

**IT'S THE END OF THE WORLD AS WE KNOW IT (AND I FEEL FINE):  
HOW COMPARATIVE CAMPAIGN FINANCE SUGGESTS THAT  
CITIZENS UNITED MAY NOT BE THE END OF THE WORLD . . . AND  
THAT THE UNITED STATES SHOULD CONSIDER OTHER POLICY  
ALTERNATIVES**

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**I. INTRODUCTION**

Believe it or not, the first campaign finance scandal in the United States saw future president and American legend George Washington throw a killer party: “a hogshead and a barrel of punch, thirty-five gallons of wine, forty-three gallons of strong cider, and dinner” for those that supported him when he ran for the Virginia House of Burgesses in 1758.<sup>1</sup> Soon after that election, the House of Burgesses attempted a colonial brand of campaign finance reform by banning candidates from providing entertainment and meals to voters in an attempt to buy their support.<sup>2</sup>

Some 250 years later, the United States Supreme Court left the country’s campaign finance laws in shambles, declaring in *Citizens United v. FEC* that the ban on corporate and union giving to groups that produced independent electioneering violated the First Amendment to the United States Constitution.<sup>3</sup> The decision caused a public outcry and left gaping holes in federal election law that have allowed millions of undisclosed, anonymously-donated dollars to filter into the campaign marketplace.<sup>4</sup> The decision left the American campaign finance system broken—meaning that what was once a comprehensive regulatory system has gaping holes that have not yet been patched—and the American public distrustful of its government and its elections.<sup>5</sup> Although the decision may seem dire and had negative consequences to this point, I argue that it is not the end of the world. Some of the world’s most successful democracies allow corporations to donate money directly to candidates or parties.<sup>6</sup> Perhaps the United States’

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<sup>1</sup> See R.T. BARTON, THE FIRST ELECTION OF WASHINGTON TO THE HOUSE OF BURGESSES (1892), available at <http://www.newrivernotes.com/va/1electgw.htm>.

<sup>2</sup> *Id.* The text reads, in part, that no candidate “before his election, either himself or by any other person or persons on his behalf and at his charge, directly or indirectly give, present or allow any person or persons having voice or vote in such election any money, meat, drink, entertainment or provision, or make any present, gift, reward, or entertainment, in order to be elected.” *Id.*

<sup>3</sup> See *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>4</sup> See *infra* Part II.B.5.

<sup>5</sup> See *infra* Part III.E.

<sup>6</sup> See *infra* Table 1.

problem is not the *Citizens United* decision itself, but a lack of a comprehensive, Congressionally-approved regulatory scheme that incorporates it. With a more robust, cohesive system of disclosure for independent electioneering that allows for corporate campaign finance and that empowers shareholders to prevent contributions while requiring that anonymous donations be truly anonymous, perhaps we could evaluate politicians without assuming the worst about them.

This note began as a comparative attempt to gauge what impact campaign finance law had on the confidence a nation's citizenry maintained for its national government and elections. Only one trend arose out of the research, one connected directly to *Citizens United*. On the whole, countries that allow corporations and unions to contribute directly to the political discourse and to the coffers of political parties and candidates have higher confidence in the honesty of their national elections and in their national governments overall. Therefore, the aim of this note is to consider how nations that do allow corporate participation, financially and otherwise, do so successfully. It will also look briefly at other nations with regulatory schemes similar to the United States that are more successful in terms of the public's confidence in their elections and in their government to discern what policies they maintain that may improve the United States' system.

First, this note outlines the history of corporate campaign finance law in the United States on its way towards a brief discussion of what *Citizens United* did and how the decision was received. It will then draw back its focus and discuss the comparative law and policy survey that it reflects, what countries were selected for study, why they were selected, and what exactly the data suggests. Some nations will be mined for campaign finance policies that elect a trusted government by way of trusted elections and, most importantly, that could be used domestically in concert with the holding of *Citizens United*, with specific attention paid to the realm of corporate campaign finance. Next, it will turn its attention to what social science says about campaign finance to determine what policy lessons are relevant, what lessons may not be, and to find other lessons that may not be obvious from the policies of successful nations. Finally, this note will distill the lessons learned from the international survey and attempt to make some suggestions as to how the United States can create a comprehensive policy moving forward, attempting to ensure that any suggestions can function under the holdings of *Citizens United* and its progeny and precursors.

## II. CORPORATE CAMPAIGN FINANCE LAW: HOW IT STARTED AND HOW WE GOT HERE

### A. A Brief History of (Corporate) Campaign Finance Law<sup>7</sup>

George Washington's foray into political "parties" notwithstanding, the first national campaign finance law banned political operatives from soliciting contributions from workers at naval yards in 1867.<sup>8</sup> As the country matured politically and economically, increasing amounts of money made its way from the pockets of businessmen and corporations into political coffers. For example, New York Life Insurance secretly provided U.S. \$48,000 (U.S. \$1.25 million today) to the Republican National Committee in 1904.<sup>9</sup> In response to what some feared as a corporate takeover of the United States government, the first federal campaign finance reform began in earnest with the Tillman Act, enacted in 1907, which banned corporations and national banks from contributing to federal campaigns.<sup>10</sup> Disclosure requirements were first instituted in 1910 for the House of Representatives, expanded to the Senate in 1911, and again expanded in scope through the Federal Corrupt Practices Act of 1925.<sup>11</sup> The Taft-Hartley Act of 1947, the final addition to the nation's first foray into campaign finance reform, barred unions and corporations from contributing or otherwise funding federal election campaigns.<sup>12</sup>

The increase of the cost of federal campaigns, as well as the ineffectiveness of early reforms, led to an improvement to regulation and oversight through the Federal Election Campaign Act (FECA), which was passed in 1971 and took effect in 1972.<sup>13</sup> Although requiring full disclosure of campaign contributions, FECA also created the mechanisms through which political action

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<sup>7</sup> Although this section will focus predominantly on corporate campaign finance, no self-respecting amateur historian would skip some of the interesting non-corporate campaign laws the United States has enacted. Also, as campaign finance generally can be seen as a comprehensive statutory scheme, it seems like a logical move to include how the federal government has elected to shape campaign finance generally.

<sup>8</sup> *The Federal Election Campaign Laws: A Short History*, at Appendix 4, FED. ELECTION COMM'N, <http://www.fec.gov/info/appfour.htm> (last visited Feb. 9, 2014) [hereinafter *Appendix 4*].

<sup>9</sup> *The New York Life Contributed \$48,000 to the Republic Campaign Funds in 1904*, ST. JOHN DAILY SUN, Sep. 16, 1905, at 1, available at <http://news.google.com/newspapers?id=uD4BAAAIBAJ&sjid=uygDAAAIBAJ&pg=5824%2C3592860>. Ironically enough, a vice president at the company said in sworn testimony: "This payment was made because we felt that the assets of the New York Life Insurance Co. would be jeopardized by democratic success." *Id.* One hopes to assume he spoke regarding the potential success of the Democratic Party and not the democratic process.

<sup>10</sup> *Appendix 4, supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

committees (PACs) could be created by corporations and labor unions, skirting around the core regulations of the Tillman Act and Taft-Hartley Act.<sup>14</sup> These PACs could use money provided by corporations or funded by other private individuals to contribute to federal races.<sup>15</sup> At the same time, Congress also passed the Revenue Act, which allowed taxpayers to donate a dollar to the general campaign funds for presidential elections.<sup>16</sup> Documentation of campaign abuses in the 1972 presidential election led to amendments to the FECA in 1974, which established the Federal Election Commission (FEC) to carry out the administrative functions of ensuring statutory and regulatory compliance.<sup>17</sup> These amendments also completed the statutory scheme for public financing of presidential campaigns, establishing contribution and expenditure limits as well as relaxing the prohibitions on donations by government contractors.<sup>18</sup>

In what can be seen as a precursor to the *Citizens United* decision, the Supreme Court, in *Buckley v. Valeo*, held that expenditure limits restricted political expression and were therefore unconstitutional.<sup>19</sup> The *Buckley* decision left open the possibility that these limits were constitutional for presidential elections, where candidates could elect not to receive federal funding and spend as they saw fit; the Court upheld this ruling in *Republican National Committee v. FEC*.<sup>20</sup> FECA was again amended in 1976, repealing expenditure limits for candidates not receiving public monies, placing significant restrictions on who PACs could solicit money, and limiting the contributions PACs could make to individual campaigns.<sup>21</sup>

Federal election law remained largely the same for the next twenty-five years until the Bipartisan Campaign Reform Act (better known as McCain-Feingold or BCRA) was enacted in 2002 as an amendment to FECA.<sup>22</sup> McCain-Feingold was a response to three developments that had occurred since the decision in *Buckley*.<sup>23</sup> First, the preceding decades saw a vast increase in the use of “soft money” in federal campaigns, where money not under the purview of federal law, but rather state law, would be funneled into party coffers and then spent on mixed-use party programs such as get-out-the-vote campaigns or general party advertising.<sup>24</sup> Between 1984 and 2000, the amount of soft money raised and spent by parties increased from 5% (U.S. \$21.6 million) of total receipts to 42%

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<sup>14</sup> *Id.*

<sup>15</sup> *Appendix 4, supra* note 8.

<sup>16</sup> *Id.* The first election fully funded by public funds occurred in 1976. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 424 U.S. 1 (1976).

<sup>20</sup> 445 U.S. 955 (1980).

<sup>21</sup> *Appendix 4, supra* note 8.

<sup>22</sup> *See generally* 2 U.S.C. §§ 431–57.

<sup>23</sup> L. Paige Whitaker, *Convinced by the Record Showing an Appearance of Corruption: The Supreme Court Upholds the Groundbreaking McCain-Feingold Campaign Finance Law*, *FED. LAW.*, Aug. 2004, at 26, 28.

<sup>24</sup> *Id.* at 28–29.

(U.S. \$498 million).<sup>25</sup> As such, Title I of the McCain-Feingold prohibited national party committees from soliciting, receiving, directing, or spending soft money.<sup>26</sup>

Second, issue ads that did not expressly tell voters how to choose—as distinct from ads that expressly advocated how one should vote on an issue—began to be funded by soft money.<sup>27</sup> Title II of McCain-Feingold prohibits “electioneering communications” that clearly refers to a federal candidate within sixty days of a general election or thirty days of a primary election from broadcast, as well as absolutely banning corporations and labor unions from funding such communications without going through regulated PAC donation processes.<sup>28</sup> The third development, the Senate Committee on Governmental Affairs’ six-volume report on the impact of soft money and its impact on officeholder access, outlined that the abuse of the soft money loophole had effectively sidestepped a finance regime intended to preclude donations from unions and corporations.<sup>29</sup>

As McCain-Feingold generally provided for a direct review of the act by the Supreme Court if it were enjoined in any district court, the Supreme Court quickly weighed its constitutionality. Senator Mitch McConnell filed suit to enjoin the act almost immediately, and the D.C. Circuit Court of Appeals declared portions of it unconstitutional in May 2003.<sup>30</sup> The D.C. Circuit granted a stay until the Court had its opportunity to address the presented issues.<sup>31</sup> That opinion, which came down in December 2003, totaled 248 pages and upheld the main tenets of McCain-Feingold on their face.<sup>32</sup> The Court found that the ban on soft money was not “impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA’s hard-money source and amount limits.”<sup>33</sup> In upholding the ban on electioneering communication, the Court noted that “the notion that the First Amendment erects a rigid barrier between express and issue advocacy also cannot be squared with this Court’s longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.”<sup>34</sup> National Public Radio (NPR) called

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<sup>25</sup> *Id.* at 29. In the 2000 election cycle, the two parties raised almost U.S. \$300 million from 800 donors. *Id.* Candidates were known to direct wealthy donors to donate in methods that allowed those donations to be used as soft money. *Id.*

<sup>26</sup> *Id.* at 30.

<sup>27</sup> Whitaker, *supra* note 23, at 29. Between U.S. \$135 million and U.S. \$150 million was spent on these ads in the 1996 election. *Id.* An estimated U.S. \$500 million was spent in 2000. *Id.*

<sup>28</sup> *Id.* at 30.

<sup>29</sup> *Id.* at 29.

<sup>30</sup> *Id.* at 30.

<sup>31</sup> *Id.*

<sup>32</sup> *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>33</sup> *Id.* at 96.

<sup>34</sup> *Id.* at 103.

the decision in *McConnell v. FEC* to be the “high-water mark for campaign finance laws.”<sup>35</sup> The waters quickly receded.

## **B. Citizens United: A First Amendment Pushback on Campaign Finance Regulation**

### 1. Wisconsin Right to Life: The Precursor to Citizens United

Some four years after *McConnell*, and after the retirements of Chief Justice William Rehnquist and Justice Sandra Day O’Connor allowed President George W. Bush to appoint Chief Justice John G. Roberts and Justice Samuel Alito to the Court, the Supreme Court’s new political alignment allowed it to revisit the *McConnell* decision in *FEC v. Wisconsin Right to Life*.<sup>36</sup> Wisconsin Right to Life is a non-profit ideological corporation that in August 2004 wanted to broadcast ads that objected to the use of filibusters by Senate Democrats, specifically Senator Russ Feingold, a participant in the 2004 Wisconsin Senate Democratic Primary and one of the sponsors of McCain-Feingold.<sup>37</sup> The decision effectively reinstated the differentiation between implied and expressed advocacy in issue advertising, stating that “an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>38</sup> It also suggested a strong pushback from the First Amendment freedom of speech towards McCain-Feingold generally, finding that the corporate political electioneering targeted by the Act, although perhaps unfortunate in the way it influenced candidates and the electorate, was still protected as long as corporations maintained First Amendment rights.<sup>39</sup> The pushback would be much stronger three years later.

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<sup>35</sup> Peter Overby, *The ‘Country Lawyer’ Shaping Campaign Finance Law*, NPR (June 22, 2011), <http://www.npr.org/2011/06/22/137318888/the-country-lawyer-shaping-campaign-finance-law>.

<sup>36</sup> Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life*, 2006–07 CATO SUP. CT. REV. 77, 84.

