind weak disclosure rules. Finally, we examine the distribution of independent expenditures before and after *Citizens United*. We do not observe spending patterns consistent with a distortion hypothesis. Instead, we find that increased spending in treated states was *not* driven by the largest expenditures (i.e. larger than $55,000); rather the effect was most pronounced in the center of the distribution (20th to 70th percentile)—expenditures ranging from $1,000 to about $40,000. We acknowledge as forthrightly as possible that an empirical analysis like that at the core of this Article can only tell part of the story. Any analysis of money in politics, specifically an empirical analysis, should also consider the broader institutional framework encompassing campaign finance regulations, of which *Citizens United* is only the most recent appendage. We have tried to do that here.

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[148] *See*, for example, Ansolabehere, et al. *supra* at note 118 ("Much of the academic research and public discussion of campaign contributions appears to be starting from some misguided assumptions."). *See also* Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 PENN. L. REV. 119 (2004) ("trends in general attitudes of corruption seem unrelated to anything happening in the campaign finance system (e.g., a rise in contributions or the introduction of a particular reform.)")

APPENDIX

A. *State Responses to* Citizens United

	Repeal	Enacted	Effective	EC ban
Alaska	AG opinion	Feb. 22, 2010	Feb. 22, 2010	Y
	Notes		**Source**	**Sample**
	Legislature passed SB 284 formally repealing independent expenditure ban on June 1, 2010 effective the next day.		http://www.legis.state.ak.us/basis/get_bill.asp?session=26&bill=SB284	Y

	Repeal	Enacted	Effective	EC ban
Arizona	HB 2788	April 1, 2010	April 1, 2010	N
	Notes		**Source**	**Sample**
			http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=HB2788&Session_ID=93	Y

	Repeal	Enacted	Effective	EC ban
Colorado	SB 203	May 25, 2010	May 25, 2010	N
	Notes		**Source**	**Sample**
			http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/19FCBA5EBA4D531F872576DA006B4483?Open&file=203_01.pdf	Y

	Repeal	Enacted	Effective	EC ban
Connecticut	HB 5471	June 8, 2010	June 8, 2010	Y
	Notes		**Source**	**Sample**
			http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5471&which_year=2010	N

	Repeal	Enacted	Effective	EC ban
Iowa	SF 2195	April 8, 2010	April 8, 2010	N
	Notes		**Source**	**Sample**
			http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&frame=1&GA=83&hbill=SF2354	Y

	Repeal	Enacted	Effective	EC ban
Kentucky	Registry of Election Finance AO 2010-001	March 24, 2010	March 24, 2010	N
	Notes		**Source**	**Sample**
	Law is still on the books.		http://kref.ky.gov/NR/rdonlyres/99DD9B22-58DA-4AF2-A641-9343CF7780E3/0/AO2010_001.pdf	N

	Repeal	Enacted	Effective	EC ban
Massachusetts	Office of Campaign & Pol. Finance	Feb. 8, 2010	Feb. 8, 2010	N
	Notes		**Source**	**Sample**
	Re-interprets "expenditure" to just mean contribution or coordinated expenditure.		http://www.ocpf.net/legaldoc/citizensunitedstatement.pdf	Y

	Repeal	Enacted	Effective	EC ban
Michigan	*Citizens United v. FEC*	Jan. 21, 2010	Jan. 21, 2010	N
	Notes		**Source**	**Sample**
	Austin was a case about Michigan's independent expenditure ban. Thus, CU directly overturned the ban. The Sec. of State acknowledged this in a statement on Jan. 29, 2010.		http://www.michigan.gov/sos/0,1607,7-127-1633_8723_15274-230880--,00.html	Y

	Repeal	Enacted	Effective	EC ban
Minnesota	HF 2574	May 18, 2010	May 28, 2010	N
	Notes		**Source**	**Sample**
	Less than two weeks before HF 2574 was passed, a fed dist court held that Minnesota's IE ban was unconstitutional. *Chamber of Commerce v. Gaertner*, 710 F.Supp.2d 868 (D.Minn. 2010).		https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF2471&ssn=0&y=2010	Y

	Repeal	Enacted	Effective	EC ban
Montana	*ATP v. Bullock* 132 S. Ct. 2490	June 25, 2012	June 25, 2012	N
	Notes		**Source**	**Sample**
			http://www.supremecourt.gov/opinions/11pdf/11-1179h9j3.pdf	N

