

2017

## Corporations as Conduits: A Cautionary Note About Regulating Hypotheticals

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### Recommended Citation

Spencer, Douglas M., "Corporations as Conduits: A Cautionary Note About Regulating Hypotheticals" (2017). *Faculty Articles and Papers*. 468.  
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# CORPORATIONS AS CONDUITS: A CAUTIONARY NOTE ABOUT REGULATING HYPOTHETICALS

Douglas M. Spencer\*

## I. INTRODUCTION

In his first official State of the Union Address, President Barack Obama publicly criticized the U.S. Supreme Court's decision in *Citizens United*<sup>1</sup> and argued that the decision would “open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”<sup>2</sup> President Obama continued, “I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities.”<sup>3</sup> As Congress roared its approval, Justice Samuel Alito, sitting in the second row, shook his head and said, “not true.”<sup>4</sup> In the wake of this exchange, empirical scholars have examined the extent to which *Citizens United* has opened the floodgates of spending in politics,<sup>5</sup> empowered corporations and

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1. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

2. Barack Obama, Address Before a Joint Session of Congress on the State of the Union, (Jan. 27, 2010), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=87433>.

3. *Id.*

4. For video of the exchange, see Martin Kady II, *Justice Alito Mouths 'Not True,' POLITICO* (Jan. 27, 2010, 10:12 PM EST), <http://www.politico.com/blogs/politico-now/2010/01/justice-alito-mouths-not-true-024608>.

5. Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 330 (2014).

special interest groups,<sup>6</sup> shifted the partisan balance in state legislatures,<sup>7</sup> entrenched incumbents,<sup>8</sup> and shaped policy outcomes.<sup>9</sup> Legal scholars have criticized the Court's reliance on the Free Speech Clause,<sup>10</sup> the corporate personhood doctrine,<sup>11</sup> binding precedent,<sup>12</sup> and a narrow conception of political corruption.<sup>13</sup>

Missing from all of this analysis and commentary is any sense of whether foreign corporations and/or entities are in fact bankrolling America's elections, as President Obama warned. This gap in our understanding of foreign influence after *Citizens United* is not happenstance. First, *Citizens United* was not a case about a foreign corporation or foreign political dollars—perhaps one reason why Justice Alito was unable to maintain his poker face in

6. John C. Coates, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657, 657 (2012).

7. Tilman Klumpp, Hugo M. Mialon & Michael A. Williams, *The Business of American Democracy: Citizens United, Independent Spending, and Elections*, 59 J.L. & ECON. 1, 11–12 (2016); Nour Abdul-Razzak, Carlo Prato & Stephane Wolton, *How Outside Spending Shapes American Democracy*, available at [https://papers.ssrn.com/abstract\\_id=2823778](https://papers.ssrn.com/abstract_id=2823778) (last revised May 19, 2017).

8. Raymond J. La Raja & Brian F. Schaffner, *The Effects of Campaign Finance Spending Bans on Electoral Outcomes: Evidence from the States About the Potential Impact of Citizens United v. FEC*, 33 ELECTORAL STUD. 102, 109 (2014).

9. Timothy Werner & John J. Coleman, *Citizens United, Independent Expenditures, and Agency Costs: Reexamining the Political Economy of State Antitakeover Statutes*, 31 J.L. ECON. & ORG. 127, 128, 132, 154 (2014); Timothy Werner, *The Sound, the Fury, and the Non-Event: Business Power and Market Reactions to the Citizens United Decision*, 39 AM. POL. RES. 118, 123–27 (2011).

10. Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 266, 415–17 (2013); Sonja West, *Favoring the Press*, 106 CAL. L. REV. (forthcoming 2018) (manuscript at 4, 6–10), available at <https://papers.ssrn.com/abstractid=2913790>.

11. Jennifer S. Taub, *Money Managers in the Middle: Seeing and Sanctioning Political Spending After Citizens United*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 443, 455–56 (2012); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 498–99, 505–06 (2010); Matthew J. Allman, Note, *Swift Boat Captains of Industry for Truth: Citizens United and the Illogic of the Natural Person Theory of Corporate Personhood*, 38 FLA. ST. U. L. REV. 387 (2011); Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 720–22, 736–40 (2011).

12. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 586 (2011); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 217 n.3 (2010).

13. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 4–5 (2014); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 234–42 (2011); Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 657–63 (2011); Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 248–52 (2010); Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 991–92 (2011).

response to President Obama's criticism.<sup>14</sup> The majority opinion does refer to foreign corporations, but only as an aside to note that the challenged regulation was not properly tailored to achieve any of the possible government interests, including "a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."<sup>15</sup> Justice Stevens sounds the alarm on foreign corporations in his dissent to highlight the untenable position of the majority that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."<sup>16</sup> Justice Stevens argued:

If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. . . . [For example] it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "enhance the relative voice" of some (i.e., humans) over others (i.e., nonhumans).<sup>17</sup>

Despite the rhetorical posture of the Court in *Citizens United*, our lack of information about the political activity of foreign corporations is more directly due to weak corporate transparency laws. Both corporate transparency laws and political transparency laws fail to require the full disclosure of relevant financial transactions, and state and federal agencies often fail to strictly enforce the laws that are on the books.

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14. Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014), [https://spectator.org/58731\\_sam-alito-civil-man/](https://spectator.org/58731_sam-alito-civil-man/) ("When he tells me that he is done making appearances at the State of the Union, I ask him about the last time he attended, in 2010, when he mouthed what looked like the words 'not true' in response to President Obama's characterization of the Court's ruling in *Citizens United v. Federal Election Commission*. 'I don't play poker,' he says. 'Either I should take it up so that I learn to have a poker face, or it's a good thing that I don't because I'd lose a lot of money. People thought I said something. I assume that they're correct. I certainly thought it.'")

15. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010).

16. *Id.* at 347 (Stevens, J., with Ginsburg, Breyer, and Sotomayor, JJ., concurring in part and dissenting in part) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978)).

17. *Id.* at 424 (emphasis in the original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)); see Hasen, *supra* note 12, at 584 (explaining that "it is unclear how, if the Court took its own broad pronouncements in *Citizens United* seriously, it could possibly sustain spending limits against foreign nationals and governments, who might seek to flood U.S. election campaigns with money").

Corporations are required to disclose all expenditures made in support of a political campaign to the Federal Election Commission (“FEC”).<sup>18</sup> Direct disclosure to the firm’s shareholders, however, is not required.<sup>19</sup> Corporations may also give money to political committees, such as 527 organizations or Super Political Action Committees (“PACs”) that use the corporation’s contribution to support or oppose political candidates.<sup>20</sup> These political committees are required to disclose the source of their funds to the FEC, but the corporations are not required to disclose these expenditures to their shareholders. Corporations are banned from directly contributing money to candidates running for any federal office. Twenty-one states have a similar ban for state elections.<sup>21</sup> However, twenty-three states do permit corporations to contribute a limited amount of money to candidates for state office, and six states allow unlimited corporate contributions directly to candidates.<sup>22</sup> The enforcement of these laws varies among the states,<sup>23</sup> and is generally considered to be weak and ineffectual.<sup>24</sup> For many campaigns, the risk of violating these contribution and disclosure laws, as well as any potential punishment, is seen as the

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18. 11 C.F.R. § 110.11 (2017).

19. *Id.* § 110.11(f)(2); see *Special Notices on Political Ads and Solicitation*, FED. ELECTION COMMISSION 7 (2006), [https://www.fec.gov/pages/brochures/spec\\_notice\\_brochure.pdf](https://www.fec.gov/pages/brochures/spec_notice_brochure.pdf) (citing to 11 C.F.R. 110.11(f)(2) with an explanation that a disclaimer notice is not required for internal corporate/labor communications).

20. Note that I follow the conventional practice of identifying 527 organizations as those that are not permitted to expressly advocate for the election or defeat of a specific candidate or candidates. Technically, nearly all campaign committees, political parties, and Super PACs are organized under Section 527 of the IRC, although these groups are permitted to expressly advocate in favor or against candidates.

21. *State Limits on Contributions to Candidates: 2015-2016 Election Cycle*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf> (last visited Nov. 13, 2017).

22. *Id.*

23. Some states have state enforcement agencies (e.g., California’s Fair Political Practices Commission and Connecticut’s State Elections Enforcement Commission) while other states rely on the state Attorney General or state prosecutors to enforce the law through traditional civil or criminal litigation. *State Ethics Oversight Agencies*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/ethics/state-ethics-oversight-agencies.aspx#California> (last visited Nov. 13, 2017).

24. Yue Qiu, *How Does Your State Rank for Integrity? The 2015 State Integrity Investigation Finds It Doesn’t Look Good*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015), <https://www.publicintegrity.org/2015/11/09/18822/how-does-your-state-rank-integrity>; Mollie Bryant, Geoff Pender & Kate Royals, *No State Officials Enforce Campaign Finance Laws*, CLARION-LEDGER (Mar. 5, 2016), <http://www.clarionledger.com/story/news/2016/03/05/public-officeprivate-gain-best-enforcement-practices/81206204/>.

cost of doing business.<sup>25</sup> As a result, it is not always possible for the public to observe corporate political activity.

Consider also that corporations may contribute money to nonprofit 501(c) organizations that can use the corporation's contribution to support or oppose candidates and issues, so long as this political activity is not the primary purpose or function of the 501(c). These tax-exempt 501(c) organizations are not required to disclose their donors, and corporations are not required to disclose contributions to a politically active 501(c) to their shareholders.

For President Obama and the dissenting Justices in *Citizens United*, this unobserved corporate political activity opens the door to foreign intrusion into American politics. Just the fact that foreign corporations could *possibly* engage in political activity or that foreign individuals could *possibly* funnel money to political groups through undisclosed corporate channels was cause for alarm.