<sup>37</sup> *Id.* at 94.

<sup>38</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470–71 (2007).

<sup>39</sup> *Id.* at 480. The Constitution does not refer to corporations as people. However, corporations have been viewed as persons deserving the protection of the Constitution since 1886, when the Court held that the Southern Pacific and Central Pacific Railroad companies enjoyed the protections of the Equal Protection Clause. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886). Over time, the Court applied other constitutional rights to corporations, including the First Amendment right to free speech. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (“If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”).

## 2. Citizens United: The Decision

Holding McCain-Feingold unconstitutional, the Supreme Court drastically changed the landscape of campaign finance in the United States in *Citizens United*. As an introduction, *Citizens United* is a nonprofit corporation that distributed a movie about Hilary Clinton and desired to market the movie through advertisements.<sup>40</sup> As Mrs. Clinton was running for the Democratic Presidential nomination at the time, such advertising fell within McCain-Feingold's electioneering-communication definition.<sup>41</sup> Recognizing the possibility that McCain-Feingold may interfere with the marketing of the film, the group sought declaratory and injunctive reliefs to allow such marketing.<sup>42</sup> This was denied, and the FEC prevailed on a motion for summary judgment with the trial court relying on *McConnell*.<sup>43</sup> After finding that the ads triggered the electioneering provisions of McCain-Feingold, the Court began a discussion of its constitutionality.<sup>44</sup>

That discussion began ominously for the corporate restrictions, and the rest of the opinion followed suit.<sup>45</sup> The Supreme Court observed that PACs functioned too rigidly, were difficult to establish, and, in any event, did not allow corporations to speak politically as PACs were not the corporations themselves.<sup>46</sup> In gutting McCain-Feingold, the Supreme Court held that the First Amendment "does not permit Congress to make [electioneering-communication] distinctions based on the corporate identity of the speaker and the content of the political speech."<sup>47</sup> Further, the Court, referring back to *Buckley's* concern regarding the constitutionality of expenditure limits, held that corporations, under the protection of the First Amendment, could not be prevented from contributing political discourse, giving them the opportunity to use corporate treasury funds to finance electioneering communications and independent expenditures.<sup>48</sup> In short, corporations could involve themselves in the political discourse; they could not, however, contribute directly to campaign coffers.<sup>49</sup> It is important to note, however, that the Court did uphold the disclosure requirements as outlined by McCain-Feingold, finding that disclosure, as opposed to a ban on corporate

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<sup>40</sup> James Bopp, Jr. & Kaylan Lytle Phillips, *The Limits of Citizens United v. Federal Election Commission: Analytical and Practical Reasons why the Sky Is Not Falling*, 46 U.S.F. L. Rev. 281, 297 (2011).

<sup>41</sup> *Id.* at 297–98.

<sup>42</sup> *Citizens United v. FEC*, 558 U.S. 310, 321 (2010).

<sup>43</sup> *Id.* at 322.

<sup>44</sup> *Id.* at 324.

<sup>45</sup> *Id.* at 337. When the section discussing a statute's constitutionality almost immediately refers to its effects as censorship, the chances of it surviving decrease exponentially.

<sup>46</sup> *Id.*

<sup>47</sup> *Citizens United*, 558 U.S. at 364.

<sup>48</sup> *Id.* at 349–56.

<sup>49</sup> Richard Esenberg, *Citizens United Is No Dred Scott*, 16 NEXUS: CHAPMAN'S J.L. & POL'Y 99, 99–100 (2011).

donations, was a preferable and constitutional method to regulate campaign advertising because disclosure requirements did not prevent anyone from speaking.<sup>50</sup>

### 3. Citizens United: Public and Academic Reactions

Public reactions to *Citizens United*, perhaps not surprisingly, ran mainly along party lines. Democrats decried the victory of the political spoils system while Republicans trumpeted the decision as victory for the First Amendment.<sup>51</sup> President Barack Obama called the ruling “a major victory for big oil, Wall Street banks, health insurance companies and other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.”<sup>52</sup> Former MSNBC host Keith Olbermann thought the decision “might actually have more dire implications than *Dred Scott v. Sandford*.”<sup>53</sup> Other liberal commentators, though perhaps less dramatic in their language, contended that Republicans had been handed a monetary weapon to which they previously did not have access.<sup>54</sup> Some liberals suggested a constitutional amendment that would effectively unravel the decision by removing First Amendment protections from for-profit organizations.<sup>55</sup> Over 750,000 people signed a petition supporting the amendment.<sup>56</sup>

Republicans and conservatives, on the other hand, were clearly pleased with the decision. Theodore Olson, former Solicitor General under President George W. Bush, opined:

[I]t may be the most important case in history because what that decision said is that individuals, under the First Amendment, cannot be inhibited, cannot be restrained, cannot be threatened,

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<sup>50</sup> *Citizens United*, 558 U.S. at 366–69.

<sup>51</sup> Peter L. Francia, *Back to the Future? The Effects of Citizens United v. FEC in the 2010 Election*, 44 J. MARSHALL L. REV. 595, 596 (2011).

<sup>52</sup> David Savage, *Court Opens up Election Spending*, BALT. SUN (Jan. 22, 2010), [http://articles.baltimoresun.com/2010-01-22/news/bal-te.scotus22jan22\\_1\\_election-spending-corporations-and-unions-supreme-court](http://articles.baltimoresun.com/2010-01-22/news/bal-te.scotus22jan22_1_election-spending-corporations-and-unions-supreme-court).

<sup>53</sup> Keith Olbermann, *Olbermann: U.S. Government for Sale*, MSNBC (Jan. 21, 2010), [http://www.msnbc.msn.com/id/34981476/ns/msnbc\\_tv-countdown\\_with\\_keith\\_olbermann/print/0/displaymode/1098/](http://www.msnbc.msn.com/id/34981476/ns/msnbc_tv-countdown_with_keith_olbermann/print/0/displaymode/1098/).

<sup>54</sup> Francia, *supra* note 51, at 606.

<sup>55</sup> See Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979 (2011).

<sup>56</sup> Robert Weissman, *One Year Later, Movement is Growing to Overturn Citizens United*, PUBLIC CITIZEN (Jan. 21, 2011), [http://www.citizen.org/pressroom/pressroom\\_redirect.cfm?ID=3264](http://www.citizen.org/pressroom/pressroom_redirect.cfm?ID=3264).



cannot be censored by the government when they wish to speak about elections and the political process.<sup>57</sup>

John Cornyn, National Republican Senatorial Committee Chair, admitted that the decision could open up resources previously unavailable for Republicans.<sup>58</sup>

Academic responses, on the whole, were far more muted than those from public figures. The decision was seen as significant, but not a disaster.<sup>59</sup> It was predicted that *Citizens United* would not “open the floodgates” as many public figures had foreseen.<sup>60</sup> Suggestions for requirements of shareholder approval of corporate contributions or expenditures were seen as potentially unconstitutional under the *Citizens United* decision.<sup>61</sup> It was also predicted that corporations may use potential independent electioneering spending as leverage against incumbents who do not support legislation crucial to their commercial enterprise.<sup>62</sup> Others forecasted an increasingly unbalanced campaign finance world where corporations and unions spending would dwarf that available to parties and candidates.<sup>63</sup> Some even championed the aforementioned constitutional amendment to remove corporate speech from the protection of the First Amendment.<sup>64</sup> Despite the rhetoric across the political aisles and the potential uncertainties seen in the academic world, it remained to be seen what practical impact the decision would have when most of these words were spoken. The picture has become a bit clearer in the interim.

#### 4. *Citizens United*: The Practical Impact Thus Far

Although many critics were justifiably concerned about the practical impact of *Citizens United*, its true impact may not be as pronounced as some

<sup>57</sup> *Bossie and Olson Comment on the One-Year Anniversary of the Citizens United Supreme Court Victory*, CITIZENS UNITED (Jan. 20, 2011), <http://www.citizensunited.com/cu-in-the-news.aspx?article=71>.

<sup>58</sup> David D. Kirkpatrick, *Courts Roll Back Limits on Election Spending*, N.Y. TIMES, Jan. 8, 2010, at A1.

<sup>59</sup> Esenberg, *supra* note 49, at 104–05.

<sup>60</sup> See John Persinger, Note, *Opening the Floodgates?: Corporate Governance and Corporate Political Activity After Citizens United*, 26 NOTRE DAME J.L. 327, 347 (2012).

<sup>61</sup> Robert B. Sobelman, *An Unconstitutional Response to Citizens United: Mandating Shareholder Approval of Corporate Political Expenditures*, 77 BROOK. L. REV. 341, 380 (2011). On the other hand, in his concurrence to *Citizens United*, Justice Kennedy plainly stated the “procedures of corporate democracy” could do what the government could not: prevent corporations from involving themselves in the political process. *Citizens United v. FEC*, 558 U.S. 310, 362 (2010).

<sup>62</sup> Gene Nichol, *Citizens United and the Roberts Court’s War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1011 (2011).

<sup>63</sup> Note, *Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance*, 124 HARV. L. REV. 1528, 1528 (2011).

<sup>64</sup> Weissman, *supra* note 55, at 1004–05.

assumed. Many of the doors thought to be unlocked by the decision may have been open already by prior jurisprudence,<sup>65</sup> specifically *Wisconsin Right to Life*. Although the doors may have been open, the *Citizens United* opinion made it much clearer that they could be walked through, and, subsequently, it was much easier to convince labor unions and corporations to make the trip.<sup>66</sup> Before the decision, many states allowed corporate donations previously banned by McCain-Feingold; the way money flowed into campaign coffers in those states could not be distinguished from those that did not allow such donations.<sup>67</sup>

Since the decision is so new, it is difficult to accurately judge exactly its effects on corporate giving. For the 2010 mid-term elections, the largest political speech expenditures were made by unions and other non-business organizations.<sup>68</sup> The American Federation of State, County, and Municipal Workers (AFSCME) spent U.S. \$87.5 million on the 2010 elections.<sup>69</sup> The U.S. Chamber of Commerce spent U.S. \$75 million.<sup>70</sup> American Crossroads and Crossroads GOP—related organizations created with the help of Karl Rove—spent U.S. \$65 million.<sup>71</sup> Although this is certainly an increase, AFSCME spent U.S. \$53 million in the election cycle for 2004, before *Wisconsin Right to Life* began to push back on McCain-Feingold.<sup>72</sup> A study of corporate stock reactions to *Citizens United* suggests that the business world had little expectation of the case having a tangible effect on their bottom line; whether corporations were politically active or not, financial market prices fluctuated normally on the important dates of *Citizens United*, when the Supreme Court granted certiorari and heard oral arguments, and actually fell slightly the day the opinion came down.<sup>73</sup>

### 5. *Citizens United* and Super PACs

Super PACs, or independent expenditure committees, “represent spending by individuals, groups, political committees, corporations or unions expressly advocating the election or defeat of clearly identified federal candidates . . . [whose] expenditures [are] not . . . in concert or cooperation with, or at the request or suggestion of, a candidate, the candidate’s campaign or a political

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<sup>65</sup> Adam Liptak, *A Drop in the Bucket*, COLUM. L. SCH. MAG., Aug. 31, 2010, at 30, available at <http://www.law.columbia.edu/magazine/54665/a-drop-in-the-bucket>.

<sup>66</sup> Roy A. Schotland, *The Post-Citizens United Fantasy-Land*, 20 CORNELL J.L. & PUB. POL’Y 753, 754 (2011).

<sup>67</sup> Liptak, *supra* note 65, at 31.

<sup>68</sup> Brody Mullins & John D. McKinnon, *Campaign’s Big Spender*, WALL ST. JOURNAL (Oct. 21, 2010), [http://online.wsj.com/article/SB10001424052702303339504575566481761790288.html?mod=WSJ\\_newsreel\\_politic.s](http://online.wsj.com/article/SB10001424052702303339504575566481761790288.html?mod=WSJ_newsreel_politic.s).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Timothy Werner, *The Sound, the Fury, and the Nonevent: Business Power and Market Reactions to the Citizens United Decision*, 39 AM. POL. RES. 118, 132–33 (2011).

party.”<sup>74</sup> According to the Wall Street Journal, Super PACs spent a total of U.S. \$567 million in the 2012 presidential election.<sup>75</sup> They also may be the most impactful legacy of the recent shift in campaign finance law as they are political organizations that may independently electioneer without limits.<sup>76</sup> Although they were not directly created by the decision in *Citizens United*, Super PACs were a consequence of both *Citizens United* and *SpeechNow.org v. FEC*.<sup>77</sup> Just weeks after *Citizens United*, *SpeechNow* saw the D.C. Circuit Court of Appeals hold that limits on donations by private individuals to PACs that was intended only to fund independent communications were unconstitutional in the same vein as those from corporations seen in *Citizens United*.<sup>78</sup> The decision upheld disclosure requirements on such donations.<sup>79</sup>

Following *SpeechNow*, the FEC issued two companion opinions that allowed for the creation of what are now considered Super PACs.<sup>80</sup> First, the FEC recognized that corporations and labor unions could contribute to independent expenditure-only committees.<sup>81</sup> Second, the FEC recognized that company-created PACs could solicit contributions from anyone legally eligible to make campaign contributions; FECA previously had allowed only supervisory employees to contribute to corporation-supported PACs.<sup>82</sup> In 2011, the FEC allowed that candidates could “attend, speak at, or be featured guests at fundraisers for IE-only (independent expenditure) committees,” as long as solicitations meet the FECAs limitations and guidelines—meaning they could only ask individuals and PACS to contribute U.S. \$5,000 and could not ask anything of corporations or unions.<sup>83</sup> Super PACs quickly became highly significant to the electoral process: as of Super Tuesday 2012, 363 Super PACs had registered and had already spent almost U.S. \$100 million.<sup>84</sup> Perhaps not surprisingly, Mitt Romney, winner of the Republican Primary, received the most Super PAC support with almost U.S. \$44.5 million in spending.<sup>85</sup>

In the 2012 race, both majority candidates had Super PACs on their side. Several organizations on either side of the aisle created Super PACs, and several

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<sup>74</sup> *Independent Expenditure Committees*, FED. ELECTION COMM’N, [http://www.fec.gov/press/press2011/ieoc\\_alpha.shtml](http://www.fec.gov/press/press2011/ieoc_alpha.shtml) (last visited Feb. 9, 2014).