	Repeal	Enacted	Effective	EC ban
North Carolina	HB 478	August 2, 2010	April 5, 2011	Y
	Notes		**Source**	**Sample**
	Statute required DOJ preclearance (submission nos. 3057, 3059 and 3090) approved on April 5, 2011.		http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=h748	N

	Repeal	Enacted	Effective	EC ban
Ohio	Secretary of State Advisory Opinion	Feb. 26, 2010	Feb. 26, 2010	Y
	Notes		**Source**	**Sample**
	Secretary of State acknowledged *Citizens United's* effect on state law on her blog. She was running for Senate at the time. Blog post was cross-posted at DailyKos.		http://www.dailykos.com/story/2010/02/26/840929/-Mad-about-Citizens-United-Yeah-it-rsquo-s-Bad-but-We-Can-Do-Something	Y

	Repeal	Enacted	Effective	EC ban
Oklahoma	Ethics Comm'n Rule Amd #20	Feb. 1. 2010	July 1, 2010	Y
	Notes		**Source**	**Sample**
	Ethics Commission said it would not enforce the law on Feb. 1. Legislature and Governor agreed and amendment became formal law on July 1, 2010.		http://tempdocuments.ok.gov/cdm/compoundobject/collection/stgovpub/id/43670/rec/45	Y

	Repeal	Enacted	Effective	EC ban
Pennsylvania	Secretary of State Advisory Opinion	Mar. 4, 2010	Mar. 4, 2010	N
	Notes		**Source**	**Sample**
			http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_160329_772781_0_0_18/DOS%20Statement%20on%20Citizens%20United%20Case%2003-10.pdf	N

	Repeal	Enacted	Effective	EC ban
South Dakota	HB 1053	Mar. 11, 2010	Mar. 11, 2010	N
	Notes		**Source**	**Sample**
			http://legis.state.sd.us/sessions/2010/Bill.aspx?File=HB1053CNF.htm	N

	Repeal	Enacted	Effective	EC ban
Tennessee	HB 3182	June 23, 2010	June 28, 2010	N
	Notes		**Source**	**Sample**
			http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB3182&ga=106	Y

	Repeal	Enacted	Effective	EC ban
Texas	Ethics Comm n Adv. Opinion No. 489	April 21, 2010	April 21, 2010	N
	Notes		**Source**	**Sample**
	Legislature meets every 2 years (i.e. it was not in session in 2010). Passed HB 2359 on June 17, 2011.		http://www.ethics.state.tx.us/opinions/489.html	Y

	Repeal	Enacted	Effective	EC ban
West Virginia	HB 4647	Mar. 13, 2010	June 1, 2010	N
	Notes		**Source**	**Sample**
			http://www.legis.state.wv.us/bill_status/bills_text.cfm?billdoc=HB4647%20SUB%20ENR.htm&yr=2010&sesstype=RS&i=4647	N

	Repeal	Enacted	Effective	EC ban
Wisconsin	Government Accountability Bd Emergency Rule	May 10, 2010	May 20, 2010	N
	Notes		**Source**	**Sample**
			http://gab.wi.gov/sites/default/files/news/nr_gab_emergency_rule_05_20_10_pdf_34804.pdf	N

	Repeal	Enacted	Effective	EC ban
Wyoming			Jan. 21, 2010	N
	Notes		**Source**	**Sample**
	Acc to Robert Stern, no legal changes, just not enforcing.		http://www.citizen.org/documents/sunlight-state-by-state-report.pdf	N

