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Friends with Benefits: Measuring Corruption in Politics after Citizens United

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ARTICLES

FRIENDS WITH BENEFITS: MEASURING CORRUPTION IN POLITICS AFTER *CITIZENS UNITED*

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Since *Citizens United*, the amount of spending on political campaigns has increased, and to a lesser extent, so has corporate spending on political advertisements. However, the increase in corporate spending on elections fails to indicate whether corporate political spending corrupts the political system. It is hard to tell if this spending provides political candidates with a significant benefit and whether politicians provide corporations with benefits in return. The majority in *Citizens United* did not recognize the anti-corruption principle as a compelling interest, due to a lack of empirical evidence. This Article draws upon principles of antitrust law to provide a new numerical scoring system to assess the corrupting influence of independent corporate political spending. This scoring system is designed to guide future empirical work, and move the debate surrounding *Citizens United* away from mere dollar amounts and towards a discussion of whether corporate money spent in politics leads to corruption.

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INTRODUCTION

Many viewed the *Citizens United*[1] opinion as the death knell of democracy. Easily the most prominent and public criticism came from President Barack Obama in his State of the Union Address: "With all due deference to the separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[2]As he said this, the attending Supreme Court Justices sat quietly, as is their custom, but Justice Alito shook his head, mouthing the words "not true."[3] Commentators have continued to dispute how much campaign spending has increased since the *Citizens United* decision.[4]

Opponents of *Citizens United* focus on spending levels and argue that the government should have the power to regulate corporate spending because corporations might drown out the voices of non-corporate speakers. This argument, commonly called the "anti-distortion principle," is one of several potential arguments against unlimited campaign spending that the Court rejected in *Citizens United*.[5] The Court also rejected arguments that corporations might spend money

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

2. President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 Cong. Rec. H418 (daily ed. Jan. 27, 2010).

3. Martin Kady II, *Justice Alito Mouths 'not true,'* Politico, (Jan. 27, 2010), http://www.politico.com/blogs/politicolive/0110/Justice_Alitos_You_lie_moment.html.

4. *See, e.g.,* Matt Bai, *How Much Has Citizens United Changed the Political Game?*, NY TIMES MAGAZINE, July 17,2012, *available at* http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all&_r=0 (challenging the belief that the increase in outside spending was causally related to the *Citizens United* decision); Richard L. Hasen, *Hillary: The Movie, Revisited*, SLATE.COM, Sept. 8, 2009 6:59 AM ET) *available at* http://www.slate.com/articles/news_and_politics/recycled/2009/09/hillary_the_movie_revisited.html ("If the court overturns its 1990 decision in *Austin vs. Michigan Commerce of Chamber* and *McConnell vs. FEC*, which limited corporate spending, it could have far-reaching effects on presidential campaigns."); David Kairys, *Money Isn't Speech and Corporations Aren't People*, SLATE.COM, Jan. 22, 2010, *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html ("The majority's ruling unleashes a new wave of campaign cash and adds to the already considerable power of corporations."); Nathaniel Persily, *The Floodgates were Already Open*, SLATE.COM, (Jan. 25, 2010, 2:30 PM EST), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/the_floodgates_were_already_open.html (arguing that the *Citizens United* decision does not in itself cause a flood of corporate campaign spending, but rather contributed to a shift in laws that has allowed for greater spending on campaigns by outside groups).

5. It does not seem that the majority would be convinced in the closely-tied "appearance of corruption," especially given the factual finding of the District Court that the vast majority of Americans already believe that corruption is occurring because of independent corporate spending on elections. *See*, Richard L. Hasen, *Super-Soft Money*, SLATE.COM, (Oct. 25, 2011 2:01 PM ET), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/citizens_united_how_justice_kennedy_has_paved_the_way_for_the_re.html "Kennedy's unfortunate sentence . . . . [incorrectly] denies the reality that large independent spending favoring a candidate can sometimes corrupt or create the appearance of corruption. . . .").

on elections to gain an undemocratic advantage. The Court rejected this "anti-corruption interest" due to a lack of empirical evidence.[6]

In this Article, I urge those concerned with *Citizens United* to focus on the anti-corruption justification, rather than the anti-distortion justification. I propose a novel scoring system to identify corrupt trends of corporate political donations drawing upon three types of information: (A) the benefit given by the corporation through its independent spending on advertisements for a politician's election; (B) the benefit received by a corporation from the politician they supported; and (C) any evidence that these benefits were connected. This method of organizing and scoring data will provide a starting point for scholars and practitioners. While crude, the 0-100 Influence Score proposed here provides a compelling way of measuring the corrupting effect of corporate money in electoral politics.