During the 2016 election, the public observed foreign hackers infiltrate four state voter registration databases and attempt to hack into sixteen more.<sup>26</sup> The public observed foreign hackers release personal communications between Hillary Clinton and her campaign manager and staff.<sup>27</sup> But the public did not (and will likely not be able to) observe the extent to which foreign dollars,

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25. When Larry Noble was General Counsel at the FEC, he made the following comment:

The argument is that violating the law has become the cost of doing business. I can tell you in many cases this is true. I have talked to enough lawyers who represent candidates who say that the classic conversation in the campaign room consists of someone asking, "We want to do this and this. What are the consequences?" Then the lawyer responds by saying, "We cannot do that. It is illegal. After the election, the FEC will go after you." To which the questioner asks, "What is the fine?" Even if the penalty is a \$20,000 fine, he is thinking, "But this action will win the election. All right, thank you. Leave the room, please." I am serious. That scenario happens, and the lawyers get up and leave the room.

Elizabeth Hedlund, Lawrence Noble, & Thomas O. Sargentich, *Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 ADMIN. L.J. AM. U. 223, 232 (1994).

26. Mike Levine & Pierre Thomas, *Russian Hackers Targeted Nearly Half of States' Voter Registration Systems, Successfully Infiltrated 4*, ABC NEWS (Sept. 29, 2016), <http://abcnews.go.com/US/russian-hackers-targeted-half-states-voter-registration-systems/story?id=42435822>.

27. See, e.g., *18 Revelations from Wikileaks' Hacked Clinton Emails*, BBC NEWS (Oct. 27, 2016), <http://www.bbc.com/news/world-us-canada-37639370> (describing the content of hacked emails from the Gmail account of John Podesta, chairman of Hillary Clinton's 2016 campaign).

funneled through corporations and nonprofits, impacted the 2016 elections. It is possible, perhaps likely, that no political spending originated outside America's borders. But the law fails to provide a way to confirm this.<sup>28</sup> This lack of transparency is not the result of *Citizens United*; in fact, the Court in *Citizens United* upheld disclosure and disclaimer requirements and argued that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."<sup>29</sup> One way to make sense of *Citizens United* is to read the Court as confirming the strong political rights of corporations *because of* its strong belief in transparency.<sup>30</sup> However, even if the majority took this position, the transparency laws on the books are problematic, regardless of how many times the Court upholds them.<sup>31</sup>

In this Article, prepared as part of a Symposium on the intersection of corporations and money in politics, I illustrate the various ways that corporations can spend their money to influence politics in America and the relevant disclosure rules, or lack thereof, that track this political activity. I also highlight opportunities for individuals such as foreign nationals to exploit corporate transparency loopholes to illegally spend money in American politics, and question whether this evidence of *possible* nefarious activity is adequate to justify regulations targeting *actual* nefarious activity (I argue that the former is necessary but not sufficient for the latter). Drawing on the logic of risk analysis, I illustrate how the debate about hypothetical foreign campaign

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28. At the time this Article went to press, Facebook, Google, and Twitter voluntarily disclosed that Russian agents had uploaded more than 1,000 videos to YouTube, posted tens of thousands of messages and videos on Facebook that reached more than 100 million users, and published more than 130,000 messages on Twitter. Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html>.

29. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010) (majority opinion).

30. Depending on one's reading of *First National Bank of Boston v. Bellotti* and *Austin v. Michigan Chamber of Commerce*, the Court in *Citizens United* did more than just "confirm" corporate political rights. Some argue that the Court expanded corporations' political rights. See, e.g., Robert Monks & Peter Murray, *Is the Supreme Court Determined to Expand Corporate Power?*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Aug. 25, 2009), <https://corpgov.law.harvard.edu/2009/08/25/is-the-supreme-court-determined-to-expand-corporate-power/>.

31. See generally Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns*, 15 ELECTION L.J. 302 (2016) (discussing, in depth, the Court's position on transparency and its effects).

activity parallels current controversies about voter fraud. Finally, I argue that campaign finance laws have been created, justified, implemented, and interpreted in relative isolation from one another, creating unnecessary (though perhaps anticipated) loopholes in enforcement that undermine the goals of oversight and accountability in campaigns and elections. Campaign finance regulations can only be effective if they are responsive to the dynamic character of political campaigns. Thus, policymakers should focus less on “comprehensive” reform that addresses multiple aspects of campaign finance in relative isolation, and focus more on “integrated” reform that treats the various channels of campaign finance as dynamic, interconnected, and manipulable by strategic actors.<sup>32</sup>

## II. CORPORATE POLITICAL ACTIVITY

The modern stereotype of corporations is that they are privately interested, profit-maximizing organizations with no obligation to serve the public interest. This view of corporations is justified by classical economic theory that promises socially efficient, and therefore beneficial, outcomes when individuals and firms are privately interested, because legal sanctions provide protection against harm that individuals and firms might inflict on others. This stereotype is reflected, at least in part, in practice. For example, corporations that aim to incorporate public benefit into their charter have adopted the moniker benefit corporations or “B corporations.”<sup>33</sup> This special designation (or disclaimer) is a recent development.<sup>34</sup> In the early years of the Republic, states provided the benefits of the corporate form—e.g., limited liability, limited risk of loss, eternal life, wealth protection—to interested parties in exchange for a commitment that the corporation would serve the

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32. See generally Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804 (2014) (discussing, in depth, political realism and campaign finance jurisprudence).

33. See, e.g., DEL. CODE ANN. tit. 8, § 362 (2017) (defining a public benefit corporation as a “for-profit corporation . . . that is intended to produce a public benefit . . . and to operate in a responsible and sustainable manner”).

34. See Suntae Kim et al., *Why Companies Are Becoming B Corporations*, *HARV. BUS. REV.* (June 17, 2016), <https://hbr.org/2016/06/why-companies-are-becoming-b-corporations> (“The first generation of B Corporations was certified in 2007, and the number of firms earning certification has grown exponentially ever since. Today there are more than 1,700 B Corporations in 50 countries.”).



public interest.<sup>35</sup> In addition to serving the public interest, corporations were required to abide by several other state-mandated regulations, such as limiting legal action to state courts, operating for a specific stated purpose, not owning stocks in other corporations, and not making political expenditures.<sup>36</sup> Corporations almost immediately began to push back against regulations, specifically the limited nature of corporate charters, the power of states to alter or revoke these charters, and the burdensome state and local taxes that adversely affected revenues.<sup>37</sup> As a result of two hundred years of regulation, litigation, corruption, and compromise, corporate regulatory law has become highly complicated, and these regulatory rules are embedded in nearly every federal agency, in addition to multiple agencies within each of the states and territories. This complex web of rules, rights, and responsibilities has created numerous avenues for corporations to legally engage in political activity. The tangle of rules has also created loopholes that provide corporations various avenues to hide that activity if they so wish.

Publicly traded corporations have the most expansive and frequent disclosure requirements, and all disclosed information is reported to the U.S. Securities and Exchange Commission (“SEC”) and made available on the SEC website. This includes, among other things, the names and ages of all directors, executive compensation, audited financial statements, revenues generated by major products, pending litigation, the equity of shareholders, and the names of shareholders that agree that their names be listed.<sup>38</sup> Publicly traded corporations must also prepare an annual

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35. THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 16 (2002); Thom Hartmann, *Unequal Protection: The Early Role of Corporations in America*, TRUTHOUT (Apr. 26, 2011), <http://www.truth-out.org/opinion/item/735-unequal-protection-the-early-role-of-corporations-in-america> (“After all, if the people, through their elected representatives, are going to authorize a legal limitation of liability for a group of people engaged in the game of business, it’s quite reasonable to ask that the game be played in a way that throws off some benefit to the government’s citizens or at least doesn’t operate counter to the public welfare.”).

36. See Jane Anne Morris, *Fixing Corporations – Part 1: The Legacy of the Founding Parents*, ENVTL. RES. FOUND. (Apr. 4, 1996), <http://www.rachel.org/?q=en/node/3953> (explaining corporate regulations in the 1800s).

37. A comprehensive history of corporate regulation is beyond the scope of this Article. For a more in-depth overview of corporate regulation, see generally CIARA TORRES-SPELLISY, *CORPORATE CITIZEN? AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE* (2016).

38. See *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, U.S. SEC. & EX. COMMISSION 9–11, <https://www.sec.gov/about/>

report for their shareholders. While publicly traded corporations have discretion over what to disclose to shareholders, the content of these reports is largely the same as SEC reports.<sup>39</sup> Private companies are regulated under state law and must submit their articles of incorporation to their respective secretary of state as well as documentation about their purpose, who controls the company, and certain financial and other information as specified in the law of each state.<sup>40</sup> All of these disclosure requirements are business-oriented, meaning their primary purpose is to ensure that corporate laws are being followed and managers are making sound business decisions. In other words, the goal of corporate disclosure is to protect shareholders, not to expose them. When it comes to political activity and money in politics, however, disclosure rules enforced by the FEC are designed specifically to expose the identity of speakers and their supporters.

### A. Political Disclosure

In federal elections, every person who contributes at least \$250 to a candidate must disclose his or her name, address, and occupation to the FEC.<sup>41</sup> Forty-two states require candidates for state office to disclose every single contribution regardless of size,

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forms/form10-k.pdf (last visited Nov. 13, 2017) (requiring the disclosure of, among other things, directors, beneficial owners, executive officers, and executive compensation); see also *Form 10-Q: Quarterly Reports Under Section 13 or 15(d) of the Securities Exchange Act of 1934*, U.S. SEC. & EX. COMMISSION 5, <https://www.sec.gov/about/forms/form10-q.pdf> (last visited Nov. 13, 2017) (requiring the disclosure of legal proceedings and other risk factors); *Form 8-K: Current Report: Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, U.S. SEC. & EX. COMMISSION 4–16, <https://www.sec.gov/about/forms/form8-k.pdf> (last visited Nov. 13, 2017) (requiring the disclosure of, among other things, audited financial statements, elected and departing directors, matters requiring a vote of shareholders, and amendments to the firm’s code of ethics). Note that all beneficial owners (those that own more than five percent of the common stock) must disclose their names and additional information. *Fast Answers: Schedule 13D*, U.S. SEC. & EX. COMMISSION, <https://www.sec.gov/fast-answers/answerssched13htm.html> (last modified Dec. 5, 2012).

39. See *Fast Answers: Annual Report*, U.S. SEC. & EX. COMMISSION, <https://www.sec.gov/fast-answers/answers-annrephm.html> (last modified Oct. 15, 2014) (noting that “[c]ompanies sometimes elect to send their annual report on Form 10-K to their shareholders in lieu of, or in addition to, providing shareholders with a separate annual report”).