<sup>75</sup> *How Much Are Super PACS Spending?* WALL ST. JOURNAL, <http://projects.wsj.com/super-pacs/> (last visited Feb. 9, 2014).

<sup>76</sup> Nicholas Confessore, *There’s Nothing Like a ‘Super PAC’ for the Serious Contender*, N.Y. TIMES, Oct. 19, 2011, at A18.

<sup>77</sup> 599 F.3d 686 (D.C. Cir. 2010).

<sup>78</sup> *Id.* at 694.

<sup>79</sup> *Id.* at 698.

<sup>80</sup> James A. Kahl, *Citizens United, Super PACs, and Corporate Spending on Political Campaigns: How Did We Get Here and Where Are We Going?*, FED. LAW, Jun. 2012, at 40, 41.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 42.

<sup>85</sup> Kahl, *supra* note 80, at 42.

others created Super PACs to supplement their already existing traditional PACs, presumably to dump money into should they need extra ammunition come election time.<sup>86</sup> Although corporations can contribute to Super PACs, they have not done so to the extent one may expect; the top ten donors to Super PACs are either private individuals or trade unions,<sup>87</sup> and less than one half of one percent of Super PAC contributions come from publicly-traded corporations.<sup>88</sup> Although disclosure is nominally required for Super PACs, the 2012 election saw Super PACs for both candidates receive money from corporations and other organizations whose owners or constituency were unknown, thereby skirting beyond the disclosure requirements.<sup>89</sup>

#### 6. Section 501(c) Groups and the Power of Spending Without Disclosure

Outside of the developments of *Citizens United*, increased independent political expenditures can be traced to the increasing prevalence of section 501(c) groups that donate to independent electioneering. Section 501(c) groups are non-profit organizations organized under Section 501(c) of the Internal Revenue Code.<sup>90</sup> These groups are not required to divulge the identity of their donors as long as their primary activity is not election activity.<sup>91</sup> Such groups include social welfare organizations organized under section 501(c)(4), such as the NRA; labor organizations organized under section 501(c)(5), such as AFSCME; and trade associations organized under section 501(c)(6), such as the Chamber of Commerce.<sup>92</sup>

Until the midterm elections of 2010, section 501(c) groups did not have a great presence in political discussions: in the 2006-midterm elections, there was virtually no independent spending by such groups. The 2010 midterms saw the

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<sup>86</sup> *Id.*

<sup>87</sup> 2014 *Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited Feb. 9, 2014).

<sup>88</sup> Anna Palmer & Abby Phillip, *Corporations Don't Pony up for Super PACs*, POLITICO (Mar. 8, 2012), <http://www.politico.com/news/stories/0312/73804.html>.

<sup>89</sup> *Super PAC Disclosure Statements Disclose Little*, BRENNAN CENTER FOR JUSTICE (Feb. 14, 2012), <http://www.brennancenter.org/blog/super-pac-disclosure-statements-disclose-little>.

<sup>90</sup> *The Campaign Legal Center Guide to the Current Rules for Federal Elections*, CAMPAIGN LEGAL CTR. (Oct. 2012), [http://www.campaignlegalcenter.org/images/THE\\_CAMPAIGN\\_LEGAL\\_CENTER\\_GUIDE\\_TO\\_THE\\_CURRENT\\_RULES\\_FOR\\_FEDERAL\\_ELECTIONS\\_10-25-12.pdf](http://www.campaignlegalcenter.org/images/THE_CAMPAIGN_LEGAL_CENTER_GUIDE_TO_THE_CURRENT_RULES_FOR_FEDERAL_ELECTIONS_10-25-12.pdf) [hereinafter *Guide to Rules for Federal Elections*].

<sup>91</sup> *Id.* The recent U.S. Internal Revenue Service (IRS) targeting scandal was motivated, in part, by the IRS conducting more comprehensive investigations to those organizations that applied for section 501(c) status despite their political action before the approval of those applications. See Nicholas Confessore & Michael Lu, *Groups Targeted by I.R.S. Tested Rules on Politics*, N.Y. TIMES, May 26, 2013, at A1.

<sup>92</sup> *Guide to Rules for Federal Elections*, *supra* note 90.

groups account for 42% of independent spending.<sup>93</sup> This increased activity by non-political section 501(c) groups has led to some skepticism regarding their true purpose.<sup>94</sup>

As businesses and corporations can donate to section 501(c) groups, their increasing prevalence places an extra hurdle between the disclosure of business and corporate donations. And, if the recent IRS “scandal” is any indication, the IRS may be ill-suited to oversee whether nonprofit groups are acting politically or not.<sup>95</sup> PACs and Super PACs allow corporations to influence the political process without any oversight from the candidates and parties they wish to influence, but with the requirement that such contributions are nominally disclosed.<sup>96</sup> Section 501(c) groups allow corporations to exert similar influence without any requirements of disclosure. If, as will be discussed later, one method of overseeing corporate campaign donations is to empower their shareholders to prevent corporations from contributing to candidates or parties, such controls would be impractical if shareholders had no knowledge of the expenditures. Regardless, after *Wisconsin Right to Life* overturned the absolute ban on corporate electioneering expenditures, the FEC struggled to construct any regulatory system for such corporate finance.<sup>97</sup> These problems are outlined in *Van Hollen v. FEC*.

### 7. *Van Hollen v. FEC*: The Difficulty in Forcing Disclosure by Corporations and Unions

After *Wisconsin Right to Life*, the Federal Election Commission was left to construct a system for disclosure of such expenditures without any statutory

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<sup>93</sup> *Id.* The Chamber of Commerce was the largest section 501(c) spender in 2010, spending almost U.S. \$30 million. See Jonathan D. Salant & Traci McMillan, *Rove-Backed Groups, U.S. Chamber Build Winning Record in Midterm Election*, BLOOMBERG (Nov. 3, 2010), <http://www.bloomberg.com/news/2010-11-04/rove-backed-groups-u-s-chamber-build-winning-record-in-midterm-election.html>.

<sup>94</sup> T.W. Farnam, *Watchdog Group Files FEC Complaint Against Crossroads GPS*, WASH. POST (Nov. 15, 2012), [http://articles.washingtonpost.com/2012-11-15/politics/35503198\\_1\\_crossroads-gps-crossroads-spokesman-jonathan-collegio-american-crossroads](http://articles.washingtonpost.com/2012-11-15/politics/35503198_1_crossroads-gps-crossroads-spokesman-jonathan-collegio-american-crossroads).

<sup>95</sup> The recent IRS “scandal” is good evidence of the difficulties caused by allowing section 501(c) groups to involve themselves with little direct regulatory oversight. The IRS, required to ensure that such groups are not exclusively intended for electioneering, created a list of words that would trigger a closer inspection of a section 501(c) applicant. Jonathan Weisman, *I.R.S. Scrutiny Went Beyond the Political*, N.Y. Times, July 5, 2013, at A1. Initially reported as a crusade against conservative groups, the IRS actually targeted groups on all sides of the political spectrum if they seemed to be political and scrutinized other applicants for other reasons. *Id.* Of the 22,000 groups that were initially denied status in 2012, only 296 were flagged as being potentially political. *Id.*

<sup>96</sup> See *supra* Part II.B.6.

<sup>97</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

directive, as the disclosure requirements found in McCain-Feingold did not explicitly apply to expenditures it essentially banned.<sup>98</sup>

The regulation at issue in *Van Hollen*, 11 C.F.R. 103.20(c)(9), required any corporation or labor union to disclose the name and address of each person donating, in aggregate, U.S. \$1,000 to the organization for the purpose of electioneering communications.<sup>99</sup> Maryland Congressman Christopher Van Hollen sued the FEC, arguing that the agency had exceeded its statutory authority by narrowing the scope of McCain-Feingold's disclosure requirements, essentially opening a loophole that allows groups to avoid disclosure by not earmarking contributions.<sup>100</sup> The D.C. District Court held that the FEC erred in creating the regulation, finding that McCain-Feingold requires every person who funds such communications to disclose contributors and that by ignoring such a requirement, the FEC had taken on a quintessentially legislative function.<sup>101</sup>

On appeal, the FEC declined to defend the regulation, which was then defended by the Hispanic Leadership Fund and the Center for Individual Freedom.<sup>102</sup> The D.C. Court of Appeals vacated the lower court decision shortly before the 2012 presidential election, finding that Congress had not spoken plainly to what disclosure to require of corporations and labor unions.<sup>103</sup> Rather, the Court of Appeals held that although Congress had spoken plainly to the direct costs of producing and airing electioneering communications, they did not address how corporations and labor unions, excluded from doing so by the act, should finance such communications.<sup>104</sup> Considering this lack of clear statutory directive, the Court of Appeals found that the FEC could either go through rulemaking procedures or attempt to defend the regulations to the District Court.<sup>105</sup>

The FEC has declined to initiate rulemaking to modify the regulations and elected to continue to defend the regulation.<sup>106</sup> The Center for Individual Freedom has petitioned the FEC to amend the regulation to address the issues raised by the D.C. Court of Appeals; no decision regarding this petition has been made,<sup>107</sup> and the original regulation was used during the 2012 election. As of

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<sup>98</sup> *Ongoing Litigation: Van Hollen v. FEC*, FED. ELECTION COMM'N. [http://www.fec.gov/law/litigation/van\\_hollen.shtml](http://www.fec.gov/law/litigation/van_hollen.shtml) (last visited Feb. 9, 2014) [hereinafter *Ongoing Litigation*].

<sup>99</sup> *Id.*

<sup>100</sup> *Van Hollen v. FEC*, BRENNAN CENTER FOR JUSTICE (Aug. 1, 2012), [http://www.brennancenter.org/content/resource/van\\_hollen\\_v.\\_fec/](http://www.brennancenter.org/content/resource/van_hollen_v._fec/).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Ongoing Litigation*, *supra* note 98.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

March 8, 2013, the FEC has yet to announce its intentions moving forward; the litigation remains ongoing.<sup>108</sup>

### 8. A Summary of Where We Stand Now (and the Disappointment of Disclosure)

As campaign finance laws are currently constructed, corporations are unable to directly contribute to federal campaigns.<sup>109</sup> They are, however, able to contribute unlimited funds to PACs or Super PACs that only make independent campaign expenditures.<sup>110</sup> Disclosure requirements under FECA continue to persist; any group or person making independent election expenditures are required to report those expenditures and the sources of their income as long as those contributions are intended for independent expenditures.<sup>111</sup> There are no disclosure requirements for donations to section 501(c) groups who may make independent expenditures as long as those political activities are not the group's primary activity. As this note shifts its focus to how other countries handle corporate campaign finance, keep in mind that although corporations can contribute to election efforts, they cannot do so directly and they may or may not do so secretly, depending on to whom they donate to and for what purpose the money is donated.

## III. COMPARATIVE CORPORATE CAMPAIGN FINANCE

### A. An Introduction to the Analysis

This note began as a search for trends in comparative campaign finance laws, specifically some correlation between different campaign finance structures and how respective electorates viewed their national government. For the most part, there is little correlation between specific campaign finance structures and people's attitudes towards their government. There was one key exception to the overall lack of relationships: countries that do not totally ban donations from businesses and labor unions tend to have greater confidence in both their government and elections. This section will introduce how the study was structured, how countries were selected for study, and what areas of campaign finance laws were analyzed.

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<sup>108</sup> Keenan Steiner, *With Court Case Looming, FEC Has Trouble Deciding How to Say It Can't Decide*, SUNLIGHT FOUND. (Mar. 8, 2013), <http://reporting.sunlightfoundation.com/2013/court-case-looming-fec-has-trouble-deciding-how-say-it-cant-deci/>.

<sup>109</sup> See *supra* Part II.B.

<sup>110</sup> See *supra* Part II.B.5.

<sup>111</sup> See *FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM'N. (Jan. 2013), <http://www.fec.gov/pages/brochures/fecfeca.shtml#Disclosure>.

## **B. How the Nations Studied Were Chosen**

In deciding what countries to analyze, it seemed apparent that some limit should be in place to preclude nations who are democratic in name only from tainting the analysis. By using an empirical study conducted by the Economist Intelligence Unit, the group of countries under study is shaped by some logical methodology that only includes the most democratic of nations.<sup>112</sup>

Countries included in this analysis are those that are considered “full democracies” under the Economist Intelligence Unit’s Democracy Index 2011.<sup>113</sup> The index is based on five categories: electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture.<sup>114</sup> In the 2011 Index, twenty-five nations were found to be full democracies.<sup>115</sup> The index refers to full democracies as those “countries in which not only basic political freedoms and civil liberties are respected, but . . . also tend to be underpinned by a political culture conducive to the flourishing of democracy.”<sup>116</sup> Although the index scores do take the transparency of election funding into account, it does not include whether businesses can contribute to campaigns in each nation’s score.<sup>117</sup>

## **C. How Each Country Was Analyzed**

For each nation, election rules under various categories were analyzed for trends. The categories included how corporate giving—or the absence thereof—was designed, what donations limits were placed on different types of campaign contributions, how public funds were made available to candidates, what spending limits (if any) candidates were placed under, and what spending oversight the government had over political parties and candidates. Statutes from the respective nations generally were found in the database maintained by the International Institute for Democracy and Electoral Assistance (IDEA);<sup>118</sup> IDEA is an intergovernmental organization based in Stockholm that supports stronger

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<sup>112</sup> According to their website, the Economic Intelligence Unit is an independent sister organization of *The Economist* and provides “forecasting and advisory services [to] entrepreneurs, financiers, and government figures.” *About Us*, ECONOMIST INTELLIGENCE UNIT, [http://www.eiu.com/site\\_info.asp?info\\_name=about\\_eiu](http://www.eiu.com/site_info.asp?info_name=about_eiu) (last visited Feb. 9, 2014).

