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Colin Schoell

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# Corporate Constituents: Corporations Have More Influence on the Federal Government than Real People Under Current U.S. Campaign Finance Regulations

by COLIN SCHOELL\*

## Introduction

In the 2016 United States presidential election, just 55.7% of voting-age citizens in the United States went to the polls and cast ballots.<sup>1</sup> This percentage ranks 26th among developed countries, behind countries such as the Czech Republic, Slovakia, and Estonia.<sup>2</sup> One of the main reasons that Americans do not vote is because they feel the system is corrupt, and their voices do not have an impact.<sup>3</sup> This feeling that the system is corrupt likely stems from the massive amount of outside money spent every two years on campaigns, especially by super political actions committees (“PACs”) that are often funded by corporations.<sup>4</sup> This feeling that the political system is corrupt led to President Donald Trump’s wildly popular promise to “Drain the Swamp.”<sup>5</sup> However, not only has he failed to fulfill that promise, but he

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\* J.D. Candidate 2020, University of California, Hastings College of the Law; B.S. Environmental Studies, University of California, Santa Barbara, 2017.

1. Drew Desilver, U.S. Trails Most Developed Countries In Voter Turnout, Pew Research Center (May 21, 2018), <http://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/>.

2. *Id.*

3. Asma Khalid, Don Gonyea & Leila Fadel, *On The Sidelines of Democracy: Exploring Why So Many Americans Don't Vote*, NAT'L PUB. RADIO (Sept. 10, 2018, 5:07 AM), <https://www.npr.org/2018/09/10/645223716/on-the-sidelines-of-democracy-exploring-why-so-many-american-s-dont-vote>.

4. *Outside Spending*, OPEN SECRETS <https://www.opensecrets.org/outsidespending/index.php?type=Y&filter=S> (last visited Sept. 13, 2019).

5. Donald Trump (@realDonaldTrump), TWITTER (Oct. 18, 2016, 8:33 AM), <https://twitter.com/realdonaldtrump/status/788402585816276992>.

has exacerbated the problem in the eyes of many.<sup>6</sup> For that reason, campaign finance reform has become increasingly popular among Americans – Democratic leaders, including the Speaker of the House of Representatives, Nancy Pelosi, have taken initiative by means of legislative vote in the House of Representatives, towards reducing the influence of political money.<sup>7</sup>

This Note will analyze the changes in campaign finance regulations, the reasons for those changes, and potential future changes in campaign finance regulation. Part I of this Note will review the history of campaign financing in the United States, from the earliest federal elections up to the most recent. There have been several major shifts in how campaigns are financed over the course of the United States's 242-year history, evolving as the country grew from an estimated 2.5 million residents to nearly 330 million today.<sup>8</sup> Part I will accomplish this review by examining three major pieces of congressional legislation that precipitated major shifts in campaign finance regulation: the Tillman Act of 1907, the Federal Election Campaign Act of 1971 ("FECA"), and the Bipartisan Campaign Reform Act of 2002 ("BCRA").

Part II will examine the four main United States Supreme Court cases that interpreted FECA and BCRA, and that currently govern federal campaign spending. These cases are *Buckley v. Valeo*, *McConnell v. Federal Election Commission*, *Citizens United v. Federal Election Commission*, and *McCutcheon v. Federal Election Commission*.<sup>9</sup> These cases show a trend toward deregulation of campaign financing, and have created a system with essentially no limits on the amount of money a person or corporation may spend to influence political candidates.

Part III will examine the current state of federal campaign financing, including the impact that the large amount of money needed for a congressional campaign has on Congress' effectiveness, and public perception of political corruption. These effects and perceptions will be compared to the rationales set forth by the Justices of the United States Supreme Court in the four main opinions on campaign finance, to determine whether those arguments still hold true or have been subverted by the current

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6. Helaine Olen, *Trump Didn't Drain the Swamp. Supporters are Starting to Notice.*, WASH. POST (Sept. 11, 2018), <https://www.washingtonpost.com/blogs/post-partisan/wp/2018/09/11/trump-didnt-drain-the-swamp-supporters-are-starting-to-notice/>.

7. Peter Overby, *Democrats Say Their First Bill Will Focus On Strengthening Democracy at Home*, NAT'L PUB. RADIO (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/665635832/democrats-say-their-first-bill-will-focus-on-strengthening-democracy-at-home>.

8. Derick Moore, *Fun Facts: From Counties Named Liberty to \$368.6M Worth of Fireworks Sold*, UNITED STATES CENSUS BUREAU (July 2, 2019), <https://www.census.gov/library/stories/2019/07/july-fourth-celebrating-243-years-of-independence.html>.