40. For an overview of disclosure requirements for private corporations, see Howard Liebman, *Public Disclosure Requirements for Private Companies: U.S. Vs. Europe*, JONES DAY (Oct. 2012), [http://www.jonesday.com/public\\_disclosure\\_requirements/](http://www.jonesday.com/public_disclosure_requirements/).

41. *Citizens Guide*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/citizens.shtml> (last updated Feb. 2017).

while eight have thresholds ranging from \$200 to \$1000.<sup>42</sup> Federal law prohibits contributions to both federal and state candidates from corporations, unions, foreign nationals, government contractors, and contributions made in the name of another.<sup>43</sup> Before 2010, this prohibition also applied to independent expenditures, though *Citizens United* removed the ban on corporations and unions.<sup>44</sup> Any independent expenditure of at least \$250 in support of or opposition to a federal candidate must be itemized and disclosed, including the name, address, and occupation of the spender<sup>45</sup> (state rules vary significantly with respect to independent expenditures).<sup>46</sup> Independent expenditures can also be made via intermediary organizations, such as PACs, 527 committees, Super PACs, nonprofit social welfare organizations organized under section 501(c)(4) of the Internal Revenue Code, or trade organizations organized under Section 501(c)(6).<sup>47</sup> With the exception of 501(c) organizations, these intermediary groups are subject to the same disclosure requirements that individuals are. Because the primary purpose or function of a 501(c) organization is not politics (and cannot be under the law), the FEC does not require that 501(c)s publicly disclose the source of their funding. The Internal Revenue Service (“IRS”), however, does collect information about donors to 501(c) groups to ensure compliance with the Internal Revenue Code.<sup>48</sup>

Taken together, all of these disclosure rules generate a lot of publicly available information that can be used by voters to inform themselves, and to hold public officials and candidates for public office accountable. While the disclosure of contributions to

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42. *State Campaign Finance Disclosure Requirements: 2015-2016 Cycle*, NAT'L CONF. OF ST. LEGISLATURES (July 17, 2015), <http://www.ncsl.org/Portals/1/documents/legismgt/elect/StateCampaignFinanceDisclosureRequirementsChart2015.pdf>.

43. *Citizens Guide*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/citizens.shtml#prohibited> (last updated Feb. 2017).

44. *Making Disbursements as a PAC*, FED. ELECTION COMMISSION, [http://www.fec.gov/pages/brochures/index.shtml#Who\\_IE](http://www.fec.gov/pages/brochures/index.shtml#Who_IE) (last visited Nov. 13, 2017); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010).

45. *FEC Form 5: Report of Independent Expenditures Made and Contributions Received*, U.S. SEC. & EX. COMMISSION 1, <https://www.fec.gov/pdf/forms/fecfrm5.pdf> (last visited Nov. 13, 2017).

46. *States' Independent Expenditure Reporting 2014*, NAT'L CONF. OF ST. LEGISLATURES, [http://www.ncsl.org/Portals/1/documents/legismgt/2014\\_Independent\\_Expenditures\\_Chart.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/2014_Independent_Expenditures_Chart.pdf) (last visited Nov. 13, 2017).

47. *Form 8283: Noncash Charitable Contributions*, INTERNAL REVENUE SERVICE 1, <https://www.irs.gov/pub/irs-pdf/f8283.pdf> (last visited Nov. 13, 2017).

48. *Id.*

candidates is relatively strict, the disclosure requirements for independent expenditures are easier to avoid. There are two separate approaches to avoiding disclosure, though individuals and groups may engage in both simultaneously. The first avoidance strategy is simply to give money to a 501(c) organization, which is not required to disclose the identity of its donors and is therefore sometimes referred to as a “dark group” or a group that deals with “dark money” (a clever moniker used by advocates of transparency to both describe and deride these groups).<sup>49</sup> This strategy comes at a cost, as 501(c) organizations cannot engage in political activity as their primary activity, so most (or nearly most) of the groups’ overall funding must be spent for non-political purposes.<sup>50</sup> Of course, one 501(c) could spend just under half of its money on political activity and then donate the rest of its funds to another 501(c), which could spend just under half of its money on political activity and donate the rest of its funds to a third 501(c), and so on.

The second disclosure-avoidance strategy parallels this “Russian doll” strategy. Individuals or organizations can create a shell corporation to hold their money, and this corporation can make independent expenditures itself or give money to a Super PAC or other political committees to make the independent expenditures. This strategy does not guarantee full privacy/secretcy should an enterprising investigator notice the donation to a Super PAC by a corporation and track down information about that corporation. As outlined above, however, private corporations are

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49. *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POL. (Oct. 30, 2017), [https://www.opensecrets.org/outsidespending/nonprof\\_summ.php](https://www.opensecrets.org/outsidespending/nonprof_summ.php).

50. The conventional wisdom is that 501(c)s must spend less than half of their money on political activities. However, the term “primary activity” is not clearly defined (50% of funding? 50% of time and effort? 50% of impact?) and a proposed clarification to the rule by the IRS has failed to materialize. See *Prepared Remarks of Commissioner of Internal Revenue Service John Koskinen Before the National Press Club*, INTERNAL REVENUE SERVICE (Apr. 2, 2014), <https://www.irs.gov/newsroom/prepared-remarks-of-commissioner-of-internal-revenue-service-john-koskinen-before-the-national-press-club-2014> (noting that due to a record number of public comments on the proposed rule, “[i]t’s going to take us a while to sort through all those comments, hold a public hearing, possibly repropose a draft regulation and get more public comments. This means that it is unlikely we will be able to complete this process before the end of the year.”). As of 2017, no new rule has been adopted, and no clarification of the term “primary activity” has been published. Currently, the IRS engages in a contextual “facts-and-circumstances test” to determine the primary purpose of a 501(c) organization. *Schedule A (Form 990 or 990-EZ): Public Charity Status and Public Support*, INTERNAL REVENUE SERVICE 2, <https://www.irs.gov/pub/irs-pdf/f990sa.pdf> (last visited Nov. 13, 2017).

not required to disclose personal information about shareholders or members besides the signatory of the articles of incorporation. In a more extreme example, an individual could create separate shell companies and place funds in the first (a private corporation), which passes all of the funds to the second (a Super PAC), which then forwards the money to the third (a 501(c)(4)) which spends just less than half of the money on a political advertisement and forwards the remaining funds to the fourth (a second 501(c)(4)), which then spends just less than half of the money on additional advertisements supporting a candidate, and donates the remaining funds back to the private corporation. In this scenario, neither the FEC nor the IRS (and thus the general public) can identify the individual source of the expenditure. The FEC does not require disclosure from either of the 501(c)(4)s that made the independent expenditures, and the IRS, which does not formally communicate with the FEC, evaluates the activity of each 501(c)(4) independently.<sup>51</sup> Once the IRS confirms that neither of the 501(c)(4)s engaged in political activity as its primary function—the first 501(c)(4) spent less than half its funds on politics and more than half its funds supporting another social welfare organization, the second 501(c)(4) spent less than half its funds on politics and more than half its funds on a private corporate client—the investigation will likely stop.<sup>52</sup> In this highly stylized example, an individual can spend approximately seventy-five percent of her money on independent expenditures and retain control over the remaining twenty-five percent that is sitting in a shell corporation, which can be dissolved after the election with little fanfare.

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51. Robert Maguire & Viveca Novak, *Shadow Money Magic: Five Easy Steps that Let You Play Big in Politics, Hide Your Donors and Game the IRS – Step 2*, CTR. FOR RESPONSIVE POL. (Apr. 16, 2013), <https://www.opensecrets.org/news/2013/04/shadow-money-magic-five-easy-steps-1/>.

52. Note that the Center for Responsive Politics (a nonprofit 501(c) itself) has tried to connect the dots between FEC reports and IRS reports and has identified several nonprofits and corporations that spend “dark money.” The Center’s efforts are motivated by the idea of “nondisclosure disclosure.” See Heather K. Gerken, Wade Gibson & Webb Lyons, *Rerouting the Flow of “Dark Money” into Political Campaigns*, WASH. POST (Apr. 3, 2014), [https://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08\\_story.html?utm\\_term=.815b935c68da](https://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08_story.html?utm_term=.815b935c68da).

## B. Empirical Evidence of Undisclosed Spending

All of the prior scenarios assume that individuals and corporations are interested in making independent expenditures. By rule, these expenditures cannot be coordinated with political campaigns, meaning the advertisements may or may not match the campaign strategy of the spender's preferred candidate.<sup>53</sup> Further, to ensure anonymity, these individuals and/or corporations must also be willing to give up control of their money to a third (or fourth) party, or expend the time and resources to incorporate one or more shell organizations. How likely are individuals and corporations to do this? Empirically, the amount of money spent on independent expenditures has skyrocketed since *Citizens United*. In 2006, the last midterm election before *Citizens United*, \$70 million was spent nationwide on independent expenditures related to federal races.<sup>54</sup> In 2010, the first midterm election after *Citizens United*, independent expenditures jumped sharply to \$310 million, and by 2014 independent expenditures surpassed \$558 million.<sup>55</sup> In presidential election years, independent expenditures increased from \$338 million in 2008 to \$1 billion in 2012 and \$1.4 billion in 2016.<sup>56</sup> As a percentage of spending by all federal candidates, independent expenditures grew from just 6% of candidate spending in 2006 to 54% in 2014.<sup>57</sup> In presidential years, the percentage increased from just 8% in 2008 to 66% in 2016.<sup>58</sup> The proportion of these independent expenditures made by "dark groups" in federal races has also increased in the wake of *Citizens United*, from \$5 million in 2006 (or 7% of all independent expenditures) to \$136 million in 2010 (44%) to \$178 million in 2014 (32%).<sup>59</sup> The amount of undisclosed spending is

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53. See generally Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399 (2016) (criticizing the assumption (or expectation) that independent expenditures are truly independent); Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88 (2013) (same); see also Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531 (2016) (criticizing that "coordination" is too narrowly construed under the law).