<sup>113</sup> *Democracy Under Stress*, ECONOMIST INTELLIGENCE UNIT 1 (Dec. 2011), [http://www.sida.se/Global/About%20Sida/Så%20arbetar%20vi/EIU\\_Democracy\\_Index\\_Dec2011.pdf](http://www.sida.se/Global/About%20Sida/Så%20arbetar%20vi/EIU_Democracy_Index_Dec2011.pdf).

<sup>114</sup> *Id.*

<sup>115</sup> This represents 15% of nations and approximately 11% of the world’s population. *Id.* at 2.

<sup>116</sup> *Id.* at 30.

<sup>117</sup> *Id.* at 30–42.

<sup>118</sup> *Political Finance Database*, INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/political-finance/index.cfm> (last visited Feb. 9, 2014).



democratic institutions and processes.<sup>119</sup> Any supplemental statutory research was done on a case-by-case basis.

Countries were further analyzed by their citizens' respective confidence in their national governments and confidence in the honesty of national elections. These two statistics were taken from annual or semiannual surveys conducted by Gallup.<sup>120</sup> Confidence in national governments and in national elections were used as comparative variables because of their unique ability to demonstrate how a nation's citizenry regards its government.<sup>121</sup>

#### D. Breaking Down the Countries

Corporate campaign finance structures can be broken into five distinct categories . . . and the United States. Some countries allow all corporations and unions to contribute to election campaigns. For the purposes of this study, they include Australia, Austria, Denmark, Ireland, Malta, Mauritius, the Netherlands, New Zealand, Norway, Sweden, and Switzerland.<sup>122</sup> Other countries merely ban corporate campaign contributions from companies with government contracts or other affiliations (i.e., they are partially publicly-held). Both Japan and Belgium allow corporate contributions to candidates, but do not allow such contributions to political parties and forbid any donation from government-affiliated corporations; although Belgium prohibits all donations from unions, Japan allows such donations for political parties.<sup>123</sup> The Czech Republic, Germany, and Spain only prohibit corporate contributions from government-affiliated corporations to political parties; none ban contributions from unions or from non-affiliated corporations.<sup>124</sup> Finland, Iceland, and Uruguay ban all contributions from government-affiliated corporations; only Uruguay bans contributions from unions.<sup>125</sup> Finally, Costa Rica, Canada, and Luxembourg have complete bans on

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<sup>119</sup> *About Us*, INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/about/> (last visited Mar. 13, 2013).

<sup>120</sup> See *Gallup WorldView*, GALLUP, <https://worldview.gallup.com/default.aspx> (last visited Feb. 9, 2014) [hereinafter *Gallup WorldView*]. The database itself is fairly robust and powerful with surveys ranging from "Confidence in Local Police" to "Tried to Use Less Water." *Id.*

<sup>121</sup> *Id.* Gallup's World Polling methodology has a target population of a nation's civilian population aged 15 and older. See *Resources - World Poll Methodology*, GALLUP, <https://worldview.gallup.com/default.aspx> (last visited Feb. 20, 2014). Questionnaires are translated into the major languages of each country. *Id.* Interviewers are trained in both the questionnaire and the execution of field procedures. *Id.* Telephone surveys are conducted where 80% of the population has phone access. *Id.* In the developing world, an area frame design is used for face-to-face interviews, which last about one hour. *Id.*

<sup>122</sup> See *Political Finance Database*, *supra* note 118.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

corporate or union campaign finance expenditures.<sup>126</sup> Without *Citizens United*, the United States would most comfortably fit into this last category; that decision, however, leaves it in a mess by itself.

### E. Different Policies Do Not Seem to Greatly Impact Public Confidence

The succeeding tables, grouping nations by their style of corporate donation policies, demonstrate the respective confidence in national governments and national elections of each nation.

**Table 1**  
Countries that have no bans on corporate or union giving<sup>127</sup>

Country	Confident in National Government	Confident in Honesty of National Elections
<b>Australia</b>	53% (2011)	67%
<b>Austria</b>	41% (2011)	67%
<b>Denmark</b>	47% (2011)	74%
<b>Ireland</b>	53% (2011)	72%
<b>Malta</b>	49% (2011)	53%
<b>Mauritius</b>	67% (2011)	68%
<b>Netherlands</b>	60% (2011)	84%
<b>New Zealand</b>	61% (2011)	79%
<b>Norway</b>	54% (2008)	69%
<b>Sweden</b>	64% (2011)	80%
<b>Switzerland</b>	58% (2009)	76%
<b>United Kingdom</b>	47% (2011)	68%
<b>Average</b>	54.5%	71.4%

<sup>126</sup> *Id.*

<sup>127</sup> *Gallup Worldview*, *supra* note 120. Parenthetical numbers indicate the year of survey for both statistics.

**Table 2**  
**Countries that have complete bans on corporate and union giving<sup>128</sup>**

<b>Country</b>	<b>Confident in National Government</b>	<b>Confident in Honesty of National Elections</b>
<b>Canada</b>	52% (2011)	66%
<b>Costa Rica</b>	32% (2011)	53%
<b>Luxembourg</b>	77% (2011)	78%
<b>South Korea</b>	23% (2011)	35%
<b>United States</b>	35% (2012)	42%
<b>Average</b>	43.8%	54.8%

**Table 3**  
**Countries that only allow corporate donations to candidates<sup>129</sup>**

<b>Country</b>	<b>Confident in National Government</b>	<b>Confident in Honesty of National Elections</b>
<b>Belgium</b>	29% (2011)	58%
<b>Japan</b>	17% (2012)	54%
<b>Average</b>	23%	56%

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<sup>128</sup> *Id.* Although the United States fits best here, *Citizens United* means that the United States fits imperfectly in this category or any category.

<sup>129</sup> *Id.* Remember that Japan and Belgium differ regarding unions. Japan allows them to contribute, while Belgium prohibits such donations.

**Table 4**  
**Countries that ban donations only from government-affiliated companies to political parties<sup>130</sup>**

Country	Confident in National Government	Confident in Honesty of National Elections
<b>Czech Republic</b>	21% (2011)	39%
<b>Germany</b>	42% (2011)	62%
<b>Spain</b>	35% (2012)	62%
<b>Average</b>	32.7%	54.3%

**Table 5**  
**Countries that ban donations from all government-affiliated companies<sup>131</sup>**

Country	Confident in National Government	Confident in Honesty of National Elections
<b>Finland</b>	57% (2011)	84%
<b>Iceland</b>	24% (2008)	84%
<b>Uruguay</b>	63% (2012)	77%
<b>Average</b>	48%	81.7%

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

## F. Cursory and More Considered Conclusions

A quick look at the tables above by someone with no knowledge of each of those nations would probably lead to the conclusion that, as far as public confidence goes, there is very little difference between countries that limit or do not limit corporate donations to election campaigns. A more nuanced examination, however, shows that those governments that do totally ban corporate donations receive less public confidence than those nations that allow or only partially limit corporate donations.<sup>132</sup> Two of the three countries with the lowest confidence in the honesty of elections ban corporate donations: the United States and South Korea.<sup>133</sup> The other of these countries, the Czech Republic, has suffered through numerous political finance and corruption scandals in the past twenty years, which may easily explain the erosion in their public confidence.<sup>134</sup>

Luxembourg, the lone country that bans all corporate contributions that sees high confidence in its national elections, is a bit of an outlier in terms of its make-up. It is extremely small, wealthy, and well-educated.<sup>135</sup> Controlling for

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<sup>132</sup> Countries that have no corporate ban average 55% confidence in their national government and 71% confidence in the honesty of their national elections. Countries with total corporate bans average 44% and 55%, respectively.

<sup>133</sup> Compare tbl.2, with tbls.1, 3, 4, and tbl.5.

<sup>134</sup> Amongst the lowlights of the Czech Republic's political scandals: in 1995, a major political party received substantial donations from two non-existent foreign donors who actually were a Czech businessperson who had purchased a steel company from the government as it privatized its economy. See *Evaluation Report on the Czech Republic on Transparency of Party Funding (Theme II)*, GRP. OF STATES AGAINST CORRUPTION (Apr. 1, 2011), [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2010\)10\\_CzechRep\\_Two\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2010)10_CzechRep_Two_EN.pdf).

The 2006 elections in the Czech Republic were marred by unsubstantiated allegations that the Prime Minister's party was being investigated for its ties to organized crime and contract assassinations. See Daniela Lazarova, *Kubice Report Challenged by Supreme State Attorney's Office*, RADIO PRAGUE (Apr. 25, 2007), <http://www.radio.cz/en/section/curraffrs/kubice-report-challenged-by-supreme-state-attorneys-office>. The man in charge of the report, Jan Kubice, is now the country's Minister of the Interior. See *Minister of the Interior*, MINISTRY OF THE INTERIOR OF THE CZECH REPUBLIC, <http://www.mvcr.cz/mvcren/article/minister-of-the-interior-766314.aspx> (last visited Feb. 9, 2014).

<sup>135</sup> Of the nations in the study, Luxembourg's Gross Domestic Product (GDP) per capita is U.S. \$27,000 higher than the runner-up in that category, Norway. See *IMF World Economic Outlook Database*, INT'L MONETARY FUND (Sept. 2011), <http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx>. Luxembourg enjoys 100% literacy for those over the age of 15. See *The World Factbook: Luxembourg*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/lu.html> (last visited Feb. 9, 2014). Further, with only 500,000 residents in an area slightly smaller than Rhode Island, the cost of elections is low. *Id.* Without formal expenditure limits, major political parties meet before elections to decide how much they will spend on elections; a recent agreement saw all parties, save one, agree to an expenditure limit of €800,000. See *Evaluation Report on Luxembourg on the*

Luxembourg's eccentricities, confidence in those nations that completely ban corporate donations is unimpressive and lags far behind that seen in nations that allow such donations.<sup>136</sup>

Since corporate bans are surely intended to maintain the integrity of the political process, their efficacy in doing so is certainly doubtful given what these confidence numbers suggest. One must wonder, given these numbers, if such a ban is truly worth the effort, or if there are other policy possibilities that could allow corporate participation without unleashing the grave concerns for corporate political control seen in the United States after the *Citizens United* decision.

#### IV. HOW OTHER NATIONS REGULATE CORPORATE FINANCE

As mentioned above, the United States has banned direct corporate donations to political candidates and parties for over 100 years, although recent jurisprudence has allowed corporations to independently spend funds to express their political opinions. This dichotomy is not logical: it allows corporations to influence elections financially without allowing them to establish financial relationships with those running in those elections. The dichotomy also has the potential to be inefficient, since such independent communications are financed and created outside of the candidate's control, allowing such communications to deviate from a candidate's agenda. Assuming *Citizens United* is not overturned, such an illogical dichotomy should not continue. Even if *Citizens United* is overturned at a later date, the preceding comparative analysis suggests that continuing such corporate bans may not have their intended effect.

Most nations that allow corporate donations regulate them. Some of these regulations would not work in the United States, as they may violate the First Amendment freedom of political speech in a method similar to McCain-Feingold. On the other hand, regulations that either put private restrictions on corporate donations, create more comprehensive methodologies to compel disclosure, or otherwise regulate donations without banning them in total, should be constitutional. This section will describe several regulatory methods that allow corporate campaign finance, assess how they function for the nations that use them, and contemplate whether they could be upheld constitutionally in the United

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"*Transparency of Political Party Funding*" (Theme II), GRP. OF STATES AGAINST CORRUPTION (June 13, 2008), [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2007\)6\\_Lux\\_embourg\\_Two\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2007)6_Lux_embourg_Two_EN.pdf). Although no formal statute exists to compel campaign finance disclosures, the small size of the country, coupled with the general familiarity of citizens with their candidates and parties, allows political actors to self-regulate without the major campaign finance scandals seen in other modern democracies. *Id.*

<sup>136</sup> Excluding Luxembourg, the average confidence in honesty of national elections for countries that ban corporate finance is 49%. See *supra* Table 2. Of the nations with no ban, only Malta's confidence percentage is lower than the average of those nations that do have complete bans. See *supra* Table 1.

States. The United Kingdom, for instance, allows corporate shareholders to deny executives the power to donate to political parties.<sup>137</sup> New Zealand allows for anonymous donations to parties through a government program where an agency receives the donation and then turns it over to its donee.<sup>138</sup> This section will also examine Canada, who underwent a reform movement similar to the United States in the early 21st century and whose reform attempts, including corporate financing bans, were upheld constitutionally. The analysis in this section also includes policies that could not be instituted constitutionally in the United States under current Supreme Court jurisprudence. They are included to provide a clear understanding of how each regime works as a system and to provide context for those policies that would work in the United States under *Citizens United*.

### **A. The United Kingdom: Where Companies May Donate with Approval and Disclosure**

The United Kingdom began to strictly regulate campaign finance when it enacted the Electoral Reform Act of 1883 in response to allegations of vote-buying.<sup>139</sup> The act introduced expenditure limits on political candidates, required that each candidate have a single agent responsible for settling campaign expenses, and mandated that disclosure be done through the national press.<sup>140</sup> The system remained in place with minor adjustments until the 1990s.<sup>141</sup> The Political Parties, Elections, and Referendum Act (PPERA), passed in 2000, significantly altered campaign finance in the United Kingdom. It created the Electoral Commission to oversee candidate and party finances, as well as created limits on political party expenditures similar to those limits already in place for candidates.<sup>142</sup> In the United Kingdom, corporations and businesses are allowed to contribute to both political parties and political candidates.<sup>143</sup> Publicly-listed corporations are required to ask for shareholder approval before making donations, and private businesses must follow their own internal rules when determining whether to donate, provided that the company is registered in the United Kingdom and incorporated in either the United Kingdom or other EU

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<sup>137</sup> See *infra* Part IV.A.

<sup>138</sup> See *infra* Part IV.B.

<sup>139</sup> Stephen Ansolabehere, *The Scope of Corruption: Lessons From Comparative Campaign Finance Disclosure*, 6 ELECTION L.J. 163, 170 (2007).