It is common practice to track both political spending on advertisements and the behavior of politicians.[7] But drawing a connection between the two is much harder. In the field of antitrust law, economic principles are used to detect whether coconspirators are pursuing agreements that harm the public. Courts routinely rely upon indirect evidence of secret agreements to find liability for anti-competitive behavior. I propose using a scoring system that aggregates similar evidence to detect any overall corrupting effect of the corporate spending following *Citizens United.*

I suggest using some of the principles of antitrust law to accumulate meaningful information that could reveal a corrupting effect. This well-developed field detects when sophisticated parties pursue secret agreements that harm the public, and has identified certain factors that identify secret agreements. Many of these antitrust principles are sufficiently analogous to apply to the field of campaign finance law.

Part I examines the *Citizens United* decision and highlights corruption as a potential compelling interest to justify restrictions on corporate election-spending. Part II provides background on applicable antitrust principles by discussing how judges in antitrust cases detect

6. *See also,* Order in Pending Case, Statement of Justice Ginsberg, *American Tradition Partnership, Inc. v. Bullock, Att'y Gen. of MT,* 11A762, Feb. 17, 2012, available at, http://big.assets.huffingtonpost.com/11A762.pdf ("[Experiences] since this Court's decision in *Citizens United v. Federal Election Comm'n,* make it exceedingly difficult to maintain that independent expenditures by corporations "do not give rise to corruption or the appearance of corruption."); Richard Posner, *Unlimited Campaign Spending—A Good Thing?,* THE BECKER-POSNER BLOG, April 8, 2012 9:30 PM, http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spending-a-good-thing-posner.html (criticizing the Citizen's United decision, and arguing that it would lead to an increase in corruption, some difficulty for new political entrants, and would not serve to inform the public).

7. *See generally,* the Sunlight Foundation, Citizens for Responsibility and Ethics in Washington, Washington Coalition for Open Government.

secret agreements to fix prices in the absence of written agreements. Part III proposes a scoring system for analyzing corruption in politics.

I. CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

In *Citizens United v. Federal Election Commission*,[8] the U.S. Supreme Court addressed the constitutionality of limiting the use of general treasury corporate funds on pre-election advertising. The case involved a challenge to the Bipartisan Campaign Reform Act (BCRA), which prevented unions and corporations from using general treasury funds to run advertisements during the final sixty days leading up to an election.[9] Pursuant to the BCRA, the FEC prevented Citizens United, a nonprofit corporation with the goal of furthering conservative ideals,[10] from airing thinly veiled political advertisements paid for by general treasury funds immediately before the 2008 elections.[11]

The Court addressed the facial validity of this restriction, ultimately ruling that the BCRA provision in question violated the First Amendment. The Court determined that the complexity and uncertainty of the law led to a chilling effect on clearly legitimate corporate speech.[12] It found that although the law allowed corporations to participate in political speech through separately created political action committees (PACs), this was a "burdensome alternative" to the forbidden use of general treasury funds.[13] The Court held that discriminating amongst speakers for political speech was impermissible.[14] Since First Amend-

8. 558 U.S. 310 (2010).

9. Pub L. 107-155, 116 Stat. 81, *available at* http://www.gpo.gov/fdsys/pkg/PLAW-107publ155/html/PLAW-107publ155.htm; Federal Election Commission, Campaign Finance Law Quick Reference for Reporters: Major Provision of the Bipartisan Campaign Reform Act of 2002, http://www.fec.gov/press/bkgnd/bcra_overview.shtml.

10. *About Citizens United*, www.citizensunited.org, ("Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security.")

11. Learning from their failed opposition to Fahrenheit 9/11, Citizen's United realized the potential value in creating a detractor documentary film to coincide with a major political election. David Weigel, *Questions for David Bossie*, SLATE.COM, (Aug. 8, 2011 4:34 PM ET), available at, http://www.slate.com/articles/technology/top_right/2011/08/questions_for_david_bossie.html Four years after opposing Moore's efforts, they created a documentary film of their own. At the time, Hillary Clinton was the frontrunner to be the Democratic party's nominee for president, and Citizen's United designed the advertising of the movie to coincide with "state presidential primaries and caucuses, the Democratic National Convention, and the presidential election." Library of Congress Report, Citizens United v. FEC and the Future of Federal Campaign Finance Reform, 7/26/2012, LAW.GOV, available at http://www.loc.gov/law/help/citizens-united.php

12. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 896 (2010).