54. *Outside Spending by Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/> (last visited Nov. 13, 2017).

55. *Id.*

56. *Id.*

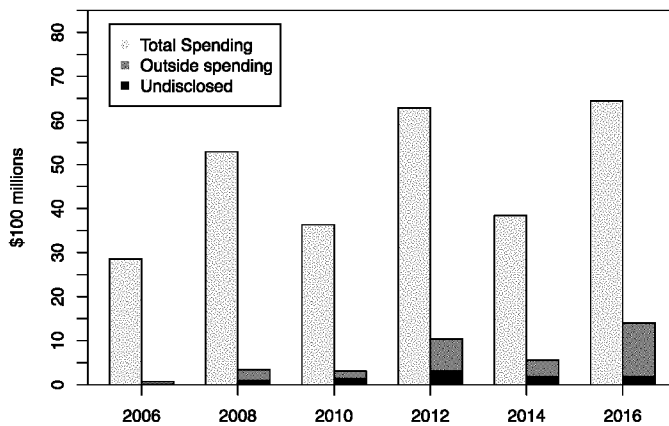
57. *Id.*

58. See generally *Election Overview*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/index.php> (last visited Nov. 13, 2017) (providing a year-to-year breakdown of candidate spending).

59. *Political Nonprofits (Dark Money)*, *supra* note 49.

even higher in presidential election years,<sup>60</sup> and the same disclosure-avoiding behavior has also been observed at the state level.<sup>61</sup> However, the hundreds of millions of dollars of “dark money” circulating during each election cycle represent just a fraction of *overall* spending in elections: 1.9% of all spending in 2008, 4.9% of in 2012, and 2.9% in 2016.<sup>62</sup> This raises the question of how pernicious “dark money” is in American politics, and how much influence foreign corporations or foreign entities could have on candidate recruitment, retention, and support.

**Figure 1.** “Dark Money” by Cycle: Total and Percentage of All Spending<sup>63</sup>



60. *Id.*

61. See Spencer & Wood, *supra* note 5, at 347 (showing 100% increase in undisclosed spending in 2010 compared to 2006).

62.

|      | President | Congress | Total    | Outside  | Dark   | Dark/Total |
|------|-----------|----------|----------|----------|--------|------------|
| 2006 | —         | \$2,853m | \$2,853m | \$70m    | \$5m   | 0.18%      |
| 2008 | \$2,800m  | \$2,486m | \$5,286m | \$338m   | \$102m | 1.93%      |
| 2010 | —         | \$3,632m | \$3,632m | \$310m   | \$136m | 3.74%      |
| 2012 | \$2,621m  | \$3,664m | \$6,286m | \$1,037m | \$309m | 4.92%      |
| 2014 | —         | \$3,845m | \$3,845m | \$558m   | \$178m | 4.63%      |
| 2016 | \$2,387m  | \$4,058m | \$6,444m | \$1,401m | \$184m | 2.86%      |

*Cost of Election*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/cost.php> (last visited Nov. 13, 2017) (for a discussion on how the total cost of election is calculated, scroll to the bottom of the page and click the “Methodology” hyperlink); *Outside Spending*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/> (last visited Nov. 13, 2017); *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/disclosure.php> (discussing reported dark money) (last visited Nov. 13, 2017).

63. *Outside Spending by Disclosure, Excluding Party Committees*, *supra* note 62.

## C. Foreign Political Activity

If individuals and corporations are protecting their anonymity, should we be concerned that these individuals are foreign nationals, or that foreign nationals fund these corporations? There is nothing particularly controversial about foreign participation in corporate governance, corporate activity, or commercial activity more generally. Open economies are generally agnostic about the identity of economic actors; it is their behavior that matters.<sup>64</sup> Adam Smith was not concerned about the ethnicity of the butcher, or the religious beliefs of the brewer, or the nationality of the baker. So long as these economic actors behaved in an economically rational way, their identities were trivial. When it comes to politics, however, personal identity—in particular, citizenship—matters a great deal. The United States government has been concerned about the corrupting influence of foreign nationals, foreign corporations, and foreign governments since the founding of the country.<sup>65</sup> The United States Constitution prohibits noncitizens from ever becoming the President of the United States,<sup>66</sup> and requires that individuals be citizens for seven years (House) and nine (Senate) before being eligible to serve in the United States Congress.<sup>67</sup> The Constitution also explicitly prohibits any federal official from accepting gifts and “emoluments” from a foreign government without the consent of Congress for fear that the official will develop a loyalty to the foreign country at the expense of the United States.<sup>68</sup> The Electoral College was justified in the Federalist Papers as guarding against foreign powers raising a Manchurian candidate. Alexander Hamilton wrote that:

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64. One ominous counterpoint to foreign corporate involvement was expressed by former White House Senior Advisor Steve Bannon (before he worked in the White House) who lamented that “[w]hen two-thirds or three-quarters of the CEOs in Silicon Valley are from South Asia or Asia, I think . . . [a] country is more than an economy. We’re a civic society.” David A. Fahrenthold & Frances Stead Sellers, *How Bannon Flattered and Coaxed Trump on Policies Key to the Alt-Right*, WASH. POST (Nov. 15, 2016), [https://www.washingtonpost.com/politics/how-bannon-flattered-and-coaxed-trump-on-policies-key-to-the-alt-right/2016/11/15/53c66362-ab69-11e6-a31b-4b6397e625d0\\_story.html?utm\\_term=.5fd8b5acd7d0](https://www.washingtonpost.com/politics/how-bannon-flattered-and-coaxed-trump-on-policies-key-to-the-alt-right/2016/11/15/53c66362-ab69-11e6-a31b-4b6397e625d0_story.html?utm_term=.5fd8b5acd7d0).

65. TEACHOUT, *supra* note 13, at 5; see Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 (2009) (arguing that corporations themselves lack the kind of loyalty and patriotism that presumptively distinguishes natives from foreigners).

66. U.S. CONST. art. II, § 1.

67. *Id.* art. I, §§ 2, 3.

68. *Id.* art. I, § 9.



Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention [by creating the Electoral College].<sup>69</sup>

The concern about foreign influence in the early years of the Republic is understandable given the context that our burgeoning confederation was trying to establish a united nation, independent from foreign European powers. The United States Congress and several states enacted scores of protective measures and regulations against foreigners.<sup>70</sup> These laws have nearly universally been upheld in the face of First Amendment challenges.<sup>71</sup> First, it is not clear that the First Amendment even applies to or protects foreigners. Second, even if the First Amendment does apply to foreigners, the courts have recognized a compelling state interest of preserving national boundaries, broadly speaking, and of preventing foreign individuals or associations from influencing our Nation's political process more specifically.<sup>72</sup> These compelling interests are predicated on the

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69. THE FEDERALIST NO. 68 (Alexander Hamilton).

70. See, e.g., An Act to Establish a Uniform Rule of Naturalization, ch. 54, 1 Stat. 566 (1798) (extending the residency requirement for citizenship); An Act Concerning Aliens, ch. 74, 1 Stat. 570 (1798) (authorizing the President to deport "dangerous" aliens); An Act Respecting Alien Enemies, ch. 54, 1 Stat. 577 (1798) (authorizing the President to deport aliens from nations at war with the U.S.); W. VA. CODE § 5-1-1 (2017) (authorizing the governor to deport all "suspicious" subjects of any nation at war with the U.S.).

71. Most of the cases addressing the rights of foreigners under the Constitution and the jurisdiction of federal courts in protecting these rights have been raised in the context of war and immigration, and have distinguished between foreigners on American soil versus their home soil. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that prisoners at Guantanamo Bay have a right to the writ of habeas corpus because the United States retains de facto sovereignty over the prison in Cuba); *Plyler v. Doe*, 457 U.S. 202 (1982) (extending state right of education to undocumented immigrants living in the U.S.); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that enemy aliens are outside the jurisdiction of federal courts); *Bridges v. Wixon*, 326 U.S. 135 (1945) (holding that First Amendment protections apply to foreigners living in the U.S.); see also *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that Fourth Amendment protections against unreasonable searches and seizures do not apply to foreigners living in a foreign country).

72. See *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (upholding a ban on campaign contributions by foreigners).

assumption that foreigners lack the patriotism necessary to act in America's interest. The related, but unspoken, assumption is that American citizens possess the patriotism that foreigners lack on account of their citizenship. While this assumption is almost certainly true on average, there are many exceptions on both sides—unpatriotic Americans and American-loving foreigners. Whether or not citizenship empirically serves as a reasonable proxy for patriotism, the Supreme Court has held that as a matter of law, citizenship is an acceptable (i.e., narrowly-tailored) bright-line test for engaging in political activity.<sup>73</sup>

The worry about foreign influence over American elections has persisted. In 1938, Congress passed the Foreign Agents Registration Act (“FARA”) that requires any agent (i.e., lobbyist) representing a “foreign principal” such as a foreign government, political party, or foreign corporation to disclose their relationship to the principal, information about their lobbying activity, and any political expenditures.<sup>74</sup> FARA was originally motivated by concerns about Nazi propaganda circulating in the United States, but was later amended to focus on more traditional lobbying activity by foreign governments seeking a voice in public policy debates.<sup>75</sup>

In the most recent presidential election, several advisors to the Donald Trump campaign communicated with Russian intelligence officials, including the Russian ambassador to the United States.<sup>76</sup> These interactions created a public outcry that contributed to the forced resignation of President Trump's National Security Advisor (in part for not complying with FARA), the arrest and guilty plea of one of his foreign policy advisors, the recusal of the United States Attorney General from matters related to Russia, and the investigation into President Trump's son-in-law for actions that a former CIA director likened to espionage.<sup>77</sup> Russia's involvement in the 2016 presidential

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73. *Id.*

74. Foreign Agents Registration Act, Pub. L. No. 75-583, 52 Stat. 631 (1938).

75. 22 U.S.C. §§ 611–21 (2012).

76. Michael S. Schmidt, Mark Mazzetti & Matt Apuzzo, *Trump Aides Had Contact with Russian Intelligence*, N.Y. TIMES, Feb. 15, 2017, at A1, available at [https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html?\\_r=0](https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html?_r=0).