<sup>140</sup> *Id.* The British reliance on print media in their political process is historically strong and ongoing. See *infra* note 160 and accompanying text.

<sup>141</sup> Ansolabehere, *supra* note 139, at 170.

<sup>142</sup> *Id.*; see also Political Parties, Elections, and Referendum Act, 2000, c. 41 (U.K.).

<sup>143</sup> See *Evaluation Report of the United Kingdom on Transparency of Party Funding (Theme II)*, GRP. OF STATES AGAINST CORRUPTION 10 (Feb. 15, 2008), [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2007\)3\\_United\\_Kingdom\\_Two\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2007)3_United_Kingdom_Two_EN.pdf) [hereinafter *Evaluation Report of the United Kingdom*].

member state.<sup>144</sup> Such shareholder approval is binding on political donations over £5,000; if such approval is withheld, the company cannot make donations for the next four years.<sup>145</sup> Such approval is general, as managers propose a political-expenditure budget and hold an up-and-down vote on the entire budget.<sup>146</sup> Managers that make donations despite shareholder disapproval are personally liable to the corporation for the amount of the expenditures.<sup>147</sup> Companies that make donations over £2,000 are required to disclose the amount of such expenditures and to what parties those donations were given in their annual director's reports.<sup>148</sup>

Rather than focus on limiting campaign donations, the British system regulates campaign finance at the expenditure level. Independent organizations, comparable to PACs, are limited in how much they can spend annually on political expenditures to less than £1 million and can only spend about £500 on any candidate in the month before elections.<sup>149</sup> Political parties and candidates experience similar restrictions in order to keep the cost of elections lower.<sup>150</sup> Party expenditures are limited to spending £30,000 per constituency contested.<sup>151</sup> Candidate restrictions vary depending on the office.<sup>152</sup> Parliamentary limits, on the other hand, vary depending on when Parliament is dissolved<sup>153</sup> and decrease if the Parliament is dissolved early.<sup>154</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> *Sunlight for Shareholders: Accountability for Corporate Political Spending*, CORP. REFORM COAL. 8 (Aug. 2012), <http://www.citizen.org/documents/sunlight-for-shareholders-august-2012.pdf> [hereinafter SUNLIGHT FOR SHAREHOLDERS] (citing Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F. L. REV. 479, 544 n.83 (2011)). *But see* Companies Act, 2006, c. 46, § 207 (U.K.).

<sup>146</sup> *Sunlight for Shareholders*, *supra* note 145, at 8 (citing CIARA TORRES-SPELLISCY, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 17 (2010), available at [http://www.brennancenter.org/sites/default/files/legacy/publications/shareholdersvoice2\\_5\\_10.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/shareholdersvoice2_5_10.pdf)).

<sup>147</sup> *Id.*

<sup>148</sup> Political Parties, Elections, and Referendum Act, 2000, c. 41, § 140 (U.K.) (repealed 2006).

<sup>149</sup> Jacob Rowbottom, *How Campaign Finance Laws Made the British Press So Powerful*, NEW REPUBLIC (July 25, 2011), <http://www.newrepublic.com/article/world/92507/campaign-finance-united-kingdom-news-corporation>.

<sup>150</sup> *See Evaluation Report of the United Kingdom*, *supra* note 143, at 11.

<sup>151</sup> *Id.* at 11–12.

<sup>152</sup> *See Guidance for Candidates and Agents: Part 3 of 6 – Spending and Donations for Individual Candidates in Great Britain*, ELECTORAL COMM'N 6 (2014), [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0011/163793/EPE-Part-3-Spending-and-donations-for-individual-candidates.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/163793/EPE-Part-3-Spending-and-donations-for-individual-candidates.pdf).

<sup>153</sup> *See* Richard Kelly, *Parliament and Constitution Center*, *In Brief: General Election – Candidate Spending Limits*, PARLIAMENT.UK 1 (Jan. 20, 2010), <http://www.parliament.uk/business/publications/research/briefing-papers/SN05282/in-brief-general-election-candidate-spending-limits>

<sup>154</sup> *Id.* at 2.



The expenditure limits seen in the United Kingdom effectively limit the monies spent in its elections. In the 2010 elections, the majority of independent organizations did not spend their maximum allowance.<sup>155</sup> Further, of the over 4,000 candidates for Parliament in 2010, only one spent the totality of their pre-candidacy limits and only seven spent the totality of their short-term limits; only one candidate spent the maximum of their aggregate limit.<sup>156</sup> No political party spent to their thresholds in the 2010 Parliamentary election, where each party was limited to £19.5 million.<sup>157</sup>

The United Kingdom can afford to limit such campaign expenditures, in part, because it prohibits political advertising in the broadcast media.<sup>158</sup> Rather than allowing political discourse in the media to be driven by candidate and party media expenditures, United Kingdom campaign finance laws allows newspapers, periodicals, and broadcasters to control the political discourse on the airwaves and in print.<sup>159</sup> This allows newspaper owners to use their properties as they wish to aid and supplement the political discourse, making the print media, in a sense, the “main forum for campaign debates.”<sup>160</sup> Broadcast media outlets are under a legal duty to give political matters due impartiality, limiting their ability to editorialize and endorse candidates or parties, but not limiting their ability to ensure that such a discourse occurs on their airwaves, as long as the discourse is balanced.<sup>161</sup>

It is unclear how these campaign finance structures could operate under the United States constitution. The limits placed on the British media are the easiest to analyze, as First Amendment protections surely would not allow Congress to prevent media organizations from endorsing candidates or

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<sup>155</sup> Rowbottom, *supra* note 149.

<sup>156</sup> 2010 UK Parliament Spending Data, ELECTORAL COMM’N, [http://www.electoralcommission.org.uk/\\_data/assets/file/0003/150807/2010-UK-Parliament-spending-data-CSV.csv](http://www.electoralcommission.org.uk/_data/assets/file/0003/150807/2010-UK-Parliament-spending-data-CSV.csv) (last visited Feb. 10, 2014).

<sup>157</sup> *Party Spending on 2010 General Election Falls by £10m*, BRITISH BROADCASTING CO. (Dec. 2, 2010), <http://www.bbc.co.uk/news/uk-politics-11901914>.

<sup>158</sup> *Cf.* Rowbottom, *supra* note 149. Rather than spending money on political advertisements through television, the bulk of campaign spending by parties was pointed towards advertising (presumably in print and on billboards) and unsolicited material to electors (presumably fliers, phone calls, and door-to-door visitation). These two spending categories amount to about two-thirds of the monies spent by parties during the election cycle. See *2010 UK General Election – Parties and Third Parties*, ELECTORAL COMM’N, <http://www.electoralcommission.org.uk/party-finance/party-finance-analysis/campaign-expenditure/uk-parliamentary-general-election-campaign-expenditure#Categories> (last visited Feb 10, 2014).

<sup>159</sup> Rowbottom, *supra* note 149.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* Although political parties and candidates can advertise on television or the radio, political parties are allowed to produce short television clips to be aired on television networks. During the election cycle, the Labour and Conservative Parties receive five broadcasts and the Liberal Democrat Party receives four broadcasts. Oonagh Gay, *Party Election Broadcasts*, PARLIAMENT.UK 11 (Jan. 10, 2010), <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03354.pdf>.

editorializing on important political issues. Similarly, *Citizens United* has shown that limits on political expenditures by outside groups are untenable. The government cannot limit political discourse, and this includes discourse that occurs in television, print, or radio advertisements. Expenditure limits for parties and candidates would be unconstitutional as seen in *Buckley*. Expenditure limits are currently only enforceable on campaigns that accept matching federal funding. As accepting matching funds has become unpopular for presidential candidates who have more to spend if they opt out of those funds, it seems unlikely that the government could dangle a matching fund apple that would entice candidates to avoid the vast money available from outside the matching fund framework.<sup>162</sup>

On the other hand, it is likely that, if corporate finance bans were rescinded, corporate shareholders could be given the power to prevent the corporations they own from making political expenditures under *Citizens United*. That decision centered on the constitutional inability of the federal government to limit or ban legitimate political speech. By providing an avenue through which shareholders could prevent a corporation from making political contributions by an up-and-down vote, such a regulation would not see the federal government limiting political discourse. Rather, it would see the federal government giving shareholders an avenue through which they could prevent a corporation they own from making speech it did not agree with, or that could affect the company's bottom line. The government would not be preventing the speech; the shareholders would impose the limitations.

Assuming that the United States begins to allow corporate finance of elections, some structure must be put into place to protect corporate shareholders from the spending of overzealous executives. The United Kingdom's structure for shareholders to disprove of and prohibit such contributions is a puzzle piece that would slide nicely into an updated campaign finance framework. Next, this note will turn to New Zealand, its campaign finance struggles, and the interesting way it keeps anonymous political donations anonymous to everyone.

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<sup>162</sup> *How Presidential Public Financing Works*, PUB. CITIZEN (July 19, 2012), <http://www.citizen.org/documents/presidential-election-public-financing-how-it-works.pdf>. In 2008, Barack Obama was the first presidential candidate to decline matching funds since the public financing system was instituted in 1971. *Id.* In the 2012 election, neither President Obama nor Mitt Romney accepted public funding for the general campaign. *Id.* In the 2012 Republican primary, the only candidate to accept public funding was former Louisiana Governor Buddy Roemer. *Id.* As a point of reference, John McCain, the GOP presidential nominee in 2008, accepted public financing and spent his allotted U.S. \$84 million beginning September 1, 2008. During the same timeframe, Candidate Obama spent U.S. \$315 million. *See Obama Raised \$104 Million as Campaign Ended*, MSNBC (Dec. 12, 2008), <http://www.msnbc.msn.com/id/28060983/#.UKFqZ1aDMZk>.

## **B. New Zealand: An Interesting Methodology for Anonymous Donations**

Traditionally, New Zealand's election expenditure laws have greatly mirrored those enacted in the United Kingdom.<sup>163</sup> The country first regulated campaigns generally with the Corrupt Practices Prevention Act of 1881, which outlined the areas where it was legal for candidates to spend money.<sup>164</sup> Amendments to the act required disclosure by political candidates of those who contributed to their election and how much they donated.<sup>165</sup>

In the past thirty years, New Zealand campaign finance has undergone three significant changes. First, campaign finance rules were changed after the country shifted from a first-past-the-post electoral system—where offices are given to the candidate who receives the most votes—to a mixed-member proportional electoral system in 1993.<sup>166</sup> The new mixed-member proportional system adopted by referendum changed New Zealand's electoral system significantly: although voters would have the opportunity to continue to vote for their representative, they would also have the opportunity to vote for a party.<sup>167</sup> The size of parliament was doubled.<sup>168</sup> Half of those seats would be assigned, as they had under the traditional regime, to candidates that won their electoral district.<sup>169</sup> Seats were divided among the parties in proportion to the votes the parties received, so that each party's share of seats corresponded to its share of the overall vote.<sup>170</sup> A change in campaign finance rules, the Electoral Act of 1993, accompanied these changes.<sup>171</sup>

By imposing fixed spending caps on campaigns, the Electoral Act explicitly restricted the expenditures of candidates and parties.<sup>172</sup> These restrictions were in direct conflict with traditional New Zealand election law that, although putting limits on candidate spending, had left political parties essentially unregulated.<sup>173</sup> The act mandated that parties register with the Electoral

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<sup>163</sup> REPORT OF THE ROYAL COMMISSION OF THE ELECTORAL SYSTEM 191 (1986) [hereinafter REPORT OF THE ROYAL COMMISSION], available at <http://www.elections.org.nz/voting-system/mmp-voting-system/report-royal-commission-electoral-system-1986>.

<sup>164</sup> *Id.* Among the types of expenditures banned was the bribing or “treating” of voters. Andrew Geddis, *Regulating the Funding of Election Campaigns in New Zealand: A Critical Overview*, 10 OTAGO L. REV. 575, 578 (2004).

<sup>165</sup> REPORT OF THE ROYAL COMMISSION, *supra* note 163, at 152.

<sup>166</sup> See Andrew Geddis, *The Regulation of Election Campaign Financing in Canada and New Zealand*, DEMOCRATIC AUDIT OF AUSTR. 3 (Mar. 20, 2006), [http://democratic.audit.anu.edu.au/papers/20060320\\_fin\\_geddis.pdf](http://democratic.audit.anu.edu.au/papers/20060320_fin_geddis.pdf).

<sup>167</sup> See *MMP Voting System*, ELECTORAL COMM'N, <http://www.elections.org.nz/voting-system/mmp-voting-system> (last visited Feb. 9, 2014).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Geddis, *supra* note 166, at 3.

<sup>172</sup> Geddis, *supra* note 164, at 576..

<sup>173</sup> See *id.* at 578.

Commission, provide a list of its membership, and elect their candidates democratically.<sup>174</sup> Third parties cannot advertise on the behalf of a candidate without the candidate's express approval and without stating the name of who is financing the advertisement; issue advertisements do not require approval, but the name of who has financed it must also be disclosed.<sup>175</sup> Any advertisement that receives candidate approval counts towards that candidate's spending cap.<sup>176</sup> The act allows anyone, foreign or domestic, to donate to a political candidate or party.<sup>177</sup>

An unusually large number of campaign finance scandals and other issues in the 2005 parliamentary elections caused a strong call for finance reform in New Zealand.<sup>178</sup> In response, Parliament passed the Electoral Finance Act of 2007, which remained on the books for about a year.<sup>179</sup> As one newspaper, speaking of the act, led: "The bill overhauling the law around electoral funding is so bad that even those who want to support it are opposing it."<sup>180</sup>

The act came under intense scrutiny during the elections of 2008. Most of the opposition stemmed from how the Electoral Commission chose to interpret and apply it: websites ostensibly political and aimed against parties or candidates that would normally face regulations under the act did not if they were seen to be personal blogs; sites that did not so qualify were required to register with the Commission and to publish requisite disclosure information.<sup>181</sup> Some websites republished themselves as blogs to work around this requirement.<sup>182</sup> Another issue arose from the use of bumper stickers for political parties or candidates, as they technically fell under the umbrella of political advertisements, which were prohibited on election day.<sup>183</sup> The act was repealed with overwhelming support,

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 584.