9. *Buckley*, 424 U.S. 1 (1976); *McConnell*, 540 U.S. 93 (2003); *Citizens United*, 558 U.S. 310 (2010); *McCutcheon*, 572 U.S. 185 (2014).

system of campaign finance. I find that while the arguments, taken individually, make sense or could work in a perfect world, the combination of these opinions, as applied in the real world, has created a system rife with corruption or the appearance of corruption that Congress tried to prevent by regulating campaign financing. This corruption is protected by the Supreme Court decisions under the guise of protecting freedom of speech under the First Amendment. This Note will also analyze the fundraising strategies used in recent elections because, while campaign finance laws apply to all candidates equally, the two major American political parties have utilized different strategies in order to raise the highest amount of money without losing voter support.

Finally, Part IV will argue for several ways in which meaningful campaign finance reform could be accomplished to reduce voter disillusionment, and the appearance of corruption through campaign donations. These potential options include: a new Supreme Court ruling, the passage of legislation by Congress, or finally, a new constitutional amendment. This section will provide examples and analyze the benefits and consequences of each option, along with the likelihood that each option will occur.

## I. History of U.S. Campaign Financing Legislation

Just as he was a Founding Father of the United States, President George Washington was the “father of campaign finance reform.”<sup>10</sup> After losing his first election to the Virginia House of Burgesses in 1755, Washington threw a lavish feast to persuade the electorate to vote for him.<sup>11</sup> This prompted the first campaign finance law in one of the colonies of the future United States of America, which prohibited candidates from giving away “money, meat, drink, entertainment or provision or . . . any present, gift, reward or entertainment etc. in order to be elected.”<sup>12</sup> The first law passed by Congress that addressed this issue was the Naval Appropriations Bill of 1867, which prohibited soliciting naval yard workers for money.<sup>13</sup> The second law that addressed the issue was the Pendleton Civil Service Reform Act in 1883, which prohibited government officials from soliciting civil service workers

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10. Jim Toedtman, *Campaign Cash Degrades Discussion of Issues*, AMERICAN ASS'N OF RETIRED PERSONS (Apr. 10, 2012), <https://www.aarp.org/politics-society/government-elections/info-04-2012/campaign-cash-key-issues.html>.

11. Jaime Fuller, *From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform.*, WASHI. POST (Apr. 3, 2014, 9:15 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/>.

12. *Id.*

13. *Id.*

for contributions in exchange for retaining their positions.<sup>14</sup> These simplistic restrictions were just the beginning of attempts to limit the amount of money used in an effort to swing an election in favor of a specific candidate.

### **A. The Tillman Act of 1907 and the Taft-Hartley Act of 1947**

During his campaign for the 1904 United States presidential election, Theodore Roosevelt accepted more than \$2 million from the corporations of wealthy capitalists, which helped him win the presidency by a large margin.<sup>15</sup> President Roosevelt then called on Congress to enact “vigorous measures to eradicate” perceived political corruption created by political contributions from corporations.<sup>16</sup> Congress listened to Roosevelt and passed the Tillman Act of 1907, which prohibited corporations from making monetary donations to national political campaigns.<sup>17</sup> In 1943, Congress passed the Smith-Connely Act and extended this prohibition on campaign donations to labor unions, which had begun using their dues for political donations.<sup>18</sup>

While these laws prohibited corporations and labor unions from donating directly to political campaigns, they could still make their own expenditures in support of or in opposition to any candidate through “PACs”.<sup>19</sup> Congress closed this loophole by passing the Taft-Hartley Act of 1947, and prohibited corporations and labor unions from making independent expenditures in all federal political campaigns.<sup>20</sup> The labor unions instead used the first PAC, the Congress of Industrial Organizations (“CIO”), as a workaround.<sup>21</sup> This was a legitimate legal strategy because the CIO, rather than the unions, donated or made expenditures to federal political campaigns.<sup>22</sup>

These laws were not very effective, however, because Congress failed to implement an effective method of enforcement. The first federal campaign financial disclosure laws were passed in 1910 in the House of Representatives, and in 1911 in the Senate, three and four years after the

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14. Fuller, *supra* note 11.

15. Sidney Milkis, *Theodore Roosevelt: Campaigns and Elections*, UVA MILLER CENTER OF PUB. AFFAIRS, <https://millercenter.org/president/roosevelt/campaigns-and-elections> (last visited July 23, 2019).

16. Fuller, *supra* note 11.

17. Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907).