13. *Id.* at 897-98.

14. *Id.*

ment protection extends to corporations,[15] the BCRA impermissibly limited speech based on the identity of the speaker.

After finding the BCRA provision was a restriction on speech, the Court applied strict scrutiny, holding that the government had not presented a compelling interest for this curtailment of corporate speech. The Court first rejected the "anti-distortion" principle—that corporate spending would drown out other speakers—finding it to be an impermissible basis for restricting speech.[16] The Court then rejected the idea that independent corporate spending on elections could lead to corruption or the appearance of corruption.[17] The Court defined corruption narrowly, as *quid pro quo* corruption, and thereby determined that "corruption" was unlikely to occur in the context of political speech. Nevertheless, the Court seemed to reaffirm corruption as a potential compelling interest.[18] The Court also rejected the shareholder protection interest—that shareholders could be forced to participate in speech they did not endorse—because acceptance of such a principle would allow impermissible censorship of media corporations and that shareholder interests were sufficiently safeguarded by procedures of "corporate democracy."[19]

Justice Stevens's partial dissent, with whom Justices Breyer, Ginsburg, and Sotomayor joined, is notable for both its length and zeal.[20] In a rare move, the aging Justice read his lengthy opinion from the bench. He vociferously disagreed with the majority on almost every

15. *Id.* at 899-900 (citing a string of cases recognizing First Amendment protection of corporate speech).

16. *Id.* at 904-908.

17. *Id.* at 908-10.

18. *Id.* at 911 ("If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.").

19. *Id.* at 911.

20. Calvin, *Justice Stevens: A Crack in the Foundation of the Citizens United Majority Opinion is Inevitable*, PEOPLE FOR THE AMERICAN WAY, (June 1, 2012, 1:06 PM), http://www.pfaw.org/content/justice-stevens-crack-foundation-citizens-united-majority-opinion-inevitable ("To read the decision aloud was noteworthy; justices typically do so on cases they believe have special merit."). Dahlia Lithwick, *The Pinocchio Project*, Slate.com, (Jan 21, 2010, 2:15 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/01/the_pinocchio_project.html ("But you can plainly see the weariness in Stevens eyes and hear it in his voice today as he is forced to contend with a legal fiction that has come to life today, a sort of constitutional Frankenstein moment when corporate speech becomes even more compelling than the 'voices of the real people' who will be drowned out.").

point,[21] and he was deeply concerned with the implications of the majority decision.[22]

Among Justice Stevens's objections, was his strong disagreement with the majority's finding that there was no anti-corruption interest sufficient to sustain the BCRA provision. Justice Stevens highlighted the district court record, which identified *quid pro quo* corruption in previous cases involving corporate political spending, as well as the district court's finding that the American people perceived a link between corporate spending and corruption. He further argued that "corruption" ought to be more broadly interpreted to include instances of "undue influence."[23]

II. ANTITRUST LAW AGREEMENT REQUIREMENT

Antitrust laws are designed to prevent corporations from engaging in anticompetitive practices, such as conspiring with competitors to keep prices at certain levels. Such practices ultimately harm consumers because they result in higher-priced, lower-quality goods and services.[24]

Congress wrote the Sherman Act to prevent anticompetitive corporate behavior. Section I of the Sherman Act forbids agreements to fix prices.[25] While early price-fixing efforts involved some sort of written statement between the parties,[26] this kind of smoking gun evidence is

21. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 930 (2010) (Stevens, J., dissenting in part and concurring in part) (pushing back on the notion that the BCRA is not a ban on corporate political speech, because corporations were allowed to use as much of their general treasury to fund advertisements at anytime other than the 30-day period); *Id.* (enumerating the ways in which corporate persons are different from natural human beings in the context of elections and political speech); *Id.* at 931-37 (arguing that the Court shouldn't be deciding the decision in the first place); *Id.* at 937-38 (arguing that the case should have been decided on narrower grounds); *Id.* at 940 (portraying the majority decision as a gross violation of *stare decisis*, since it seemed to be overruling Austin more because it did not pay attention to the reliance that potential litigants may have placed on a long-standing precedent); *Id.* at 942-43 (challenging the notion that a PAC would be a burdensome alternative to raising money, considering how much money they were able to raise with the restriction in place); *Id.* at 950-52 (arguing that the framers of the constitution intended corporations to play a limited, strictly-regulated role in American democracy); *Id.* at 960 (emphasizing the legislative determination that these kinds of laws were necessary).