B. State-Level Independent Expenditures During the 2010 Election Cycle

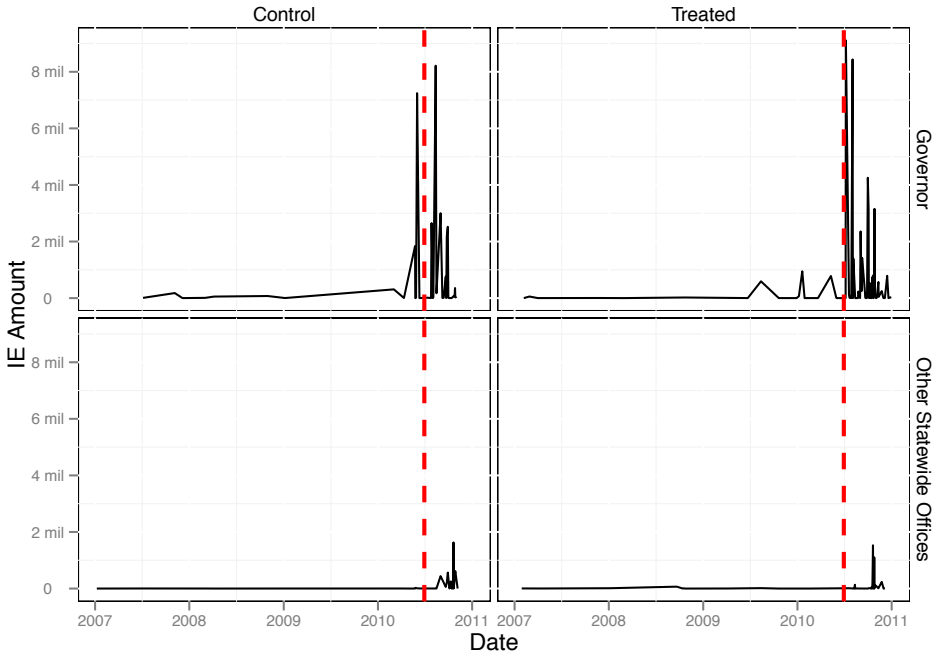

Figure B. Independent expenditures during the 2010 election cycle. The vertical red, dotted line represents July 1, 2010 when every state in the sample had repealed its ban on corporate independent expenditures. In the "treated" states, 89.8% of all independent expenditures happened after July 1. This is a lower bound, since many of the states repealed their bans much earlier than July 1. Aggregated independent expenditures after the date of each individual state's repeal accounts for 96.4% of all independent expenditures in the 2010 election cycle (and 100% in seven of the 11 treated states).

C. Summary Statistics

Variable	Min	Max	Mean
Years	2006	2010	2008
Total Spent	0	28,268,883	178,758.6
Lower House Dems	0.186	0.894	0.507
Lower House Size	40	163	106.8
Lower House District Size	8708	466,700	88,870
Lower House Turnover	6	61	25
Lower House Contested	26	147	73.61
Upper House Dems	0.200	0.875	0.494
Upper House Size	20	67	39.33
Upper House District Size	33,870	933,500	238,900
Upper House Turnover	0	22	7.20
Upper House Contested	2	65	19.81
Gubernatorial Dem	0	1	0.574
Divided Gov't	0	1	0.5185
Unified Gov't	0	1	0
% with B.A. or higher	21.7	38.2	26.97
Median Income	39940	65,520	51,470
State payroll of firms	6,857,313	749,900,003	141,700,000
% unionized employees	0.039	0.247	0.126
State population	677,300	37,340,000	9,004,000