18. Fuller, *supra* note 11.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

passage of the Tillman Act, respectively.<sup>23</sup> Candidates easily evaded these laws however, as there was no penalty for a candidate who claimed to have no knowledge of spending on his behalf.<sup>24</sup> The sheer amount of campaign donations and expenditures that went unreported is demonstrated by the fact that political candidates in the 1968 congressional campaigns reported \$8.5 million in campaign contributions, while candidates in the 1972 congressional campaigns, following the passage of FECA, reported \$88.9 million in campaign contributions.<sup>25</sup> Prior to 1972, candidates simply would not report any contributions that exceeded the limits that were in place, and, if caught, claimed to have no knowledge of the excess spending.<sup>26</sup>

## **B. Federal Election Campaign Act and the Federal Election Commission**

In an effort to more effectively regulate the amount of money donated and spent on federal political campaigns, Congress enacted FECA in 1971.<sup>27</sup> This legislation required full reporting of all campaign contributions and expenditures.<sup>28</sup> Additionally, the law laid the groundwork for the first official labor union PACs and corporate PACs, even though the CIO had been around for several decades at this point.<sup>29</sup> Along with FECA, Congress passed the United States Revenue Act of 1971 (“Revenue Act”), which allowed citizens to check a box on their tax form to give one of their tax dollars to finance United States presidential campaigns during the general election.<sup>30</sup> As a condition for the public financing, once a presidential candidate accepted public campaign donations, they could no longer accept private contributions.<sup>31</sup>

Under the Revenue Act, the Clerk of the United States House of Representatives (“Clerk”), the Secretary of the Senate (“Secretary”), and the Comptroller General of the United States General Accounting Officer (“Comptroller General”) were responsible for monitoring compliance with disclosure requirements, and for reporting violations to the United States

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23. *The Federal Election Campaign Laws: A Short History*, FEDERAL ELECTION COMMISSION, <https://transition.fec.gov/info/appfour.htm> (last visited July 23, 2019) [hereinafter *FEC History*].

24. *Id.*

25. *Id.*

26. *Id.*

27. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

28. *FEC History*, *supra* note 23.

29. *Id.*

30. *Id.*

31. *Public Funding of Presidential Campaigns Brochure*, FED. ELEC. COMM’N, <https://transition.fec.gov/pages/brochures/pubfund.shtml#anchor688095> (last visited July 23, 2019).

Department of Justice (“Justice Department”) for prosecution.<sup>32</sup> This system of oversight was extremely ineffective, and although the Clerk, Secretary, and Comptroller General reported approximately 7,100 violations to the Justice Department, very few violations were actually prosecuted.<sup>33</sup> These continued violations of campaign finance regulations led Congress to amend FECA in 1974.<sup>34</sup>

Congress passed comprehensive amendments to FECA in 1974 hoping to limit the amount of money spent on elections, and to eliminate violations by establishing an independent regulation agency, the Federal Election Commission (“FEC”).<sup>35</sup> The FEC took over campaign finance oversight from the Clerk, Secretary, and Comptroller General.<sup>36</sup> Under these amendments, the President, the Speaker of the House of Representatives, and the president pro tempore of the Senate each appoint two commissioners to comprise the six voting members of the FEC.<sup>37</sup> The final two members of the eight-member commission are appointed by the Secretary and the Clerk as ex officio (nonvoting) members.<sup>38</sup> Congress gave the FEC recordkeeping, disclosure, and investigatory functions, as well as extensive rulemaking, adjudicatory, and enforcement powers over federal campaign financing regulations.<sup>39</sup>

In order to regulate the amount of money spent on federal political campaigns, Congress used these amendments to establish limits on the contributions and expenditures a person or group could make to one candidate, and in the aggregate.<sup>40</sup> FECA limited individual contributions to \$1,000 for any single candidate per election, and \$25,000 overall per election.<sup>41</sup> Additionally, FECA limited campaign expenditures by individuals and groups “relative to a clearly identified candidate” to \$1,000 per year, and limited campaign spending per candidate using prescribed limits.<sup>42</sup> Just two years after Congress enacted these limits, however, they were challenged in *Buckley v. Valeo*, which is discussed below.<sup>43</sup>

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32. *FEC History*, *supra* note 23.

33. *Id.*

34. Fed. Elec. Campaign Act Amends. of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

35. *FEC History*, *supra* note 23.

36. *Id.*

37. *Id.*

38. *Buckley*, 424 U.S. at 113.

39. *Id.* at 110.

40. *Id.* at 7.