22. *Id.* at 931 ("The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution."); *Id.* at 941 (predicting that the role of corporations will increase in electoral politics because of the majority decision).

23. *Id.* at 964; Id at 968 (accusing the majority of reaching this decision without "serious analysis").

24. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1993) at 91 ("[Antitrust] law's mission is to preserve, improve and reinforce the powerful economic mechanisms that compel businesses to respond to consumers.")

25. 15 U.S.C. 1

26. *See e.g.*, Trans Missouri Freight, 166 U.S. 290 (1897).

less common in more sophisticated, modern schemes. Since law-abiding, competing corporations often end up having similar prices that change simultaneously (due to similar market forces affecting all competitors), it is often difficult to determine the difference between simultaneous, competitive activity and collusive, anticompetitive activity.[27] Thus, courts must be cautious to differentiate between these scenarios. An erroneous application of the Sherman Act will ultimately harm the economy by discouraging the very kind of competition that is good for consumers.

The U.S. Supreme Court has held that mere parallel behavior is not sufficient to support a finding of liability. When that action is coupled with some evidence of an agreement, however, the Court will infer a conspiracy.[28] When making this distinction, courts rely on economic factors that indicate when parallel price changes are occurring because of illicit collusion, as opposed to innocuous market forces.[29]

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27. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS 2D. 307 (1981) ("[U]nder perfect competition every firm would charge the same price; price adjustments would be made by all firms at the same time. The decision of one firm not to add to capacity may indicate only that the addition is unprofitable; no one should be surprised if other firms come to the same conclusion. If the price of an input into production rises, all firms will increase their price at the same time. Concentrating on agreement is a convenient way of separating efficient from inefficient practices.").

28. Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600 (1914) ("[C]onspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done."). *See also*, PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS PROBLEMS, TEXT, CASES 5TH ED. 279 (1997) ("The courts approach unanimity in saying that mere parallelism does not establish the contract , combination, or conspiracy required by Sherman act Section 1. . . . Usually they say that parallelism accompanied by some other fact supports a jury verdict or that parallelism is insufficient to get to the jury unless some other fact is established. "); RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST CASE, ECONOMIC NOTES AND OTHER MATERIALS 2D. 330 (1981) ("A similar distinction often is employed in discrimination law. A law's racially disproportionate effect sometimes permits, but it rarely compels, the inference that the legislature intended to discriminate."); *But see Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962) (arguing that courts should not mechanistically apply an agreement requirement).

29. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST CASE, ECONOMIC NOTES AND OTHER MATERIALS 2D. 336-40 (1981) (Discussing the market conditions that are most conducive to collusion); PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS PROBLEMS, TEXT, CASES 5TH ED. 280-85 (1997); Richard Posner, *Oligopoloy and Conspiracy and the Antitrust Laws*, 21 STAN. L. REV. 1562 (1969); George Stigler, *A Theory of Oligopoly*, 72 J. OF POLITICAL ECONOMY 44 (1964) (discussing the structure of oligopolies) *available at* http://home.uchicago.edu/~vlima/courses/econ201/Stigler.pdf; Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. OF ECON. LITERATURE 43 (2006). Courts have demonstrated a willingness to incorporate these economic indicators when determining liability under the Sherman Act, *see e.g.*, Ambrook Enterprises v. Time Inc., 612 F. 2d 604 (2d Cir. 1979); Gainesville Utilities Dept. v. Florida Power & Light Co., 573 F. 2d 292 (5th Cir. 1978); Bogosian v. Gulf Oil Corp., 561 F. 2d 434 (3d Cir. 1977); Wall Products Co. v. National Gypsum Co., 326 F.Supp. 295 (N.D. Cal. 1971).

Direct, "smoking gun" evidence continues to be the most compelling evidence to courts determining antitrust liability.[30] But indirect evidence is often used as well. For example, courts infer an agreement when the evidence shows that the parties met in private immediately before a concerted price change.[31] Courts are more likely to find liability when the parties present no economically plausible explanation to their parallel behavior or the individual company's behavior.[32] Additionally, when there are enough factors demonstrating that the market will allow the defendants to operate as a price-fixing cartel, a finding of liability is more likely.[33]

In antitrust cases, defendants can avoid liability by explaining the prices with a pro-competitive justification. For example, if price decreases are in-line with market-wide decreases in input prices,[34] or if there is a common free rider problem that each of the defendants are addressing[35], a court is more inclined to find no liability.[36] Additionally, if there is no economically plausible way for the defendant to reap a profit from the alleged agreement, the Court is inclined to find no liability.[37]

30. ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 186-87 (2010)

31. *See* Cackling Acres v. Olseon Farms, 541 F.2d 242 (10th Cir. 1976).