<sup>176</sup> *Id.* at 585.

<sup>177</sup> *Id.* at 589.

<sup>178</sup> See Geddis, *supra* note 166, at 4. The scandals included: members of a church spending N.Z. \$500,000 on leaflets attacking the Labour and Green Parties that may have also promoted the National Party; the Labour Party overspending its limit by N.Z. \$400,000; the National Party overspending its limit by N.Z. \$100,000; and a winning candidate in one electorate most likely overspending his limit, but being spared when a court strictly construed the statutory language. *Id.*

<sup>179</sup> See, e.g., Simon Power, *Electoral Finance Reform Proposal*, ELECTORAL FINANCE REFORM (2010), <http://www.justice.govt.nz/electoral/electoral-finance-reform/documents/Electoral%20Finance%20Reform%20Proposal%20Document.pdf/view>

<sup>180</sup> Audrey Young, *Electoral Bill No One Wants*, N.Z. HERALD (Aug. 11, 2007, 5:00 AM), [http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10457070](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10457070).

<sup>181</sup> Soo-Jeong Ahn et al., *Asia/Pacific*, 43 INT'L LAW. 1007, 1036-37 (2009).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1037. Although no one was prosecuted for displaying a bumper sticker on election day, the maximum penalty for displaying political ads on election day was N.Z. \$20,000. Rather than question the sanity of the rule, New Zealand's Chief Electoral Officer questioned the sense in parties and candidates giving away bumper stickers. *Id.*

112 to 9, shortly after the new government took office.<sup>184</sup> A short lesson for those crafting new American campaign finance regulation: do not follow New Zealand's example in inept implementation.

After the repeal, the Electoral Act of 1993 governed campaign finance until new legislation could be passed.<sup>185</sup> This legislation, the Electoral (Finance Reform and Advance Voting) Amendment Bill, left much of the Electoral Act 1993 unchanged.<sup>186</sup> Third party campaigners that intend to spend more than N.Z. \$12,000 are now required to register with the Electoral Commission.<sup>187</sup> There are no requirements for disclosure by these third parties, a move criticized by academics that fear it will allow registered third parties to act as fronts for other interests.<sup>188</sup> Anonymous donors are currently limited to N.Z. \$1,500 in donations to a candidate; any part that exceeds that amount must be returned or donated to the crown.<sup>189</sup> Donations above N.Z. \$1,500 to candidates must be disclosed.<sup>190</sup> There is no limit on the amount of those donations, and they can come from individuals, businesses, and unions.<sup>191</sup>

Donations to parties, on the other hand, function differently. Parties must disclose donations, or a series of donations of at least N.Z. \$1,500, from any individual or organization that totals more than N.Z. \$15,000.<sup>192</sup> Donations that total more than N.Z. \$30,000 must be immediately disclosed.<sup>193</sup> Anonymous and overseas donations to parties themselves must be limited to N.Z. \$1,500.<sup>194</sup> Most interestingly, however, New Zealand also provides avenues for individuals to make large, truly anonymous donations to political parties.<sup>195</sup> To do so, donations are required to go to the Electoral Commission, which in turn gives the money to

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<sup>184</sup> *Electoral Finance Act Repealed*, ONE NEWS (Feb. 17, 2009, 8:50 PM), <http://tvnz.co.nz/politics-news/electoral-finance-act-repealed-2491786>.

<sup>185</sup> Jonathan Boston & Alec Mladenovic, *Political Equality and the Regulation of Election Spending by Parallel Campaigners*, 45 AUSTL. J. OF POL. SCI. 623, 628 (2010).

<sup>186</sup> *Id.* at 628–29.

<sup>187</sup> *Id.* at 628.

<sup>188</sup> *Id.* at 628–30.

<sup>189</sup> *Anonymous Donations*, ELECTORAL COMM'N (Nov. 14 2012), <http://www.elections.org.nz/parties-candidates/registered-political-parties/party-donations/ab-out-an-nual-returns-party-donatio-5>.

<sup>190</sup> *Part 4: Election Expenses and Donations*, ELECTORAL COMM'N (Jan. 2013), <http://www.elections.org.nz/becoming-candidate-general-election/part-4-election-expenses-and-donations>.

<sup>191</sup> *Id.*

<sup>192</sup> *Party Donations*, ELECTORAL COMM'N (Feb. 1, 2013), <http://www.elections.org.nz/parties-candidates/registered-political-parties-0/party-donations>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Donations Protected from Disclosure Limits Adjusted*, ELECTORAL COMM'N (June 29, 2012), <http://www.elections.org.nz/news-media/donations-protected-disclosure-limits-adjusted>.

the parties at regular intervals.<sup>196</sup> Those that choose to donate via this method cannot donate more than N.Z. \$43,350 between two successive elections, although one can reach this limit for unlimited parties.<sup>197</sup> Parties may not receive more than N.Z. \$289,000 from such donations between two successive elections.<sup>198</sup> It is illegal for those that make anonymous donations through this method to tell a party, or anyone else, that they have made such a donation.<sup>199</sup>

Despite the problems seen with the Electoral Finance Act 2007, confidence in the honesty of elections and in the nation's government remains fairly high.<sup>200</sup> Without making any definitive conclusions as to why this has occurred, some observations seem rather obvious. First, the nation has generally been very responsive to the public's doubts regarding campaign finance irregularities, something the United States has been slow to do. Even the failed Electoral Finance Act was crafted in an attempt to assuage fears developed after scandals two years earlier. Second, the regime itself is comprehensive and cohesive. No significant court action has neutered any of its power. Third, countries that allow contributions while placing some regulation on corporate and union contributions tend to view their process more positively.

Finally, the unique method through which the country deals with anonymous donations probably influences the citizenry's views on such donations. By placing relatively low limits on anonymous donations that parties do not have to disclose, but allowing larger anonymous donations in a form that precludes the party from knowing where the money is coming, New Zealand allows such donations in a form that is neutral. The Electoral Commission knows where the money is coming from, but parties are unable to see who may be trying to curry their favor. Such donations cannot have strings attached because the party cannot see who would hold them. The United States could easily incorporate such a structure for anonymous donations and should do so, thereby ensuring that those that wish to donate anonymously truly are nameless, and not campaign boosters whose name is known by those who receive the money.

Nothing in the New Zealand regime would explicitly offend prior American Supreme Court jurisprudence. No groups are foreclosed from making political speech. Rather, as outlined above, they are merely required to meet some statutory guidelines when donating, depending on how their money is earmarked and to whom it goes. Such restrictions and regulations fit nicely within the holdings of *Citizens United* and *Wisconsin Right to Life*. In short, if any part of the design of New Zealand's campaign finance structures seems attractive to a policy recommendation to the United States, it could certainly be done so

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<sup>196</sup> *Donations Protected from Disclosure*, ELECTORAL COMM'N (Jan. 30, 2014), <http://www.elections.org.nz/parties-candidates/registered-political-parties-0/party-donations/donations-protected-disclosure>.

<sup>197</sup> *Donations Protected from Disclosure Limits Adjusted*, *supra* note 195.

<sup>198</sup> *Id.*

<sup>199</sup> *Anonymous Donations*, *supra* note 189.

<sup>200</sup> *See supra* Table 1, Part IV.E.

constitutionally. Next, we will turn to Canada, where a cohesive campaign finance system has maintained confidence in both elections and the government.

### **C. Canada: A Reform Movement *Not* Tempered by the First Amendment**

Much like the United States, Canada underwent a recent campaign finance reform. Unlike the United States, however, those reforms have not been tempered by judicial interference. Canada began regulating election financing in 1874, with the Dominion Elections Act, which mandated the reporting of campaign expenses.<sup>201</sup> Continuing reform was slow and largely in response to scandals.<sup>202</sup> Beginning in 1963, modern reform began at the provincial level; Quebec instituted spending limits for political parties and candidates and provided for partial reimbursements to candidates for campaign expenditures.<sup>203</sup> Similar legislation was passed in the other provinces between 1969 and 1999.<sup>204</sup> At the federal level, the Election Finances Act was passed in 1974 and established Canada's modern election financing regime; the Act regulated political parties, restricted candidate and party expenditures, mandated disclosure of contributions to parties and candidates, allowed for tax deductions for contributions and reimbursement for candidate expenditures, and placed a prohibition on expenditures by third parties.<sup>205</sup> It placed no limits on contributions.<sup>206</sup> With some minor judicial and legislative tweaks, the federal system remained largely unchanged until Canada experienced a post-millennial reform movement similar to that seen in the United States.<sup>207</sup>

Canada's 2003 Elections Act responded to a political scandal involving the waste of government money intended to procure political advertising.<sup>208</sup> From 1997 to 2001, the Sponsorship program, which was designed to provide public funding for candidates in Montreal, provided Can. \$250 million in taxpayer money to advertising agencies to secure advertisements; about Can. \$100 million went to agency fees and commissions, rather than purchasing airtime.<sup>209</sup> Some of the agencies implicated in the scandal had loose ties to the Liberal Party; this hint

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<sup>201</sup> Tim Mowrey & Alain Pelletier, *Election Financing in Canada*, ELECTORAL INSIGHT (May 2002), [http://www.elections.ca/res/eim/article\\_search/article.asp?id=74&lang=e&frmPageSize](http://www.elections.ca/res/eim/article_search/article.asp?id=74&lang=e&frmPageSize).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Colin Feasby, *Constitutional Questions about Canada's New Political Finance Regime*, 45 OSGOODE HALL L. J. 514, 514 (2007).

<sup>206</sup> *Id.*

<sup>207</sup> Robert G. Boatright, *Interest Group Adaptations to Campaign Finance Reform in Canada and the United States*, 42 CAN. J. POL. SCI. 17, 19 (2009).

<sup>208</sup> Feasby, *supra* note 205, at 524.

<sup>209</sup> *Id.*

of corruption resulted in an outcry for comprehensive reform.<sup>210</sup> The legislation itself was an amendment to the 2000 Elections Act, which greatly limited the type of issue advocacy spending allowed in the United States under *Citizens United*.<sup>211</sup>

The Elections Act introduced fundamental change to the Canadian political finance regime. It established contribution limits at the federal level by individuals, prohibited corporate contributions to political parties while allowing limited donations to candidates, and required increased disclosure of political donations by parties themselves.<sup>212</sup> Such disclosure and aggregate limits were designed to curb the flow of political monies from third parties into campaign coffers.<sup>213</sup> As a result of such restrictions, the availability of public funding for political campaign expenses increased.<sup>214</sup> Some three years later, Canada instituted the Accountability Act, which further limited political contributions as well as increasing the share of campaign expenses paid by the federal government.<sup>215</sup> Business and labor union contributions were prohibited generally and individual contributions were further limited.<sup>216</sup> These new limitations were not accompanied by increased public financing.<sup>217</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> Boatright, *supra* note 207, at 20. Such limitations of issue advocacy were found to be constitutional under the Canadian constitution. *Harper v. Can.*, 2004 SCC 33, [2004] 1 S.C.R. 827, 830 (Can.). In coming to this conclusion, the Supreme Court of Canada found that although such limitations violated Canada's recognized fundamental freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication, such limitations were constitutionally valid if they were reasonable limits prescribed by a law that can be demonstrably justified in a free and democratic society. *Id.* The Court stated:

These provisions advance the pressing and substantial objectives of proper implementation and enforcement of the third party election advertising limits and of provision to voters of relevant election information. They are rationally connected to the first objective and the disclosure provisions, by adding transparency to the electoral process, are also rationally connected to the second objective.

*Id.*

<sup>212</sup> Feasby, *supra* note 205, at 525.

<sup>213</sup> *Id.*

<sup>214</sup> Boatright, *supra* note 207, at 20.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.* The corporate financing ban was not expected to have a large effect on the majority of Canadian parties, with the exception of the New Democratic Party, which had strong historical connections with organized labor. *See* Robert G. Boatright, *The End of the Reform Era? Campaign Finance Retrenchment in the United States and Canada*, 10 THE FORUM, art. 8, 2012, at 6.

<sup>217</sup> Feasby, *supra* note 205, at 537. The increased limitations were not expected to have a large effect on the majority of Canadian parties. One notable exception, however, was the Liberal Party, who received over 40% of its contributions from donors who contributed more than the new statutory limit. *Id.*



The practical effect of Canadian reforms has seen the Conservative Party, with a broader constituency, consolidate power at the federal level, mostly to the detriment of the Labor Party, who lost their position as the majority government in 2004 and then lost their position as the most numerous minority party in 2006 to the Conservative Party.<sup>218</sup> In 2011, the Conservative Party was elected as the majority party in the Canadian Parliament, the first time since 2000 that a party other than the Liberal party had won a majority and the first time that a conservative party had held the majority since 1988.<sup>219</sup> Although it is difficult to measure the effect of the change in campaign finance dynamics on the Conservative Party's victory in 2011, their ability to fundraise from a broader base did allow the party to frame the election when it had become imminent,<sup>220</sup> but before the government had been disbanded.<sup>221</sup>

Canadian campaign finance disclosure functions much more efficiently and completely than that seen south of their border. Third-party groups are generally required to report advocacy spending and are allowed to decide whether their spending qualifies, although the Chief Electoral officer may question their choice.<sup>222</sup> Those groups that do conduct such advocacy are required to ask the Chief Electoral Officer for permissions if they are to spend more than Can. \$500.<sup>223</sup> Within four months, the group must also disclose those who gave the group more than Can. \$200 in the six months leading up to the election, along

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<sup>218</sup> Boatright, *supra* note 216, at 9.

<sup>219</sup> See Ian Austen, *Conservatives in Canada Expand Party's Hold*, N.Y. TIMES, May 3, 2011, at A7; see also David Frum, *What the GOP Can – and Can't – Learn from Canada's Conservatives*, THE WEEK (May 11, 2011), <http://theweek.com/bullpen/column/215142/what-the-gop-can-mdash-and-cant-mdash-learn-from-canadas-conservatives>.