77. Maggie Haberman et al., *Michael Flynn Resigns as National Security Adviser*, N.Y. TIMES, Feb. 13, 2017, at A1, available at <https://www.nytimes.com/2017/02/13/us/>

election, from repeated communications with the Trump campaign, to hacking state voter registration databases and the Democratic National Committee, is cause for great concern and a wakeup call for reform. In contrast to daily headlines about Russian hacking and the wall-to-wall coverage on cable news of the Trump administration's close ties to Russia, however, the public has no idea the extent to which foreigners may have spent money in support of certain candidates or in opposition to other candidates, or whether Donald Trump is himself indebted to foreign governments or corporations through his personal businesses.

We know that foreign nationals have engaged in political activity in the past,<sup>78</sup> and the lack of both political and business-oriented corporate transparency raises the very real possibility that foreigners could be influencing our elections without our knowledge. The public is not blind to or unconcerned about these vulnerabilities either. When the IRS proposed a rule to clarify the "primary activity" standard for nonprofits that do not disclose their donors, a record number of public comments were submitted during the proposed rule's notice and comment period.<sup>79</sup> A few years later, a new record was set at the SEC: more than 1.2 million

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politics/donald-trump-national-security-adviser-michael-flynn.html; Matt Zapotosky et al., *Three Former Trump Campaign Officials Charged by Special Counsel*, WASH. POST (Oct. 30, 2017), [https://www.washingtonpost.com/world/national-security/manafort-and-former-business-partner-asked-to-surrender-in-connection-with-special-counsel-probe/2017/10/30/6fe051f0-bd67-11e7-959c-fe2b598d8c00\\_story.html?utm\\_term=.675566da6a8f](https://www.washingtonpost.com/world/national-security/manafort-and-former-business-partner-asked-to-surrender-in-connection-with-special-counsel-probe/2017/10/30/6fe051f0-bd67-11e7-959c-fe2b598d8c00_story.html?utm_term=.675566da6a8f) ("former Trump foreign policy advisor George Papadopoulos admitted to making a false statement to FBI investigators who asked about his contacts with foreigners claiming to have high-level Russian connections."); Mark Lander & Eric Lichtblau, *Sessions Recuses Himself from Russia Investigation*, N.Y. TIMES, Mar. 3, 2017, at A1, available at <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>; Brooke Seipel, *Ex CIA-Director: CIA Would Consider Kushner Actions "Espionage,"* THE HILL (May 27, 2017), <http://thehill.com/blogs/blog-briefing-room/news/335398-ex-cia-director-if-kushner-set-up-secure-line-with-russia-cia>.

78. See, e.g., James Bennet, *Clinton Says Chinese Money Did Not Influence U.S. Policy*, N.Y. TIMES (May 18, 1998), <http://www.nytimes.com/1998/05/18/us/clinton-says-chinese-money-did-not-influence-us-policy.html>; Patrick McGreevy, *Condom Measure Opponents Fined for Taking Donations from Foreign Interests*, L.A. TIMES (Dec. 7, 2015), <http://www.latimes.com/politics/la-pol-ca-measure-b-condom-campaign-fine-20151207-story.html> (outlining the case of foreign corporations giving money to ballot measure committees in violation of state and federal law).

79. See *Prepared Remarks of Commissioner of Internal Revenue Service John Koskinen Before the National Press Club*, *supra* note 50 ("During the comment period, which ended in February, we received more than 150,000 comments. That's a record for an IRS rulemaking comment period.").

public comments were submitted in response to the proposed rule that corporations be required to disclose political expenditures to their shareholders and to the SEC.<sup>80</sup> Both the IRS and the SEC have failed to implement their proposed rules (or any new rule), and so the vulnerabilities that make foreign corporate involvement possible still exist. What does not exist, however, is a consensus about the risk that these vulnerabilities pose for American politics.

### III. ASSESSING RISK: DISTINGUISHING VULNERABILITIES AND THREATS

Showing that fraud, corruption, or foreign infiltration is possible does not prove that fraud, corruption, and foreign infiltration is likely, or that it even happens. Just because it is possible for nefarious actors to use corporations as conduits does not mean that the practice is widespread. In other words, just because a system is vulnerable does not mean that every possible breach is a legitimate threat. In assessing risk in any context, one must consider the following equation:

$$\textit{risk} = \textit{likelihood} * \textit{impact}$$

where *likelihood* is a function of a threat exploiting a vulnerability, and *impact* is a function of the value of the system or asset (i.e., the cost minus the benefit). To illustrate, think of the most vulnerable entry points to a locked house or a locked car. Without doubt, the easiest entry is through a window. Windows are brittle and far easier to smash than a wooden or metal door. In fact, windows are so easily broken that one can accomplish the task with nearly any object or weapon, including a bare hand. If windows are so vulnerable, then why do people install windows in their homes where they keep their valuables? Why do automobile companies manufacture cars with windows? The answer, of course, is that the impact of windows—being able to see while driving, natural light in one’s home, fresh air in one’s home or car—justify

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80. See Lisa Gilbert, *Political Spending Disclosure and the SEC*, THE HILL (Mar. 28, 2016), <http://thehill.com/blogs/pundits-blog/finance/274433-political-spending-disclosure-and-the-sec> (“44 U.S. senators, 70 investing endowed foundations, the founder of the largest mutual fund in the country, a bipartisan group of former chairs and members of the SEC, five state treasurers, pension funds, securities lawyers and a historic 1.2 million retail investors have all asked the SEC to shine a light on unlimited corporate political spending by requiring disclosure.”).

the risk of being burglarized. The benefits of windows do not outweigh all risks, however. In areas where the likelihood of being burglarized is high, people install bars over their windows. In areas where the likelihood of being burglarized is low, people do not.<sup>81</sup> This simple intuition can teach us a lot about regulating hypotheticals, and recent debates about voter fraud crystalize the problem perfectly.

### A. Analyzing the Risk of Voter Fraud

One area of election law where the risk equation has been badly misunderstood is the risk of voter fraud. Policymakers, election administrators, lawyers, judges, and the general public alike consistently fail to appreciate the difference between vulnerabilities, threats, and risk in the context of voter fraud. In recent years, several states have adopted strict voter identification laws that have been sold to the public as necessary to prevent the very serious risk of voter fraud.<sup>82</sup> Proponents of voter ID provide two kinds of evidence to support these new laws. First, they point to known instances of voter registration fraud (e.g., paid signature gatherers registering Mickey Mouse and members of the Dallas Cowboys to vote),<sup>83</sup> and absentee ballot fraud (e.g., stealing, buying, and/or selling absentee ballots),<sup>84</sup> even though voter ID laws have zero impact on voter registration and absentee ballots. Second, proponents of voter ID argue (and have shown) that it is possible for a voter to impersonate somebody to vote more than once.<sup>85</sup> All of this evidence completely misses the point. Just

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81. People are also likely to put bars on their windows when the value of their assets is extremely high, even if the likelihood of burglary is relative low. I am grateful to Justin Levitt for this metaphor.

82. *Voting Laws Roundup 2017*, BRENNAN CTR. FOR JUST. (May 10, 2017), <https://www.brennancenter.org/analysis/voting-laws-roundup-2017>.

83. Drew Griffin & Kathleen Johnston, *Thousands of Voter Registration Forms Faked, Officials Say*, CNN (Oct. 10, 2008), <http://www.cnn.com/2008/POLITICS/10/09/acorn.fraud.claims/>.

84. Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7, 2012, at A1, available at <http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html>.

85. See, e.g., John Fund, *Democrats Dismiss Voter-Fraud Worries, but Reality Intrudes*, NAT'L REV. (Aug. 7, 2016), <http://www.nationalreview.com/article/438754/james-okeefe-voter-fraud-videos-prove-voter-frauds-real> (highlighting the work of James O'Keefe who showed that it is possible to get a ballot on behalf of somebody who recently died or who is a noncitizen from election officials without showing a photo ID, and citing a Pew report that 2.8 million people are registered to vote in two or more states).

because something is *possible* (e.g., smashing a window) does not mean that strict rules are required to prevent it (e.g., putting bars over all windows). The notorious videos produced by conservative provocateur James O’Keefe that show him trying to vote without a voter ID are analogous to a video of somebody walking down a residential street full of houses with windows and pointing to all of the places where there are rocks, sticks, and pieces of concrete, all of which could easily smash the windows. Importantly, these weapons have *not been used*, which is why the hypothetical homeowners have not put bars on their windows.

In the case of voter impersonation fraud, the possible has not materialized into the actual. How do we know? First, very few people have ever been caught or prosecuted for voter impersonation fraud.<sup>86</sup> Admittedly, prosecutions are not the best metric of criminal incidence because of prosecutorial discretion, and because successful fraud entails not getting caught. In the case of voting, however, every person who casts a ballot is recorded as such on the voter rolls, which are publicly available and therefore available for audit.<sup>87</sup> By investigating the voter rolls, one can observe whether people who have died in the previous year appear as having voted, or whether the same individual appears on two different state lists.<sup>88</sup> When these audits are conducted, evidence of voter impersonation fraud has emerged in a small number of cases. The most cited figure is that voter impersonation fraud accounts for 0.00000031% of ballots cast between 2000–2014.<sup>89</sup> In other words, the risk of voter impersonation fraud is low because

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86. Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. (Nov. 9, 2007), <http://www.brennancenter.org/publication/truth-about-voter-fraud>; see *Election Fraud in America*, NEWS21 (Aug. 12, 2012), <http://votingrights.news21.com/interactive/election-fraud-database/> (reporting 0.5% of cases as voter impersonation fraud); *Voted Fraud Cases*, HERITAGE FOUND., [http://www.heritage.org/voterfraud/search?name=&state=All&year=&case\\_type=All&fraud\\_type=23746](http://www.heritage.org/voterfraud/search?name=&state=All&year=&case_type=All&fraud_type=23746) (last visited Jan. 1, 2018) (noting thirteen cases of voter impersonation since 2004).

87. For information on how to acquire voter files in all fifty states, see Michael McDonald, *Voter List Information*, U.S. ELECTIONS PROJECT (Aug. 22, 2015), <http://voterlist.electproject.org/>.