D. Quantile Regression of Difference-in-Differences Model

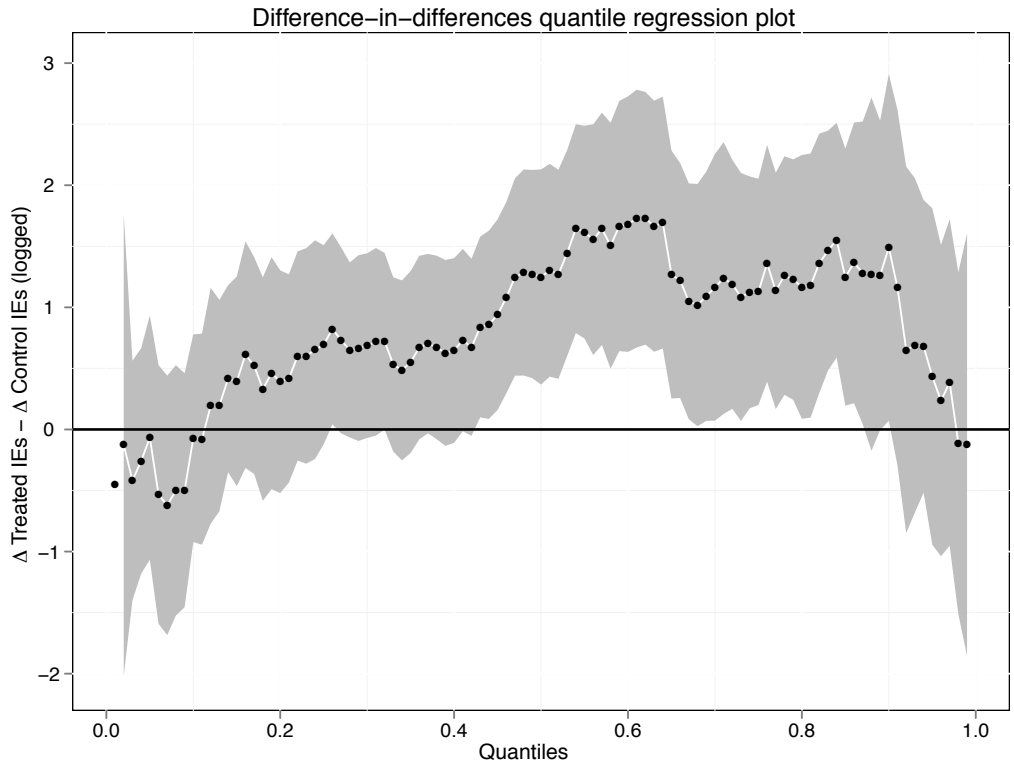

Figure D. Quantile difference-in-difference regression interaction term including state fixed effects. The [treatment – control] difference at every percentile is shown, comprising the [2010 – 2006] difference in log independent expenditures by spender state and year. Grey region is 95% confidence interval.

E. Repeat Spenders

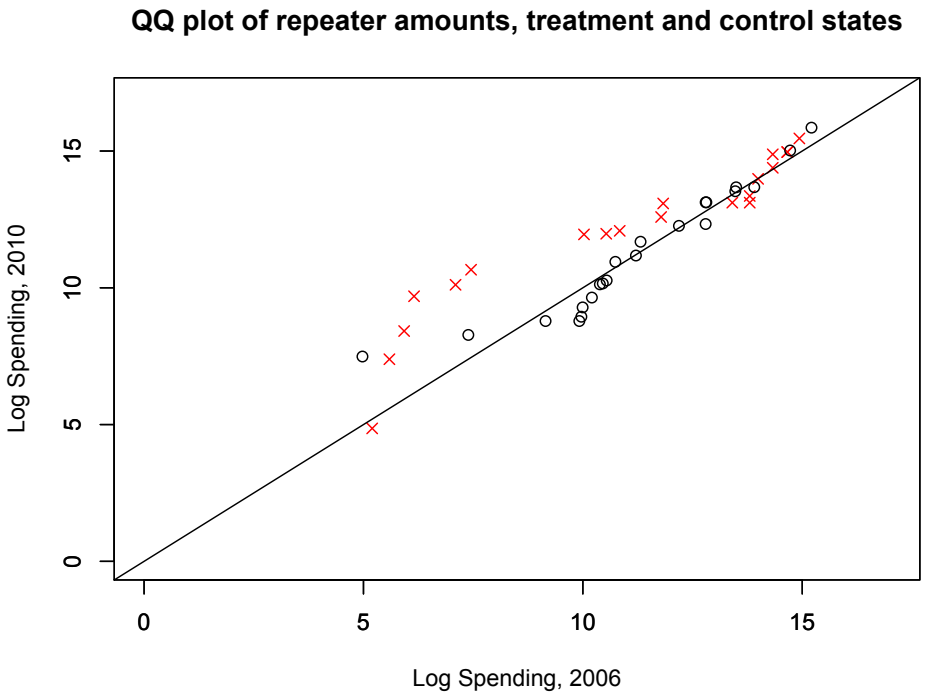

Figure E. Quantile-quantile plots for "repeat players" in treatment and control states between 2006 and 2010. Black circles are the QQplot for the control states (N = 53), and red Xs are the QQplot for treatment states (N = 41). The diagonal line is where the points would be if spending in 2006 exactly equaled the spending in 2010 for a group.