32. *See e.g.*, In re Text Messaging Antitrust Litigation, 630 F. 3d 622 (7th Cir. 2010) (where each of the cell phone companies increased their prices in unison even though costs were falling – this would have only been economically sensible had an agreement to raise prices existed among the companies).

33. *See e.g.,* In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008) (finding liability in a case where there was a high industry concentration within the hands of a few companies who produced a highly fungible product with a highly inelastic demand curve). *See also*, KEVIN SCOTT MARSHALL (EDITOR), THE ECONOMICS OF ANTITRUST INJURY AND FIRM-SPECIFIC DAMAGES 16 (2008)

34. *See* e.g., Pevely Dairy Co. v. U.S. 178 F. 2d 363 (1949) (finding no liability for the milk handler defendants because the uniform changes in milk prices could be explained by market conditions such as labor unions and government regulation).

35. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 731 (1988) ("Manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by 'free riding' on the services provided by other dealers."); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984); GTE Silvania 433 U.S. 36, 55 (1977) ("Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.").

36. Theatre enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954) (finding no liability for movie distributors who made independent business decisions to refuse first run movies to suburban theatres because they could have come to the same conclusion that the downtown theaters could serve more people and the suburban theaters would just free ride on the downtown theaters' advertising efforts).

37. Mastushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (holding that the posited scheme to charge anti-competitive prices in order to gain a market hold in the television market was implausible, and so the defendants had no motive to conspire.)

An agreement between corporations to fix prices and *quid pro quo* corruption between a political candidate and a corporation share three important attributes. First, both arrangements are illegal—and highly undesirable. In antitrust cases, this illegality is a response to the deadweight loss to society when output is restricted and prices are kept artificially high. Similarly, *quid pro quo* corruption is illegal because it harms society. This harm occurs when the politician makes decisions based on an individual corporation's interest, that are odds with the interest of the broader society's interest. Second, both arrangements involve sophisticated actors who are highly motivated to keep illegal arrangements secret. Corporations are motivated to hide agreements to restrain trade and to avoid the treble damages and criminal charges under the Sherman Act.[38] Politicians are motivated to keep corrupt agreements with corporations secret for fear of criminal charges (at worst) and losing popularity (at best). Third, each can easily be confused with legal behavior. Corporations acting in parallel could easily be engaged in productive competition, just as politicians granting a benefit to a politically active corporation could be acting pursuant to democratic principles.

In the next part, I will apply some of the principles used to find agreements in the antitrust context to inform a method for measuring the influence of corporate political spending.

III. MEASURING CORRUPTION IN POLITICS

"If you cannot measure it, you cannot improve it." – Lord Kelvin

Since *Citizens United,* the amount of spending on political campaigns has increased, and to a lesser extent, so has corporate spending on political advertisements. While the amount of spending for advertisements can be relevant to claims that corporate speech might distort political discourse, it is inadequate to address whether this spending has a corrupting effect. It is hard to tell if this spending provides political candidates with a significant benefit, and if any reciprocal benefit granted by the politician is directly related.

This Part proposes a guide for measuring trends to determine how political corporate spending affects the decisions of politicians. Over time, this data will provide empirical evidence for either supporters or opponents of corporate involvement in political discourse. It is important to note that the purpose of this guide is to facilitate information-gathering, rather than to indict a particular politician or corporation for corruption.

38. 15 U.S.C. 15(a).

In the most basic terms, corruption requires a public official conferring a benefit upon some individual or group in return for his or her own benefit. The majority in *Citizens United* requires that this exchange of benefits resemble *quid pro quo* corruption—meaning that the benefit given to the corporation would have to be approximately equivalent and clearly connected to the amount of help given to the candidate.[39] In contrast, the dissent suggests a more inclusive definition of corruption including looser connections, such as an official becoming more inclined to consider the viewpoint of a corporate donor after receiving some benefit on Election Day.

Rather than endorse one view of corruption, this guide allows a researcher to apply an influence score to a political expenditure by a corporation. A high score is associated with *quid pro quo* corruption, while a low score indicates that the expenditure had a milder influence. Calibrated and aggregated over time, these scores will reveal the extent to which corporate political advertising genuinely corrupts the political process.