88. Greg Palast, *The GOP’s Stealth War Against Voters*, ROLLING STONE (Aug. 24, 2016), <http://www.rollingstone.com/politics/features/the-gops-stealth-war-against-voters-w435890>.

89. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm\\_term=.c70f3ed34e50](https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.c70f3ed34e50).

the likelihood is infinitesimally small. And the likelihood is small because voter impersonation fraud is highly illogical. Voting twice is vanishingly unlikely to make a difference in the outcome of an election, and any election that is decided by one vote or that ends in a tie is going to draw an enormous amount of public scrutiny and investigation during the recount process. Thus, proponents of voter ID laws have not only oversold their case of fraud to the public, they have also possibly helped enact a self-defeating law. Potential voters who do not have an ID and cannot, or do not want to, get one may opt to vote via absentee ballot, where evidence of fraud is much higher.<sup>90</sup> In fact, thirteen elections have been invalidated due to absentee ballot fraud in the past forty years, while not a single election has been overturned due to voter impersonation fraud.<sup>91</sup> By misunderstanding the relationship between risk, vulnerabilities, and threats, proponents of voter ID laws may have unwittingly increased the very fraud they allegedly sought to snuff out.<sup>92</sup>

It is worth pointing out that opponents of voter ID have similarly mischaracterized the risk of voter ID laws and therefore have also undermined the credibility of their position. For example, the Brennan Center for Justice repeatedly highlights that eleven percent of eligible voters do not have government-

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90. See generally *The Truth About Voter Fraud*, *supra* note 86, at 34 n.16 (“Most proposals to require photo identification of voters do not address the absentee voting process, where fraud through forgery or undue influence, often directly implicating candidates or their close associates, is far more of a threat.”); *A Sampling of Election Fraud Cases from Across the Country*, HERITAGE FOUND., <http://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-voterfraudcases.pdf> (last visited Jan. 1, 2018) (noting 170 cases of absentee ballot fraud, compared to just thirteen cases of voter impersonation fraud in its sample). *Voter Fraud Cases*, *supra* note 86.

91. Absentee ballot fraud invalidated elections in the following cases: *McClendon v. Hodges*, 272 SW.3d 188 (Ky. 2008); *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007) *aff'd*, 561 F.3d 420 (5th Cir. 2009); *Pabey v. Patrick*, 816 N.E.2d 1138 (Ind. 2004); *Straughter v. Collins*, 819 So. 2d 1244 (Miss. 2002); *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000); *Adkins v. Huckabay*, 755 So. 2d 206 (La. 2000); *Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999); *In re Protest of Election Returns and Absentee Ballots*, 725 So. 2d 1108 (Fla. Ct. App. 1998); *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994); *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993); *Stebbins v. White*, 190 Cal.App.3d 769 (Cal. Ct. App. 1987); *Kiehne v. Atwood*, 604 P.2d 123 (N.M. 1979); *Petition of Byron*, 398 A.2d 599 (N.J. Super. Ct. 1978).

92. Many have argued that proponents of voter ID laws have not been genuinely concerned about voter fraud, but instead have been concerned about strengthening the position of the Republican party. Keith G. Bentele & Erin O'Brien, *Jim Crow. 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSPS. ON POL. 1088, 1089 (2013); William D. Hicks et al., *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RES. Q. 18, 19 (2015).

issued photo ID and *could be* disenfranchised by a voter ID law.<sup>93</sup> The Economist argues that as many as six hundred thousand minority and young Texans *could be* prevented from voting because of the state's proposed voter ID laws.<sup>94</sup> These numbers reflect the *possible* disenfranchising impact of voter ID, but fail to account for people who can easily get an ID and people who are unlikely to vote, whether or not they have ID. So, what is the actual disenfranchising impact of voter ID laws? To date, no systematic causal analysis has been able to isolate the effect of voter ID on turnout.<sup>95</sup> Anecdotally, the estimated number of disenfranchised voters is much lower than critics have predicted. In the 2007 Marion County municipal elections, Indiana's voter ID law suppressed the vote of at least thirty-two voters.<sup>96</sup> In the 2008 general election, 1,039 voters in Indiana were required to cast a provisional ballot because they lacked voter ID. More than 900 of these ballots were not counted (of more than 2.8 million ballots cast in the state).<sup>97</sup> In 2012, more than 640 provisional ballots that were cast due to lack of voter ID were never counted (of more than 2.6 million ballots cast in the state).<sup>98</sup> In 2012, Kansas reported that 84 voters were disenfranchised due to the state's voter ID law.<sup>99</sup> In 2016, the Wisconsin Election Commission reported that at least 399 voters were disenfranchised by the state's voter ID law.<sup>100</sup> These numbers all suggest that voter ID has a smaller disenfranchising effect than many feared. On the other hand, there

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93. *Voter ID*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/analysis/voter-id> (last visited Nov. 3, 2017).

94. *A Texas Law Could Disenfranchise 600,000 Voters*, ECONOMIST (May 6, 2016), <http://www.economist.com/blogs/democracyinamerica/2016/05/got-id>.

95. For a good discussion of the measurement challenges related to voter ID, see Daniel J. Hopkins et al., *Voting but for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79 (2017) (showing that, even with precinct-level data on turnout and photo ID, the effects of voter ID are confounded by external events such as voter mobilization efforts that, by design, correlate with rates of photo ID possession).

96. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 217 (2008).

97. Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J. L. & POL. 329, 330 (2009).

98. Michael J. Pitts, *Empirically Measuring the Impact of Photo ID over Time and Its Impact on Women*, 48 IND. L. REV. 605, 612 (2015).

99. Wendy R. Weiser, *84 Votes Too Many*, BRENNAN CTR. FOR JUST. (July 23, 2012), <https://www.brennancenter.org/blog/84-voters-too-many>.

100. Matthew DeFour, *At Least 399 Votes Not Counted Because Voter Didn't Provide Valid ID*, WIS. ST. J. (Nov. 23, 2016), [http://host.madison.com/wsj/news/local/govt-and-politics/at-least-votes-not-counted-because-voter-didn-t-provide/article\\_de3374f7-5e23-595c-9857-c885814560ff.html](http://host.madison.com/wsj/news/local/govt-and-politics/at-least-votes-not-counted-because-voter-didn-t-provide/article_de3374f7-5e23-595c-9857-c885814560ff.html).



is strong evidence that the number of disenfranchised voters is still dramatically higher than thirty-one, which is the approximate number of impersonated votes cast *nationwide* in all elections between 2000–2014.<sup>101</sup> A simple cost-benefit analysis should instruct the public to view voter ID laws more skeptically than it currently does.<sup>102</sup>

One final consideration is that because voter impersonation fraud can only be detected by auditing the publicly available voter file, voter impersonation fraud arguably cannot be rooted out *ex ante*. This is a legitimate concern in election law cases where traditional damages do not apply, and where judges are very hesitant to order a new election. On the other hand, the punishment for knowingly voting illegally can be quite stiff, so voter impersonation fraud can certainly be deterred.<sup>103</sup> What is important is that voter impersonation fraud (and absentee ballot fraud) can be detected by auditing the publicly available voter files. The same cannot be said about campaign finance fraud.

#### B. Analyzing the Risk of (Foreign) Corporate Political Activity

One major difference between voter fraud and corporate campaign finance fraud is that an investigator cannot track down every single campaign contribution to its roots. So, while the logic of risk assessment holds in the campaign finance context (risk = likelihood \* impact), the likelihood that foreigners are channeling political expenditures through American corporations will never be known with much certainty unless the law is changed. There is evidence that foreign involvement is greater than zero. For example, in 2012, concerned citizens in Los Angeles gathered enough signatures to qualify a ballot initiative that would require actors in adult films to wear condoms while performing sex acts on screen (among other things).<sup>104</sup> Opponents of the initiative, called

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101. Levitt, *supra* note 89; see Lorraine C. Minnite, *The Misleading Myth of Voter Fraud in American Elections*, SCHOLAR STRATEGY NETWORK (Jan. 2014), <http://www.scholarsstrategynetwork.org/brief/misleading-myth-voter-fraud-american-elections> (reporting just six cases of voter impersonation fraud from 2000–2012).

102. Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP (Aug. 22, 2016), <http://www.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx>.

103. *Mexican Woman in Texas Sentenced to 8 years in Prison for Voter Fraud*, FOX NEWS (Feb. 11, 2017), <http://www.foxnews.com/us/2017/02/11/mexican-woman-in-texas-sentenced-to-8-years-in-prison-for-voter-fraud.html>.

104. McGreevy, *supra* note 78.

“Measure B,” created a campaign committee that was funded by one U.S. subsidiary of a foreign corporation and one foreign subsidiary of the same foreign corporation, which was managed by a foreign national. The campaign committee raised \$343,000 from the U.S. subsidiary and \$75,000 from the foreign subsidiary in clear violation of the long-standing ban on foreign nationals and foreign corporations from spending any money “in connection with” U.S. elections.<sup>105</sup> The perpetrators were caught because they made no attempt to hide their identities. It is unknown the extent to which other foreign entities have hidden their identities in an attempt to influence a political campaign.<sup>106</sup>

While the constitutional concerns associated with voter fraud are not identical to the constitutional concerns associated with corporate political disclosure, there is some irony in the fact that those who claim voter fraud is rampant because it is *possible* cast a more moderate tone when predicting the likelihood of foreign political involvement or defending corporate disclosure avoidance.<sup>107</sup>

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105. 52 U.S.C. § 30121(a)(1)(A); McGreevy, *supra* note 78. Note that the FEC deadlocked on whether Section 30121 applied to ballot committees. McGreevy, *supra* note 78. The campaign committee thus escaped punishment from the FEC, but was fined \$61,500 by the California Fair Political Practices Commission. *Id.*

106. There are also examples of foreigners who have attempted to support candidates without using the corporate form to conceal their identity. *See, e.g., Campaign Finance Key Player: Yah Lin ‘Charlie’ Trie*, WASH. POST (Mar. 4, 1998), <http://www.washingtonpost.com/wp-srv/politics/special/campfin/players/trie.htm> (“The investigation found that some of the [foreign] money came from sequentially numbered money orders, supposedly from different people in different cities, but all apparently signed in the same handwriting.”).