F. Independent expenditure bans and Substitution Toward Direct Contributions

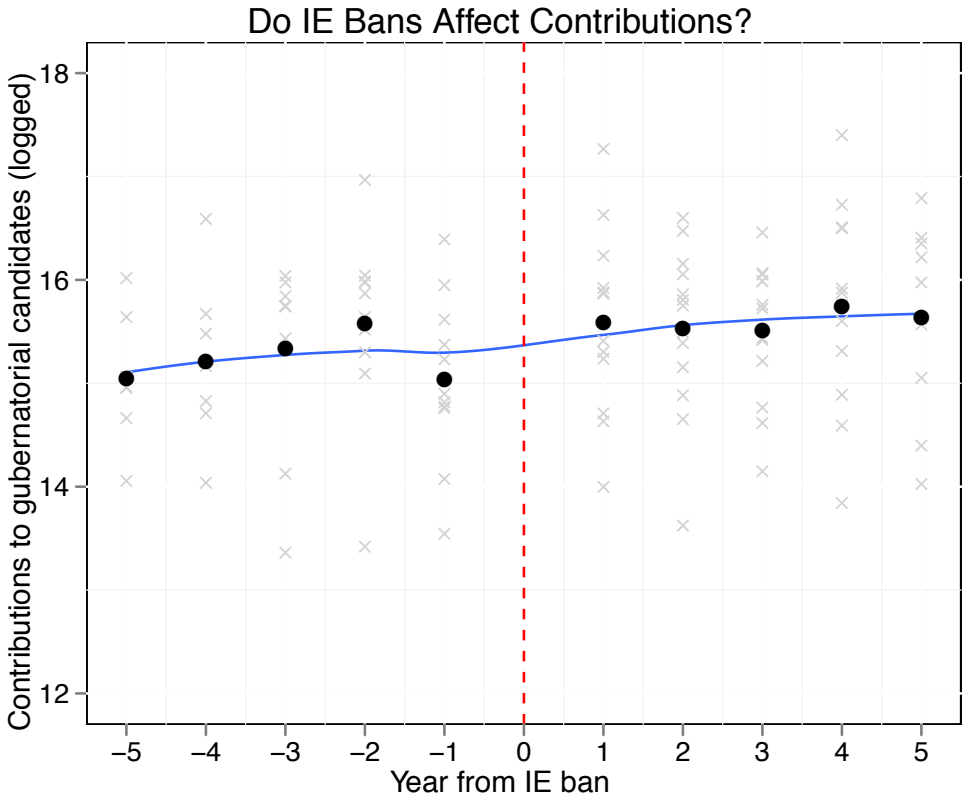

Figure F. Direct campaign contributions to gubernatorial candidates in states that passed a ban on corporate/union independent expenditures. *Source*: *The Gubernatorial Campaign Finance Database* compiled by Thad Beyle and Jennifer M. Jensen. If there is a substitution away from independent expenditures in reaction to a ban, then we expect to see more contributions in years following a ban. In most states, only individuals are allowed to substitute in this way; corporations and unions are banned in 23 states from making direct contributions to candidates. *See* National Conference of State Legislatures, *Life After Citizens United* (2011) *at* http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx.

DATA SOURCES

The data for this project came from a variety of sources. Many were straightforward to gather or update, others less so. The following table explains each variable used, its source, and any coding decisions we made.

Variable	Source
Independent expenditures	National Institute on Money in State Politics www.followthemoney.org
Legislative competition	Updated from Dean W. Burnham, *Partisan Division of American State Governments*, ICPSR STUDY #16 (1996); Ernesto Dal Bo, Pedro Dal Bo, and Jason Snyder, *Political Dynasties*, 76 REV. OF ECON. STUD. 115 (2009); Stephen Ansolabehere, et al. *More Democracy: The Direct Primary and Competition in U.S. Elections*, 24 STUD. IN AM. POL. DEV. 190 (2010),
State population	U.S. Census population estimates http://www.census.gov/popest/data/historical/index.html
Legislative turnover	Book of the States, Table 3.4 http://www.csg.org/policy/publications/bookofthestates.aspx (2006-present). Data before 2006 are not available online.
Number of competitive legislative races	Election returns reported on individual Secretaries of State websites. We identified races as "competitive" where the winner received less than 55% of the vote.
Legislative district size	National Conference of State Legislatures, Constituents per State Legislative District http://www.ncsl.org/legislatures-elections/redist/constituents-per-state-legislative-district.aspx Earlier years calculated: number of seats/state population.
Median income	U.S. Census State Median Income http://www.census.gov/hhes/www/income/data/statemedian
Number of firms	U.S. Census Statistics of U.S. Businesses http://www.census.gov/econ/susb/historical_data.html
Firm payrolls	U.S. Census Statistics of U.S. Businesses http://www.census.gov/econ/susb/historical_data.html
Percent of employees represented by unions	Source: U.S. Bureau of Labor Statistics http://www.bls.gov/webapps/legacy/cpslutab5.htm
Percent population with B.A. or more	National Center for Education Statistics, Digest of Education Statistics. The reported percentage is precisely estimated over time and we use the most recent measure reported for any given year. http://nces.ed.gov/programs/digest/