<sup>220</sup> Under certain circumstances, such as when they fail to pass a budget or there is a no-confidence vote against the Prime Minister, the Canadian Parliament can be dissolved before their terms are complete. See *Dissolving Parliament*, PARLIAMENT OF CAN. (Jan. 28, 2014), [http://www.parl.gc.ca/About/Parliament/Education/OurCountryOurParliament/html\\_booklet/dissolving-parliament-e.html](http://www.parl.gc.ca/About/Parliament/Education/OurCountryOurParliament/html_booklet/dissolving-parliament-e.html). Prior to 2011's dissolution, the Conservative Party ran advertisements touting their strength as they may have foreseen a dissolution. Boatright, *supra* note 216, at 16.

<sup>221</sup> See Boatright, *supra* note 216, at 16. According to Boatright, Canadian governments without a majority are generally unstable and generally do not last long. *Id.* He argues that the Conservative Party's advantage in fundraising allowed conservatives to criticize the minority government before the election was called, thereby framing the election before it occurred. *Id.* He also notes that the Liberal Party's failure in that election could be due to the relative success of the New Democrat's charismatic leader Jack Layton, conflicts between like-minded Labour and New Democrat candidates at debates, and the New Democrats ability to drive out the youth vote. *Id.* at 17. As Boatright notes, much of the Liberal Party's strength was derived from the fact that it won elections; when that characteristic was put in doubt, more voters defected to other political options. *Id.*

<sup>222</sup> Alexandre Couture Gagnon & Filip Palda, *The Price of Transparency: Do Campaign Finance Disclosure Laws Discourage Political Participation by Citizen's Groups?*, 146 PUB. CHOICE 353, 359 (2011).

<sup>223</sup> *Id.*

with the date of the donation.<sup>224</sup> In Ontario, groups are required to disclose contributions within ten days of their receipt.<sup>225</sup> On the whole, because the Canadian model has not been altered judicially, its disclosure system functions far more coherently than those in the United States.

In part, because Canada typically has maintained weaker third-party issue advocacy groups than those seen in the United States, the restrictions placed on those groups by the new Canadian campaign finance regime were not the impediment some believed they may be, as many issue advocacy groups used traditional non-media methods of getting out their message.<sup>226</sup> The regime also did not restrict the use of the Internet in pushing political messages, allowing various sites critical of the Conservative movement to receive wide viewership and even receive some national television coverage, although these sites were generally not affiliated with any established advocacy group.<sup>227</sup> Despite the lack of regulation of Internet activities, election observers believed that the use of the Internet as a campaign tool by Canadian parties and mainstream advocacy groups inexplicably lagged far behind how Candidate Barack Obama had used it in his victory in the 2008 United States presidential election.<sup>228</sup>

In many ways, the Canadian model is very similar to the model employed in the United States, with the exception that bans on issue advocacy and corporate donations have not been found to be unconstitutional. Because of the unaltered reforms, the Canadian disclosure is not dysfunctional. Unlike in the United States, where loopholes to avoid disclosure abound, Canadian disclosure laws are effective in ensuring that those that spend on electioneering communications disclose who they get their money from. In a comparative analysis, looking to Canada's scheme is useful to see how the United States' structures may function if they had not been partially revoked by the U.S. Supreme Court, as well as useful in seeing how a coherence in disclosure could help the politico's confidence in its government and elections. The new Canadian scheme has had an impact on how its politics function; those impacts can inform as to what may occur in the United States if an attempt was made to reintroduce those policies in a form that may be more constitutionally tenable.

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<sup>224</sup> *Id.* at 360.

<sup>225</sup> Province of Ontario Election Finances Act, R.S.O. 1990, c. E.7, § 34.1 (Can.).

<sup>226</sup> See Boatright, *supra* note 216, at 18–19. Canadian interest groups are traditionally weaker than American interest groups because their parties are traditionally weaker than their American counterparts. *Id.* As Canada has a multi-party system, it is important for members of Parliament to stick with their party or face a loss of political strength as a group; because the United States has only two traditional parties, their entrenched power allows members to be influenced by interest groups without fear of a loss of general party power. *Id.* Boatright also observes that Canadian issue advocacy groups largely relied on the same methods in the 2011 elections that they relied on before: position papers, election agendas, and party “report cards.” *Id.*

<sup>227</sup> *Id.* at 19.

<sup>228</sup> *Id.*

Since the Canadian and United States campaign finance structures are so similar, it is easy to discern what Canadian policies could function constitutionally in the United States system.<sup>229</sup> The largest exceptions to these general similarities, however, are clearly not constitutional. The Supreme Court has already said that preventing businesses and corporations from participating in issue advocacy is unconstitutional in *Citizens United*. General bans on issue advocacy as part of electioneering can be seen as a corollary of both *Citizens United* and *Wisconsin Right to Life*. Perhaps most interestingly, however, is the public perception of Canadian national elections when compared to the perception in the United States, as the public confidence in the honesty of national election is some twenty points higher in Canada than in the United States.<sup>230</sup>

Although such confidence is surely tied to a number of factors, it is likely that the fact the Canadian regime has been found to be constitutional, while the United States regime was partially altered by the U.S. Supreme Court, influences this opinion, specifically when one considers the coherence of Canada's disclosure policies. It is also likely that the differences in the traditional role of advocacy groups in the United States and Canada also affect this public perception because increased restrictions on Canadian groups and the fact that those "outsiders" are generally not seen as central to the election system provides a public perception that politicians drive their elections, not any man behind the curtain.

Moving forward, keep in mind that each of these nations has a cohesive, comprehensive campaign finance structure. The United Kingdom's system for corporate finance would function in the United States, as would New Zealand's regulation of anonymous party donations. The Canadian model, although unconstitutional in part, also outlines the importance of creating the perception, through disclosure, that the candidates and parties, and not anyone behind a curtain, are driving elections. Using some of the policies from the United Kingdom and New Zealand, such a comprehensive regulatory system can be enacted, and it can return power to candidates.

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<sup>229</sup> One should also keep in mind that the Canadian model is about to change once again. The Conservative government recently passed legislation removing federal public financing of parties without easing any of the restrictions put into place. See Canada Elections Act, R.S.C 2000, c. 9 § 435.01 (Can.). The practical impact of these measures are yet to be seen, as public financing is being gradually phased out, ending with a complete abolition of public funding in 2015 when the next national election is held. Boatright, *supra* note 216, at 19. Again, because of their broad constituent base, the Conservative party is expected to benefit the most from these changes in the short term. *Id.* at 20.

<sup>230</sup> See *supra* Table 2, Part III.E.

## V. WHAT THE SOCIAL SCIENCES SAY ABOUT CAMPAIGN FINANCE

Before turning to policy recommendations, it is important to understand how voters think about elections and the policies that define them. Luckily, there is voluminous research on voters and how they are affected by campaign finance. Political scientists have spoken and written on campaign finance. So have economists, statisticians, and law professors: Unfortunately, despite the wide scope of academics that have addressed the topic, little consensus has been built regarding what finance structures work the best and how those structures should be formed. Some political scientists and law professors advocate for total public financing of elections; some favor keeping all political donations totally anonymous, while others favor a totally unregulated system.<sup>231</sup> The intention of this section is to comb through some of the available academic research and literature, separate what seems helpful, and prepare a structure through which to apply the lessons taught by United Kingdom, New Zealand, and Canada in the previous section to the United States in the next.

In doing so, it will first consider broad arguments that have been made regarding campaign finance, looking at the purposes of campaign finance and how fundraising affects candidates. Second, this section will look at problems found in enforcing campaign finance laws, specifically looking for potential obstructions that may make a seemingly worthy campaign finance structure impossible to enforce.

### A. The Purposes and Influences of Campaign Finance

When considering the purposes of campaign financing and electioneering communications, one should remember that there are two sides to campaign finance. Private individuals, corporations, unions, and other third parties donate to campaigns and make electioneering communications for a reason. Politicians and political parties accept such donations for another reason. Understanding the different motivations involved in campaign finance helps to gauge what policies are worthwhile and what policies are worthless. It makes no sense to prescribe a cure that does not serve the needs of the electorate or the political process.

It is no secret that labor unions and corporations often view their contributions to political parties and candidates as a monetary transaction that ensures or purchases access to the political process; traditional PAC donations

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<sup>231</sup> See, e.g., Jay Mandle, *The Politics of Democracy*, 47 CHALLENGE 53, 60 (2004) (advocating for total public financing); BRUCE ACKERMAN & IAN AYERS, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002) (advocating for an anonymous donation system); Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891 (1999) (advocating for an unregulated system).

generally follow this trend.<sup>232</sup> Although the motivations for individuals that donate to campaigns are less clear, most also assume that such donations are intended to either purchase access or to ensure their viewpoints are represented within government.<sup>233</sup> The motivations of those contributing to Super PACs are ambiguous, but their identities are not: 72% of donations to Super PACs in the 2012 election came from 253 donors, whether corporate or individual persons.<sup>234</sup> Although the newness of Super PACs means that little academic research has been conducted, the relatively small number of donors providing so much money, some anonymously, implies that those who contribute to Super PACs are mainly interested in the success of candidates that share their viewpoints. Such large sums of money seem unnecessary to ensure access and may preclude it because some large contributors are seen as inexorably tied to their candidate.<sup>235</sup> In these circumstances, the public attention focused on such relationships serves as a strong disincentive for donors to get too involved in the policies of elected officials that they supported. However, these large donations also ensure that candidates remain consistent with their campaign policies, as those policies originally established the support; this is especially true because, in some circumstances, the candidate still does not know exactly from where the money is coming.<sup>236</sup> Super PAC spending is most likely an ideological campaign finance arms race since divergent political ideologies often lead independent groups to raise ever-increasing monies to compete against other policy groups that are ideologically opposed to their viewpoint.<sup>237</sup>

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<sup>232</sup> See Benjamin Hourigan, *Who Pays?*, INST. OF PUB. AFFAIRS REV. 13 (2006); see also Yasmin Dawood, *Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context*, 4 INT'L. J. CON. LAW. 269, 279 (2006).

<sup>233</sup> See Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 PUB. CHOICE 221, 222 (2009). Those running models of individual campaign donors run models with two different assumptions. *Id.* One assumes that contributions are intended to purchase access; the other assumes that people contribute so that a likeminded candidate wins. *Id.* Analysts suggest that PAC contributions follow the former, while direct contributions from individuals follow the later. *Id.* at 222–23.

<sup>234</sup> Andy Kroll, *2012's Least Horrible Super-PACS*, MOTHER JONES (Nov. 30, 2012), <http://www.motherjones.com/politics/2012/11/super-pac-colbert-credo-soros>; see also Adam Lioz & Blair Bowie, *Election Spending 2012: Post-Election Federal Election Commission Data*, DEMOS (Nov. 9, 2012), <http://www.demos.org/publication/election-spending-2012-post-election-analysis-federal-election-commission-data>.

<sup>235</sup> Like Sheldon Adelson and Mitt Romney. See Nicholas Confessore & Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES, Nov. 8, 2012, at A1.

<sup>236</sup> See Michael McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. TIMES, Feb. 26, 2012, at A1. This article discusses the fact that Mitt Romney's campaign used the same direct mail consulting service as Restore Our Future, a Super PAC that supported him. This company had various connections to other conservative Super PACs and other organization. *Id.*

<sup>237</sup> See Ensley, *supra* note 233, at 223 (discussing that policy differences between candidates often cause supporting interest groups to compete against each other, and thus, when the policy differences between candidates are vast, interest groups have heightened inspiration to support their choice).

Much like the purpose of donations, the influences donations have are much better understood for traditional methods of campaign donations than in the newer Super-PAC field. Traditional PAC donations generally appear to be a part of a larger lobbying strategy employed by corporations to gain a voice in policy debates.<sup>238</sup> Individual donations, as they are not directly aimed at gaining influence, likely have very little influence as to how a candidate behaves; those who donate are more interested in how that candidate has already behaved.<sup>239</sup> Again, it is somewhat dangerous to guess what influences Super PACs may have without more (or any) academic research. This author thinks the influence that Super PACs have is two-fold. First, the vast money they spend ensures that the candidates they support will stay somewhat faithful to the ideology the group espouses. Otherwise, incumbent candidates that deviate from the ideology of the Super PACs that supported them could face a primary challenger supported by the same PAC who purports to remain more consistent with the group's ideological message.<sup>240</sup> Second, this money most likely has a great influence on the electorate itself, as issue advertising and other Super PAC electioneering increases the visibility and immediacy of campaign issues and very well could influence how these issues are addressed post-election.<sup>241</sup>

### **B. Problems of Access and Enforcement: How the U.S. System May Shape Public Perception**

It is well established that citizens of the United States do not have much confidence in their national elections or national government.<sup>242</sup> Some reasons for this seem obvious: the United States lacks a comprehensive regulatory scheme to oversee how elections are funded, providing the illusion—if not a reality—that candidates are often bought and paid for by interest groups that help them get elected. The United States also sees one of the lowest voter turnout rates in the world. For the 2012 election, 54% of the voting age population in the United States voted.<sup>243</sup> Meanwhile, 61% of the electorate turned out for Canada's 2011

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<sup>238</sup> *Id.* at 222; see also W. Mark Crain, Robert D. Tollison & Donald R. Leavens, *Laissez-Faire in Campaign Finance*, 56 PUB. CHOICE 201, 204 (1988).

<sup>239</sup> See Ensley, *supra* note 233, at 223.

<sup>240</sup> See Jonathan Allen & Ginger Gibson, *Lindsey Graham on a Roll with Conservative Issues*, POLITICO (Feb. 2, 2013), <http://www.politico.com/story/2013/02/lindsey-graham-on-a-roll-with-conservative-issues-87530.html>. In response to a possible primary challenge from his right, Lindsey Graham began to diverge from his propensity to align with Democrats on some issues. *Id.*

<sup>241</sup> See Paul Blumenthal, *Super PACs, Outside Money Influenced, but Didn't Buy the 2012 Election*, HUFFINGTON POST (Nov. 7, 2012), [http://www.huffingtonpost.com/2012/11/07/super-pacs-2012-election-outside-money\\_n\\_2087040.html](http://www.huffingtonpost.com/2012/11/07/super-pacs-2012-election-outside-money_n_2087040.html).