This method requires any political expenditure by a corporation to be given a score on a scale of 0 to 100. This Influence Score is determined by three variables: (A) the benefit given by the Corporation; (B) the benefit received by the corporation; and (C) the likelihood that those benefits were connected. Researchers determine a 0–10 value for each of these of these variables given the facts surrounding the particular political expenditure by a corporation. A score of 0 represents no benefit or no connection. A 10 represents a very large benefit or tight connection. These values are entered into the following equation:

$$\mathbf{C \times \frac{(A+B)}{2} = Influence\ Score}$$

A resulting Influence Score of 0 creates a data point suggesting that the political donation had no corrupting effect, while a score of 100 creates a data point indicating a high level of corruption. The benefits given to a politician by a corporate expenditure (A) and the benefits

39. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, # (2010) ("Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." (quoting *McConnell*, 540 U.S., at 297); *See also,* Daniel Fisher, *Inside the Koch Empire: How the Brothers Plan to Reshape America*, FORBES, (December, 5, 2012, 11:57 AM), http://www.forbes.com/sites/danielfisher/2012/12/05/inside-the-koch-empire-how-the-brothers-plan-to-reshape-america/ ("'Most power is power to coerce somebody,' says Charles [Koch], ... 'We don't have the power to coerce anybody.'").

received by the corporation from the politician (B) are weighted equally. The larger the benefits at play, the greater the magnitude of any corruptive effect manifested. The connection score (C) has a larger bearing on the Influence Score than either of the other two variables, since without a connection between benefits, both the corporation's actions and the politician's actions are harmless, desirable even, for a functioning democracy. However, a close connection tends to produce a high score, and is therefore highly indicative of corruption, even where the benefits exchanged are relatively low.

This formula offers a crude but novel attempt at quantifying what is to date a nebulous and diffuse set of data. The 0–100 scoring system quickly transforms this complicated, fact-intensive data into a simple heuristic that allows researchers to determine trends, make comparisons between types of donations, identify correlations between donations and shifts in policy, and over time, suggest causation. Although the input variables rely on subjective judgments and incomplete data, they provide direction for future research and guidance to the legislature and judiciary alike when assessing the impact of corporate political speech. The following subparts discuss in more detail how a researcher might measure each of the three variables.

A. *Benefit Given by the Corporation*

Under the proposed formula, researchers assign a 0–10 score based on how much benefit a corporation's political spending grants to a politician. A score of 0 indicates no benefit, while a score of 10 is a very large benefit.

Assigning a value to the benefits that a corporation gives to a candidate through its independent spending requires considering the amount of money spent, and its significance to the candidate's success.[40]Examining the amount of money that a corporation spends on a particular candidate is a good starting point for assigning a 0–10 value. In the 2012 election, for example, the amount of outside spending on the presidential election increased from 262.7 million dollars in 2008 to 1.3 billion dollars in 2012.[41] The vast majority of this money was

40. Of course the influence of one corporation or individual is difficult to measure. Sometimes an individual may believe that his individual donation or endorsement is worth much more than it actually is. *See, e.g.*, Katie Blueck, *Donald Trump's Notable Tweets of 2012*, POLITICO, (quoting Donald Trump post-election tweet "Romney campaign used me in 6 primary states and won every one – they should have used me in Florida and Ohio & he would be President.").

41. Sunlight Reporting Group, *What we learned: 10 Lessons from the Campaign Brought to you by Citizen's United*, SUNLIGHT FOUNDATION, (Nov. 6, 2012, 11:31 AM), http://reporting.sunlightfoundation.com/2012/what-we-learned-lessons-first-presidential-campaign-brought-you-/

spent in the final days of the campaign—the exact time frame implicated by the BCRA provisions considered in *Citizens United*.[42]

However, in absolute terms, the amount of spending by any one corporation was relatively small compared to the amount spent by individual donors. In fact, the $1.225 billion dollars of non-corporate donations dwarfed the $75 million that corporations spent. .[43] Furthermore, individuals spent more on elections than any single corporation. For example, Sheldon Adelson spent a staggering $53 million in the 2012 election cycle,[44] while the largest corporate expenditure was a comparatively measly $5.3 million.[45]