107. *Compare* Hunter Woodall, *Kris Kobach Was a Source of Donald Trump’s Voter Fraud Allegation, Conway Says*, KAN. CITY STAR (Dec. 2, 2016), <http://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article118434743.html> (where Kansas Secretary of State Kris Kobach defended President Trump’s claim that three to five million votes were illegally cast) *with* John Celock, *Kris Kobach Considered Unlikely to Implement Citizens United Disclosure Rules in Kansas*, HUFFINGTON POST (Aug. 19, 2013), [http://www.huffingtonpost.com/2013/08/19/kris-kobach-citizens-united\\_n\\_3779905.html](http://www.huffingtonpost.com/2013/08/19/kris-kobach-citizens-united_n_3779905.html) (where Kris Kobach did not favor disclosure for politically active 501(c)(4) organizations); *compare also* Jennifer Matthes & Hans von Spakovsky, *When Zombies, Aliens, and Felons Steal Our Votes*, DAILY SIGNAL (Oct. 7, 2016), <http://dailysignal.com/2016/10/07/when-zombies-aliens-and-felons-steal-our-votes/> (where Heritage Foundation Senior Legal Fellow Hans von Spakovsky complained about voter fraud), *with* Hans A. von Spakovsky, *Forced Donor Disclosure Is Bad for Democracy*, WASH. TIMES (Feb. 8, 2016), <http://www.washingtontimes.com/news/2016/feb/8/hans-von-spakovsky-forced-donor-disclosure-is-bad/> (where Hans von Spakovsky warns that campaign finance disclosure is dangerous). This irony, however, does have a mirror. *See, e.g.,* Bob Bauer, former Obama White House Counsel and co-chair of the Presidential Commission on Election Administration, who has argued that “[a] virtual cottage industry of voter fraud alarmism has sprung up to shake public confidence in the voting systems,” Leandra Bernstein, *Experts Say Trump’s Voter Fraud Commission Is a*

While it makes no sense to assume the worst (that every undisclosed dollar is spent by nefarious foreign agents), two important considerations distinguish the campaign finance context from the voter fraud context: (1) although there is little to no evidence that candidates solicit the vote of ineligible populations, there is evidence that political consultants exploit corporate loopholes;<sup>108</sup> and (2) there is no way to effectively audit campaign finance reports to catch willful fraudsters. This lack of transparency undercuts the position, devoid of any context, that corporations have First Amendment rights that cannot be infringed.<sup>109</sup> Relatedly, the lack of transparency makes it impossible to assess the tradeoffs of different regulations, since we cannot understand the risks of extending strong First Amendment rights to corporations.<sup>110</sup> This leaves the courts in a position to speculate on these tradeoffs with no empirical grounding. One example of this speculation is the Court's decision in *McCutcheon v. FEC* to invalidate the aggregate limit for giving to political

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*Solution in Need of a Problem*, WJLA ABC NEWS (May 12, 2017), <http://wjla.com/news/nation-world/trump-voter-fraud-commission>, yet is one of the country's foremost champions of campaign finance disclosure. Robert F. Bauer & Samuel Issacharoff, *Keep Shining the Light on "Dark Money,"* POLITICO (Apr. 12, 2015), <http://www.politico.com/magazine/story/2015/04/keep-shining-the-light-on-dark-money-116901>; UC Irvine Law Professor Rick Hasen who argues that voter impersonation is "extremely rare," Rick Hasen, *Don't Point to Voter Registration Fraud, or Absentee Ballot Fraud, to Defend Trump's Irresponsible Vote-Rigging Claims*, ELECTION L. BLOG (Oct. 2, 2016), <https://electionlawblog.org/?p=87081>, but also advocates for disclosure to root out foreign political activity, *Show Me the Donors*, SLATE (Oct. 14, 2010), [http://www.slate.com/articles/news\\_and\\_politics/politics/2010/10/show\\_me\\_the\\_donors.html](http://www.slate.com/articles/news_and_politics/politics/2010/10/show_me_the_donors.html)); and Douglas Spencer (Author) who argues that voter impersonation fraud is exceedingly rare, *supra* Part II(A), yet has also argued in favor of "stricter [campaign finance] disclosure requirements than the status quo" (though not for fear of corporate or foreign political activity), Spencer & Wood, *supra* note 5, at 358.

108. See Hedlund, Noble & Sargentich, *supra* note 25, at 226–28 (discussing the enforcement of election laws and the need to close loopholes in them).

109. The Court suffers from its own decision to create a balancing test between individual rights and First Amendment rights. See generally Jacob Eisler, *The Deep Patterns of Campaign Finance Law*, 49 CONN. L. REV. 55, 116 (2016) (noting that individual rights and the First Amendment "dovetail, as both protect citizen autonomy and the ability to ensure the proper causal relationship between popular will and government action." Furthermore, when the Court relies on the First Amendment to evaluate campaign finance regulations, the analysis "cannot be addressed merely by asking, simplistically, if there is a first-order impact on the 'amount' of speech or association. Rather the inquiry must be more nuanced and must determine how much the chilling effects of the measure worsen the political position . . . of the mass of voters").

110. See Spencer & Wood, *supra* note 5, at 356 ("Lack of quality data prevents an evaluation of both assumptions underlying campaign finance laws and the effects of the laws and decisions that emerge based on those assumptions.").

candidates in federal elections.<sup>111</sup> The majority opinion, by Chief Justice Roberts, and the dissent, by Justice Breyer, read like a battle of competing hypotheticals. Justice Breyer describes various scenarios that he thinks are *possible* while Chief Justice Roberts argues about what he thinks is *plausible*. Justice Breyer argues that a clever contributor could now circumvent the individual contribution limit by creating one hundred political action committees and donating the maximum PAC contribution to a single candidate one hundred times.<sup>112</sup> Chief Justice Roberts argues that this circumvention is “highly implausible” because of various anti-earmarking provisions that have been enacted over the years.<sup>113</sup> But these anti-earmarking provisions were added precisely because there was actual (or feared) circumvention, and neither the majority nor the dissent provide any empirical evidence to support their claim that the ruling was a major setback (dissent) or a fine-tuning to the law (majority).<sup>114</sup>

In short, it would not be responsible to presume that foreign dollars are dominating the political landscape, or that foreigners are systematically attempting to influence American elections just because it is *possible*. In fact, we know that no more than about five percent of political spending could even come from foreign sources. However, the fact that hundreds of millions of dollars are unaccounted for in each election opens the door to unnecessary conspiratorial rhetoric because, well, “there’s no way to know for sure” how much foreign money is influencing our elections.<sup>115</sup> Weak transparency also forces the Supreme Court to speculate on the determinants of certain political outcomes and the impact of various regulations and reforms, ungrounded in empirical evidence. Perhaps it is time to rethink how courts evaluate regulations of the political process given the state of disclosure laws on the books and in practice.

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111. 134 S. Ct. 1434 (2014).

112. *Id.* at 1474–75 (Breyer, J., dissenting).

113. *Id.* at 1453 (majority opinion).

114. For example, one relevant piece of information would be to know how many donors ran up against the aggregate limit in the previous decade.

115. See *The 10 Things They Won't Tell You About Money in Politics: Dollars from Doha, Dakar, or Dengzhou*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/resources/10things/08.php> (last visited Nov. 13, 2017) (“Unfortunately, it’s impossible to say how much foreign money is influencing our elections. . . . There’s no evidence that this scenario has occurred recently or that the IRS has investigated such cases. *But there’s no way to know for sure.*”) (emphasis added).

#### IV. INTEGRATED CAMPAIGN FINANCE REFORM

Pam Karlan and Sam Issacharoff famously compared money in politics to water, and argued that, “Money, like water will seek its own level.”<sup>116</sup> They continued, “The price of apparent containment may be uncontrolled flood damage elsewhere.”<sup>117</sup> In other words, Karlan and Issacharoff argued that money in politics is hydraulic. Like the game of whack-a-mole, when reformers limit or ban money in one particular channel (e.g., campaign contributions) they are likely to see money pop up later in other channels (e.g., independent expenditures). This hydraulic metaphor has become a central theory in the debates over effective campaign finance reform,<sup>118</sup> although the theory is descriptive and not normative, and thus is aimed at the problem and not the solution.

To the extent that the hydraulic metaphor is an accurate description of money in politics, regulators and enforcers would do well to embrace campaign finance reform through the same lens. Call this the normative hydraulic theory—one that informs the rulemaking and jurisprudence in campaign finance. To understand what I mean by this, consider the history of modern campaign finance reform, from the Tillman Act in 1907, to the Federal Election Campaign Act (“FECA”) in the 1970s, to the Bipartisan Campaign Reform Act (“BCRA”) in 2002, and everything in between. These reforms addressed different kinds of money (the “what” of campaign finance), and also different sources of that money (the “who” of campaign finance). Consider the various “whats” of campaign finance: campaign contributions, in-kind donations, independent expenditures, issue advertisements, electioneering communications, and patronage. Examples of the “who” of campaign finance include corporations, unions, political

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116. Pamela S. Karlan & Samuel Issacharoff, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999).

117. *Id.*

118. See, e.g., Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 40 (2012) (“What has occurred since *Citizens United* should be described as ‘reverse hydraulics.’”); RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 1, 110 (2014) (“Like water, money finds a way to get around obstacles.”); Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. ONLINE 27, 28 (2014) (“Unfortunately, the ‘deregulate and disclose’ approach of the Roberts Court is unlikely to solve the hydraulics problem that frustrates courts and law professors.”).

parties, foreigners, minors, civil service employees, millionaires, donors, and other financial allies.