<sup>242</sup> See *supra* Table 2, Part III.E.

<sup>243</sup> See *Voter Turnout Data for United States*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/vt/countryview.cfm?id=231> (last updated Oct.

elections,<sup>244</sup> 74% turned out for New Zealand's 2011 elections,<sup>245</sup> and 66% turned out for the United Kingdom's 2010 elections.<sup>246</sup> Although the reasons for such disparate rates may be numerous, it is likely that those who do not vote have lower opinions of the government than those who do. Those that do not vote in elections may establish a baseline of distrust that is difficult to overcome.

Various theories explaining lower voter turnout have arisen since the trend towards lower turnout began in the 1960s. Although they differ substantively, many can be tied, directly or indirectly, back to issues regarding how campaigns function. For example, some social scientists believe that nonvoters do not vote because they lack information regarding candidates and their policy preferences.<sup>247</sup> Although one would think that the increased information provided by interest groups would spur voter turnout, the content of the ads interest groups choose to broadcast are often not based on useful information. In fact, early evaluations of third-party spending show that up to 86% of advertisements by Super PACs and interest groups in the 2012 presidential election were attack ads against the candidate the group opposed.<sup>248</sup> Although such ads may provide information about what one candidate may or may not think, they are unlikely to spell out clearly what policies the ad's proponent would like to implement, focusing on rhetoric rather than substance.

5, 2011). Note that voter turnout in the United States greatly depends on whether there is a presidential election and that the 2012 election saw strong turnout. *Id.*

<sup>244</sup> See *Voter Turnout Data for Canada*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/vt/countryview.cfm?id=37> (last updated Oct. 5, 2011). Canada's voter turnout is much more consistent than the United States. *Id.*

<sup>245</sup> See *Voter Turnout Data for New Zealand*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/vt/countryview.cfm?id=171> (last updated Oct. 5, 2011). New Zealand's voter turnout is also much more consistent than in the United States. *Id.*

<sup>246</sup> See *Voter Turnout Data for United Kingdom*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/vt/countryview.cfm?id=171> (last updated Oct. 5, 2011). The United Kingdom historically has averaged about 75% voter turnout, although the last three parliamentary elections have seen turnout decrease to slightly over 60%. *Id.*

<sup>247</sup> John G. Matsusaka, *Explaining Voter Turnout Patterns: An Information Theory*, 84 PUB. CHOICE 91, 92 (1995).

<sup>248</sup> See *Presidential Ads 70 Percent Negative in 2012, up from 9 Percent in 2008*, WESLEYAN MEDIA PROJECT (May 2, 2012), <http://mediaproject.wesleyan.edu/2012/05/02/jump-in-negativity/>. Meanwhile, about 50% of candidate ads were attack ads in 2012. *Id.* In 2008, about 92% of candidate ads were positive and about 75% of interest group ads were positive. *Id.* For a deeper analysis into the tone of campaign advertising in the 2012 election, see Laura Baum, *Obama Dominates Advertising in Key States*, WESLEYAN MEDIA PROJECT (Oct. 3, 2012), <http://mediaproject.wesleyan.edu/2012/10/03/obama-dominates-ads-in-key-states/>.

Other political scientists focus on models of alienation when accounting for low voter turnout.<sup>249</sup> Under the alienation theory, voters are discouraged from voting when party or candidate ideologies are too distant from a voter's viewpoint to justify the cost of voting.<sup>250</sup> In an era where the influence of interest groups and the existence of essentially single-party voting districts often drives candidates to the outer edges of their party's ideology, current campaign finance rules may also influence those that choose not to vote because they cannot identify with a candidate or simply think that a vote cast in a predetermined district is worthless. The United States' campaign finance structure may essentially create undesirable political candidates or a perception that the candidates are undesirable.

The reality that the FEC historically struggles to enforce current campaign finance rules further complicates the citizenry's opinion of federal elections. Before McCain-Feingold, critics believed that the FEC often failed to fully enforce campaign finance laws.<sup>251</sup> Three hypotheses were generally advanced for these problems: first, that the parties discouraged the FEC from fully enforcing the law; second, that the agency was insufficiently funded to fulfill its purposes; and, third, that the law itself had inherent flaws that made true enforcement impossible.<sup>252</sup> Although each of these hypotheses has merit, determining which is the most probable is unnecessary. Here, it is far more important that the FEC's inability to enforce campaign finance laws created an atmosphere of distrust that still surrounds campaign finance.

Post-McCain-Feingold and post-*Citizens United*, enforcement agencies have continued to struggle with campaign finance law enforcement. Since *Wisconsin Right to Life*, the FEC struggled to differentiate between issue advocacy, which is constitutionally protected, and advocacy that is too closely related to candidates, which is not protected. In reality, only advertisements that explicitly reference a candidate are banned.<sup>253</sup> Further, independent groups organized under section 501(c) of the Internal Revenue Code are not required to disclose their contributors if less than half of their activity is political; some groups organized under section 501(c) do not clearly have a purpose that is not political.<sup>254</sup> In the 2010 elections, over 45% of outside spending, not including that spent by parties, came without the disclosure of donors of the money.<sup>255</sup> Some groups, armed with the knowledge that they should comply with disclosure

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<sup>249</sup> James Adams, Jay Dow & Samuel Merrill III, *The Political Consequences of Alienation-Based and Indifference-Based Voter Abstention: Applications to Presidential Elections*, 28 POL. BEHAVIOR 65, 66 (2006).

<sup>250</sup> *Id.*

<sup>251</sup> See Lochner & Cain, *supra* note 231, at 1893.

<sup>252</sup> *Id.* at 1893–94.

<sup>253</sup> Francis Bingham, *Show me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027, 1050 (2011).

<sup>254</sup> Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1.

<sup>255</sup> Lili Levi, *Plan B For Campaign-finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 115 (2011).



regulations, intentionally did not do so because they viewed the chances they would be caught as low and considered any fines simply the cost of doing business.<sup>256</sup> Whatever the motivations for groups to skirt finance laws, and the structures that allow them to do so, the rules as currently constructed create a game that displeases those that determine its outcome.

## VI. WHAT SHOULD WE DO WITH THIS MESS?

Because it is easier for interest groups to raise money through anonymous donations, their political influence is strengthening. By design, they are independent of candidates and can plan events and run advertisements that may contravene the desires of the candidates they support. This dichotomy is inefficient and surely influences the American public's poor view of the political process. If we are to trust our politicians, we have to believe they are in control of what they say and believe. The United States needs to create a system that constitutionally discourages interest groups from so strongly affecting election outcomes without limiting their ability to speak

First, the United States should allow corporate donations to political parties and candidates. Under its original construction, such a ban made sense as it precluded some political influence by companies over parties. This original justification, however, is now moot. Corporations can now constitutionally influence the process from avenues outside of a candidate's control. Allowing companies to donate to candidates would return some of that control. Remember that corporate campaign finance succeeds in other parts of the world. United Kingdom allows companies to donate, but also allows shareholders to prevent such donations. This would be constitutional in the United States and would provide an independent barrier to corporate spending.<sup>257</sup> The United States should allow corporate donations to parties. It should also allow shareholders to prevent such donations.

Second, contribution limits to candidates and parties should also be eliminated. Private individuals, unions, and corporations can currently give unlimited funds to third-party advocacy groups. This policy change would place more of a candidate's campaign within their control; the more money a candidate has, the less likely it is they will need to rely on outside third parties during the election cycle. By broadening the donation market, it is likely that much of the money currently flowing into the coffers of third-party interest groups could be diverted to the candidates themselves. This may also allow a candidate to better dictate the electioneering and marketing associated with his or her campaign by stating clearly that groups are donating to a specific candidate, rather than a

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<sup>256</sup> *Id.*

<sup>257</sup> *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) (Kennedy, J., concurring); *see also* *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978) (“Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.”).

specific policy goal. This would also allow the public to know what entities are on the side of candidates and may even preclude some donations if donors think that contributions may affect their bottom line.

Third, disclosure—identified by the Supreme Court as extremely important in *Citizens United*—must be expanded to include all political contributions. Requirements for disclosure to political parties should remain in place and be strengthened, and new policies should disallow anonymous donations directly to third-party groups that electioneer. Those groups organized under section 501(c) or section 527(c) of the Internal Revenue Code, in addition to Super PACs, can be constitutionally required to disclose who contributes money to their cause.<sup>258</sup> Although the rules currently require disclosure under certain circumstances delineated earlier, it is crucial that any group involved in electioneering disclose those that contribute to electioneering efforts. Such changes would also take pressure off of the IRS. Under some circumstances, it could also be beneficial to allow groups to keep funding or electioneering activities distinct from monies it uses for other purposes. Nevertheless, disclosure of donations to these groups, to the political parties, and candidates themselves is crucial to ensure clarity in the finances of electioneering.

Fourth, recognizing that some people may want to contribute to continue political campaigns free of disclosure, the United States should adopt a system similar to that which is provided by New Zealand for anonymous donations.<sup>259</sup> Again, New Zealand allows anonymous donations to political parties and candidates if they are below a certain threshold or if they are first given to the nation's election commission before distribution to those parties. In New Zealand, it is illegal to disclose that you made such an anonymous donation. In doing so, New Zealand allows these donations but forbids the hidden expectations that such "anonymous" donations may accompany.<sup>260</sup> By establishing a similar system, the United States could allow for the continuance of anonymous donations without their ill effects. Privately owned businesses could also donate through this method, although publicly traded corporations could not as they would be required to disclose such donations to their shareholders. Such donations would not be allowed to third-party groups as those groups would be under strict disclosure requirements.

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<sup>258</sup> *Citizens United*, 558 U.S. at 361 ("The Government may regulate corporate political speech through disclaimer and disclosure requirements."). *Citizens United* itself is organized under section 501(c)(4). *Frequently Asked Questions*, CITIZENS UNITED, <http://www.citizensunited.org/frequently-asked-questions.aspx> (last visited Feb. 10, 2014).

<sup>259</sup> The United States currently allows anonymous contributions to candidates up to an aggregate limit of U.S. \$100 and to political parties up to U.S. \$50 for a single contribution or up to U.S. \$200 for aggregated contributions. 2 U.S.C. 14, §§ 432(c), 441(g). This system could remain in place for the recommended policy changes, or we could require any anonymous contribution go through an anonymizing-clearinghouse.

<sup>260</sup> See *supra* Part IV.B for further detailed discussion of New Zealand's system.

## VII. CONCLUSION

This note began as a comparative attempt to discover successful election policies from other countries that would be constitutional in the United States. Although this author had no expectation that a comparative analysis of global campaign finance law would lead to a conclusion that *Citizens United* is not the metaphorical end of the world, the analysis dictated such a conclusion. Citizens in countries that allow corporate campaign finance are overwhelmingly happier with their political systems than those that do not.

Without a retreat from the holding in *Citizens United*, the current campaign finance system in the United States will remain broken until changed. The policy recommendations above create a comprehensive regime that survives constitutional scrutiny. Canada demonstrates that a functional, fully developed campaign finance system, with aggressive disclosure, increases confidence in that government and its electoral process. By increasing the flow of money available to candidates and by clarifying who is making such donations, the power to run campaigns would return to the candidates and parties themselves. Issue advocacy groups would still play a role, but that role would be focused towards their specific policy goals, rather than the election of specific candidates. Elections should establish a relationship between a clearly understood candidate and the electorate they serve. If *Citizens United* is not going anywhere, then it should be embraced, and it should be made to work for the electorate.

Unsurprisingly—at least for this author—the Supreme Court has recently taken up a case that may dramatically alter what policy recommendations are constitutional, as the Court weighs whether aggregated contribution limits are constitutional.<sup>261</sup> The Court also recently declined to consider the constitutionality of the prohibition on corporate donations to campaigns and parties.<sup>262</sup> The U.S. Securities and Exchange Commission is currently weighing regulations that would require publicly traded companies to disclose any political contributions it makes to its shareholders.<sup>263</sup> The landscape may be shifting quickly. But for the landscape we currently see, the above recommendations should provide a robust campaign finance regime that is constitutional.

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<sup>261</sup> Adam Liptak, *Justices Take Case on Overall Limit to Political Donations*, N.Y. TIMES, Feb. 19, 2013, at A1. Oral arguments for the case occurred on October 8, 2013. Ronald Collins & David Skover, *Symposium: McCutcheon v. Federal Election Commission*, SCOTUSBLOG (Aug. 12, 2013), <http://www.scotusblog.com/2013/08/symposium-mccutcheon-v-federal-election-commission/>. Because the issues in *McCutcheon* center on aggregate donation limits, it is unlikely to affect any policy recommendation made here.

<sup>262</sup> Robert Barnes, *Supreme Court Lets Ban Stand on Direct Corporate Campaign Donations*, WASH. POST (Feb. 25, 2013), [http://articles.washingtonpost.com/2013-02-25/politics/37286007\\_1\\_contribution-limits-campaign-finance-corporations-and-unions](http://articles.washingtonpost.com/2013-02-25/politics/37286007_1_contribution-limits-campaign-finance-corporations-and-unions).

<sup>263</sup> Elizabeth Dwoskin, *SEC May Force Disclosure of Political Contributions*, BUSINESSWEEK (Jan. 16, 2013), <http://www.businessweek.com/articles/2013-01-16/sec-may-force-disclosure-of-political-contributions>.

As a final observation, this author has little idea how these policy recommendations would be received by a distrustful American citizenry. The United States, after all, has banned the corporate finance of political campaigns for over 100 years. At the same time, however, it is clear that some changes need to be made and that these changes must fit the analytical framework established by the Supreme Court in *Citizens United*.<sup>264</sup> These proposals would fit within that framework. Although these policies may not solve all of the citizenry's distrust in the government and its elections, the policies are good starts towards repairing those relationships. Most importantly, they would reemphasize the proper relationship for political campaigns: the relationship between the candidates and the voters.



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