The analysis should not stop at the amount of money spent. Not all spending on an election is equal. Much of the spending by Super PACs and other groups funded by large corporate donors was negative, giving candidates the benefit of escaping some of the consequences of "going negative."[46] However, much of the money spent by outside groups was less effective than direct campaign contributions. The Obama campaign, for example, was able to secure steep discounts on television advertising that were unavailable to non-campaign groups.[47]

Additionally, outside spending may cause problems for the candidate the spending is designed to benefit. For example, the Obama campaign used the *Citizens United* decision to spur its own donors to make campaign donations to fight back against the increased corporate spending that was primarily benefitting Mitt Romney.[48] The

42. *Id.*; Jake Harper, *Outside Spenders Dump $210 Million Into Last Full Week of the Campaign*, SUNLIGHT FOUNDATION, (Nov. 2, 2012, 10:38 AM), http://reporting.sunlightfoundation.com/2012/last-full-week-spending/.

43. Michael Beckel & Reity O'Brien, *Election's Enigmatic Biggest Corporate Donors has contributed $5.3 million*, NBCNEWS.com, (Nov. 5, 2012 4:34 AM EST), http://openchannel.nbcnews.com/_news/2012/11/05/14928532-elections-enigmatic-biggest-corporate-donor-has-contributed-53-million?lite.

44. Steven Bertoni, *Why Sheldon Adelson's Election Donations Were Millions Well Spent*, FORBES, Nov. 8, 2012, available at http://www.forbes.com/sites/stevenbertoni/2012/11/08/why-sheldon-adelsons-election-donations-were-millions-well-spent/.

45. Michael Beckel & Reity O'Brien, *Election's Enigmatic Biggest Corporate Donors has Contributed $5.3 million*, NBCNEWS.com, (Nov. 5, 2012 4:34 AM EST), http://openchannel.nbcnews.com/_news/2012/11/05/14928532-elections-enigmatic-biggest-corporate-donor-has-contributed-53-million?lite.

46. Sunlight Reporting Group, *What we learned: 10 Lessons from the Campaign Brought to you by Citizen's United*, Sunlight Foundation, (Nov. 6, 2012, 11:31 AM), *available at*, http://reporting.sunlightfoundation.com/2012/what-we-learned-lessons-first-presidential-campaign-brought-you-/.

47. Sunlight Reporting Group, *What We learned: 10 Lessons from the Campaign Brought to you by Citizens United*, SUNLIGHT FOUNDATION, (Nov. 6, 2012, 11:31 AM), *available at*, http://reporting.sunlightfoundation.com/2012/what-we-learned-lessons-first-presidential-campaign-brought-you-/.

48. E-mail from Jeremy Bird, Nat'l. Field Dir., Obama for America, to Patrick E. Murray, *This email is going around*, (Sept. 26, 2012, 10:13 AM ET) (on file with author) (forwarding a heartwarming letter that the Obama campaign received from a Pennsylvanian mother of two

amount of donations raised in response to the fear of Romney's much larger corporate donors may have been small, but Romney's association with large corporations likely played an important role in portraying Romney as an undesirable alternative to Obama. The absolute dollar amount spent on behalf of a particular candidate is not necessarily indicative of its benefit to the candidate. As was the case in the 2012 presidential election, the loss of populist appeal might reduce the benefit of independent corporate spending.

With these considerations in mind, a numerical score is assigned to a corporation's political expenditure. A score of 10 is given to an advertisement that reaches a large number of voters, is particularly persuasive, and assists the candidate. A low score is given to an expenditure that has little connection to the outcome of an election. An expenditure that is counterproductive or has no effect on the outcome of the election, receives a zero score.

B. *Benefit Received by the Corporation*

Under the formula proposed herein, variable (B) is assigned a score 0–10, with 0 being no benefit given to the corporation, and 10 being a very large benefit.

The benefits received by a corporation from an elected official are generally easier to measure than the benefits given to a politician. Specific tax rates, amounts of subsidies, permits given, and the effects of regulations imposed upon a corporation are all available in the detailed accounting a corporation must provide to shareholders. The cost of a particular piece of legislation can be readily estimated. Additionally, any monetary benefit that the corporation received should be assessed based on the size of the corporation.

The value of certain benefits may be difficult to ascertain. An example of a non-corporate, individual donor from the 2012 cycle is instructive: Sheldon Adelson's apparent election night bust might not have been as fruitless as it first appears.[49] While Adelson's preferred

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who gave up family pizza night to make a small donation to offset the effects of Citizen's United), *text available at* http://www.barackobama.com/news/entry/it-was-15/; *But see also*, *Americans Pool Together $945.23 to Counteract Corporate Money's Influence in Politics*, THE ONION, Jun. 22 2012, *available at* http://www.theonion.com/articles/americans-pool-together-94523-to-counteract-corpor,28622/ (illustrating through satire the inherent imbalance between the average American donor the average corporate donor).