Nearly all campaign finance laws address both “whos” and “whats.” For example, the Tillman Act<sup>119</sup> banned contributions by corporations, the Hatch Act<sup>120</sup> regulated campaign activity by government employees, the Smith-Connally Act<sup>121</sup> banned unions from making contributions, and the Taft-Hartley Act<sup>122</sup> restricted unions from making independent expenditures. At certain times, Congress has enacted “comprehensive” campaign finance reform laws. These laws were “comprehensive” because they regulated several “whats” and many “whos” at the same time. For example, the 1974 amendments to the FECA banned contributions from corporations and unions, strictly limited contributions and expenditures by individuals, and set spending limits for candidates.<sup>123</sup> In 2002, the BCRA banned contributions from minors and foreign entities, regulated electioneering communications by broadcast media, and banned soft money activity by political parties, among other things.<sup>124</sup>

In the courts, campaign finance regulations of the “whos” and “whats” have been evaluated separately and neither has fared particularly well. Regulations that target “who is giving” or “who is spending” have proven unsuccessful in large part because the Supreme Court has not accepted the equality rationale that would justify regulations giving the “whos” an equal footing on a level playing field.<sup>125</sup> Some regulations that target the “whats” have also fared poorly because the “what” can be difficult to constitutionally

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119. Pub. L. No. 59-36, 34 Stat. 864b (1907).

120. An Act to Prevent Pernicious Political Activity, 5 U.S.C.A. §§ 1501–08 (1939).

121. War Labor Disputes Act, Pub. L. No. 78-89, 57 Stat. 163 (1943).

122. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947).

123. FECA Amendment, Pub. L. No. 93-443, 88 Stat. 101 (1974).

124. BCRA Amendment, Pub. L. No. 107-155, 116 Stat. 81 (2002).

125. *See, e.g.,* Davis v. Fed. Election Comm’n, 554 U.S. 724, 741–42 (2008) (“We have similarly held that the interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections’ cannot support a cap on expenditures for ‘express advocacy of the election or defeat of candidates,’ as ‘the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.’” (quoting Buckley v. Valeo, 424 U.S. 1, 48–49) (1976)); *see also* McConnell v. Fed. Election Comm’n, 540 U.S. 93, 227 (2003) (“[W]e have noted that ‘[p]olitical “free trade” does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.’” (quoting Fed. Election Comm’n v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986)); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting) (“[T]he notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment . . .”).

articulate. For example, in *Buckley*, the Supreme Court invalidated limits on independent expenditures because the term “independent expenditure” was too vague.<sup>126</sup> When Congress attempted to clarify “independent expenditure” in 2003 by identifying criteria for electioneering communications, the Court in *FEC v. Wisconsin Right to Life* held that the criteria were both too broad and too narrow.<sup>127</sup>

The Court’s analysis of these issues misses the point in my opinion, which is that the “whos” and the “whats” are interconnected. In other words, as the “what” becomes more challenging to articulate, the “who” becomes more important. Conversely, as the “who” becomes less regulated the “what” becomes that much more important. The central intuition is that courts should be willing to allow more wiggle room in certain dimensions of campaign finance law when the realities of the regulation and the political environment dictate. Similarly, campaign finance reformers should place less emphasis on “comprehensive” reform and hone their focus on “integrated” reform by recognizing that the moving parts of campaign finance are interconnected. A nice illustration of this distinction is found in the BCRA of 2002.<sup>128</sup> This “comprehensive” reform targeted both “whos” and “whats” but also the additional dimension of “when.” In the case of the “whos” and “whats,” BCRA failed to appreciate the strategic response of political actors to the law’s ban on soft money. Banning soft money transactions by political parties drove more spending to outside groups—nonprofits, independent political committees, and special interest groups—which were largely ignored in the law.<sup>129</sup> On the other hand, Congress properly sensed the integrated relationship between the “what” and the

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126. 424 U.S. at 76 (“In its effort to be all-inclusive, however, the provision raises serious problems of vagueness . . .”).

127. 551 U.S. 449, 457 (2007) (On electioneering communications as too broad: “BCRA’s definition of ‘electioneering communication’ is clear and expansive” and “the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.” On electioneering communications as too narrow: “We conclude that the speech at issue in this as-applied challenge is not the functional equivalent of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy” (internal quotation marks omitted)).

128. Pub. L. No. 107-155, 116 Stat. 81 (2002).

129. See DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 23–27* (2014) (charting the shift from candidate- and party-centered spending to nonprofits, super PACs, and other political organizations in the wake of *McConnell v. FEC* in 2003 and *Citizens United* in 2010).

“when,” and therefore defined a new kind of “electioneering communication” in terms of *when* it was made—thirty days before a primary or sixty days before a general election. By recognizing that political advertisements, both candidate-centered and issue ads, are much more valuable to a candidate in the days leading up to an election, Congress responded with dynamic regulation.

In another example, the Supreme Court in *Citizens United* appeared to take account of the integrated nature of campaign finance by upholding disclosure and disclaimer requirements while also striking down a ban on independent expenditures by corporations.<sup>130</sup> Campaign finance disclosure is often promoted as a way to constitutionally regulate money in politics when the “who” and the “what” become slippery. If it is too difficult to regulate who spends money, or what they spend their money on (e.g., issue ads vs. advocacy), then courts should be open to regulations about *how* people spend their money. For example, we may care less about the “who” or “what” when the law precludes coordination with the candidate, or when the law requires disclosure. In the words of the Supreme Court, “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”<sup>131</sup> Interestingly, the Supreme Court has not tolerated any uncertainty over the “what” (e.g., the line between issue and express advocacy), but it does tolerate a good deal of wiggle room over the “how” (e.g., the line between independent and coordinated expenditures). While some view the Court’s position on these issues as unprincipled,<sup>132</sup> in a system where uncertainty in the “how” is tolerated *because of* problems with the “what,” the Court’s position becomes more defensible. Reading *Citizens United* through this lens provides a new understanding of the outcome, and a new argument for overturning the decision in the future. One way to make sense of *Citizens United* is to read the Court as confirming the strong political rights of corporations *because of* the Court’s near-unanimous endorsement of transparency rules. To the extent that disclosure and disclaimers are widely adopted and enforced (as upheld by the Court in *Citizens United*), the political involvement of corporations poses less of a threat. On the other hand, in a world

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130. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318 (2010).

131. *Id.* at 369 (internal citation omitted).

132. *See, e.g.*, Gilbert & Barnes, *supra* note 53, at 402 (pointing to a “fallacy of the Supreme Court’s making at the heart of campaign finance: the belief that coordination relates in an operational way to corruption”).



where more and more people distrust organized business, where concerns over foreign political activity and influence are particularly salient, and where more spending is going underground (i.e., where disclosure is not being enforced), the Court should be more tolerant of regulations of the “who” (corporations) and the “what” (independent expenditures). In other words, if the deregulation of corporations and independent expenditures is justified (at least in part) *because of* strict disclosure rules, then evidence that there actually is very weak disclosure should cast doubt on the Court’s conclusion that corporations and unions should be free to spend in elections.

For the Court to adopt this dynamic interpretive posture, it may have to rely more on as-applied challenges in order to evaluate the implementation of challenged regulations and the hydraulic relationship between political actors, their behavior, and the political environment of each case.<sup>133</sup> Indeed, although not motivated by the normative hydraulic theory, courts have shifted toward as-applied challenges in election administration cases in recent years.<sup>134</sup> Campaign finance cases have not followed suit (yet). One argument for the tolerance of more wiggle room in campaign finance cases is found in Federalist No. 37, where James Madison argued that vague rules and standards ought to be tolerated in areas where outcomes are unknown, so they can be amended later with greater specificity as “ascertained by a series of particular discussions and adjudications.”<sup>135</sup> Whatever the case, facts matter, and empirical evidence should be especially relevant to the disposition of politically charged cases.

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133. Note that the hydraulic theory of campaign finance conflates opportunity with strategic decisionmaking. Paul Herrnson refers to this as the entrepreneurial theory of politics. PAUL S. HERRN SON, CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON 36–38 (7th ed. 2016); see MICHAEL J. MALBIN, LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 4 (2003) (“But people and organizations are not made of water. Therefore, some will be better positioned than others to shift.”).

134. See generally Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009) (charting the shift toward as-applied challenges in election law cases, and constitutional adjudication more generally, after the Supreme Court upheld Washington state’s blanket primary system against a facial challenge in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008)).

135. THE FEDERALIST NO. 37 (James Madison).

## V. CONCLUSION

My goal in writing this Article is to challenge the increasing partisanship about basic facts underlying the regulation of campaigns, voting, and politics. Because we lack a consensus about how to even measure risk, our scholarship, statutes, and judicial opinions are littered with hypotheticals, and the scary refrain that “there’s no way to know for sure!” Republicans repeat this chorus in exasperated tones about voter fraud while Democrats are equally breathless about “dark money” in campaign finance. But we actually do know some things. For example, we know that voter fraud is low because we can audit voter lists and look for the names of noncitizens, those who have died, and double-entries. Indeed, we uncover dozens of cases of fraudulent voting after each election, but never more than a small fraction, say 0.001% or less,<sup>136</sup> of overall ballots cast (and nowhere close to millions).<sup>137</sup> The caveat, of course, is that this information is only available *ex post*, which is not ideal, though punitive measures can serve as a deterrent. In campaign finance, there is no transparency, even *ex post*, about hundreds of millions of dollars. Yet, we know something about undisclosed money; for example, that undisclosed dollars amount to less than five percent of all spending, and that it is two to three times more likely to be spent in support of conservative candidates and issues.<sup>138</sup> These facts, often ignored, matter! Although the empirics are incomplete, they provide context to incredibly important debates, and illustrate the relationship between various dimensions of political regulation. Understanding the nuanced relationship between campaign finance rules and regulations, and the strategic reactions by political actors in today’s highly polarized environment may exceed the ability of the judiciary. Indeed, judges are not fortune tellers. However, ignoring empirical data because it is incomplete is like choosing to walk naked in a snowstorm because your parka doesn’t have a hood. A more productive, and less partisan, debate about money in politics must take risk assessment seriously, must confront the empirics, and

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136. David Becker, *Just the Facts of Fraud*, CTR. FOR ELECTION INNOVATION & RES. (May 1, 2017), <https://www.electioninnovation.org/news/2017/5/1/just-the-facts-on-fraud>.

137. Donald J. Trump, TWITTER (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=en>.

138. *Political Nonprofits (Dark Money)*, *supra* note 49.

must be honest about the scope of reform. Otherwise, the hypotheticals will swallow reality.