49. *See* Steven Bertoni, *Why Sheldon Adelson's Election Donations Were Millions Well Spent*, FORBES, Nov. 8, 2012, available at http://www.forbes.com/sites/stevenbertoni/2012/11/08/why-sheldon-adelsons-election-donations-were-millions-well-spent/ ("It bought Adelson a direct line into every politician–and media outlet–in America, no matter their party affiliation. When Adelson calls, you're going to pick up the phone. And pick it up fast. Just ask Newt Gingrich and Mitt Romney and even Harry Reid. That $53 million worth of donations, just 0.25% of his wealth, has made Sheldon Adelson a player.").

political candidates seem to have lost more often than not, Adelson's notoriety will earn him access to every political hopeful seeking a large donation. Adelson may not have gained many immediate benefits or maybe even the ones he had hoped for, but his largess may provide him with less obvious benefits in the future.

In conclusion, researchers must be cognizant of the myriad types of benefits received by corporate donors, including new favorable legislation and reputational benefits when scoring (B).

C. *Connection between the Benefits*

It is often difficult to connect the benefit a corporation provides to a candidate with the value the candidate confers back to the corporation. A candidate or a corporation might have made their decisions independently, and the correlation of the two benefits could be purely coincidental.

Similarly, it is difficult to prove the existence of a conspiracy in an antitrust claim, since sophisticated actors are unlikely to leave concrete evidence of their agreements. Thus, antitrust factors can be instructive in the political context.

First, the timing of communications would be highly relevant. Communications that correspond with political decisions and corporate decisions to run political ads would—like communications that correlate with price fluctuations—be highly indicative of corruption in this model. For example, meetings between a politician and corporate representative before key votes, or a letter from the politician indicating a willingness to grant a benefit to the corporation if they run favorable political advertisements, both raise (C) in the formula.

Similar to antitrust, where the judge looks to the surrounding market, the researcher should determine (C) in part by examining the political environment surrounding the benefits received by the corporation and by the politician. For example, a court is more likely to find an antitrust arrangement where an agreement involves only a few key players.[50] Because fewer members are easier to control and make cheating more difficult, making an agreement to restrain prices more likely. In the political context, the researcher determines the relative importance of any funding received from any given corporate donor. If a corporate independent advertisement represents the most powerful part of the politician's campaign, the researcher assigns a high value to (C). Conversely, if additional resources advertise the politician throughout her campaign, this value would decrease.

50. See note 33 *supra*.

The economic factors used by courts in the antitrust context could not be used to classify individual corporations and candidates as corrupt. For individuals cases, there are many justifications that a candidate or a corporation could use to explain the benefit conferred on the other. Political motivations are more complex than the economic interests assumed in antitrust law. For example, a pro-competitive reason for restricting output or maintaining higher prices is difficult to justify because the corporation is assumed to be a rational economic actor seeking to maximize profits. But politicians are not supposed to be purely economic actors. They are assumed to be acting based on a complex combination factors that may include personal convictions, compromises with other lawmakers, and a desire -for re-election. A politician often makes the argument that her actions were in the best interests of her constituency or in line with her own political beliefs.

But while these factors might not be sufficient to indict individual corporations or politicians, the resulting data could be used to aggregate data and determine broader trends. The inquiry proposed here is designed to accumulate data in support or opposition of the compelling interest of the corruptive effect in politics in general. It should not be used to convict a particular corporation or public official for bribery. Thus, the information need not be perfect in order for instructive trends to emerge.

CONCLUSION

The *Citizens United* decision has been examined primarily as a decision that would increase the amount of money in politics. However, such an approach only addresses the anti-distortion principle — one of the emphatic points in the *Citizens United* majority opinion. Much more vulnerable, and rarely analyzed, is the corrupting effect of independent corporate spending during elections. The dearth of analysis is due in part to the relative difficulty of assessing a corrupting effect. It is easy to determine levels of spending, but it is hard to tell if this spending provides political candidates with a significant benefit, and if politicians provide corporations with benefits in return. This Article provides a new numerical scoring system to assess the corrupting influence of independent corporate political spending made possible by *Citizens United.*