41. *Id.*

42. *Id.*

43. *Id.*

### C. The Bipartisan Campaign Reform Act of 2002 (“BCRA”)

All of the legislation leading up to and including FECA focused on the regulation of “hard money,” which is donated directly to a political campaign or spent advocating for a specific candidate’s election or defeat.<sup>44</sup> This legislation did nothing to regulate the amount of “soft money,” which is donated to political parties, or “party-building” activities, such as “get-out-the-vote” drives, voter registration efforts, and generic political party advertisements.<sup>45</sup> An unlimited amount of soft money could be donated to candidates, and the amount of soft money raised by both parties skyrocketed from \$105.1 million in 1993-1994 to \$487.4 million in 1999-2000.<sup>46</sup>

In response to this influx of unregulated money into political parties, Congress passed the BCRA, also known as the McCain-Feingold Act.<sup>47</sup> This legislation sought to address “the increased importance of ‘soft money’, [and] the proliferation of ‘issue ads,’” which focus on a policy issue, rather than on electing or defeating a candidate.<sup>48</sup> To address these issues, Congress regulated the use of soft money by political parties and candidates, and prohibited corporations and unions from using general treasury funds to influence federal election outcomes.<sup>49</sup> These regulations were challenged the very next year in *McConnell v. Federal Election Commission*, which is discussed below.<sup>50</sup>

## II. United States Supreme Court Decisions on Constitutionality of Campaign Financing

The United States Supreme Court did not enter the arena of campaign finance regulation until 1976, choosing to defer to Congress’ knowledge and understanding of the corrupting power of money in politics. However, the passage of FECA led to constitutional challenges that eventually reached the Supreme Court.<sup>51</sup> The United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit Court of Appeals”) viewed FECA as “by far the most comprehensive reform legislation (ever) passed by Congress” concerning federal elections, and upheld all but one provision, which they

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44. Bill Mears, *Where the Money Is: A Campaign Spending Primer*, CNN (Jan. 23, 2012, 7:19 PM), <https://www.cnn.com/2012/01/23/politics/campaign-spending-primer/index.html>.

45. *Id.*

46. STEFFEN SCHMIDT, MACK SHELLEY & BARBARA BARDES, *AM. GOV’T AND POLITICS TODAY* 360 (Carolyn Merrill et al. eds., 14th ed. 2008).

47. Fuller, *supra* note 11.

48. *McConnell*, 540 U.S. at 93.

49. *Id.* at 94.

50. *Id.*

51. *Buckley*, 424 U.S. at 7.



considered to be too vague or overbroad.<sup>52</sup> Since then, several subsequent Supreme Court decisions have chipped away at campaign finance on constitutional grounds.

### **A. *Buckley v. Valeo* (1978)**

In order to challenge the contribution and expenditure limits established by FECA, a group of plaintiffs, including a presidential candidate, a senator seeking reelection, and a potential contributor, filed suit claiming that the limits unconstitutionally interfered with their freedoms of speech and association, which are protected by the First Amendment of the United States Constitution.<sup>53</sup> The Court found some merit in their arguments, specifically the idea that political expenditures qualified as speech, rather than conduct, and therefore limiting political expenditures infringed on the First Amendment's protection of freedom of speech.<sup>54</sup> The Court upheld FECA's individual contribution limits, the establishment of the FEC, disclosure and reporting requirements, and public financing scheme for presidential elections as constitutional under the First Amendment.<sup>55</sup> However, the Court struck down limits on campaign expenditures, both per candidate limits and aggregate limits on independent expenditures by individuals and groups, and limits on personal expenditures by candidates because they violated the freedom of speech and freedom of association.<sup>56</sup>

While the D.C. Circuit Court of Appeals found the restrictions of monetary expenditures to be symbolic conduct that could be regulated as such, the Supreme Court determined that some communications made by spending money "involve speech alone, some involve conduct primarily, and some involve a combination of the two."<sup>57</sup> The Court found that, even if the expenditure of money is considered to be conduct, the limits would still be unconstitutional under the First Amendment because the government's interest in "equalizing the relative ability of all voters to affect electoral outcomes" through individual expenditure limits suppresses communication.<sup>58</sup> Although the regulation of independent political expenditures was not content based, the Court found that the government does have an interest in regulating the conduct of spending because the communication integral to the conduct was harmful.<sup>59</sup>

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52. *Buckley*, 424 U.S. at 7 (citing *Buckley v. Valeo*, 519 F.2d 821, 831 (1975)).

53. *Id.* at 14.

54. *Id.* at 16.

55. *Id.* at 143.

56. *Id.*

57. *Id.* at 16.

58. *Buckley*, 424 U.S. at 17.

59. *U.S. v. O'Brien*, 391 U.S. 367, 382 (1968).

In its analysis, the Court differentiated between the limits on individual expenditures and the limits on contributions by the severity of each limit's restriction on First Amendment rights of those spending the money.<sup>60</sup> While limits on expenditures explicitly capped the amount of political speech a person could disseminate using their money, a limit on donating to a candidate "entails only a marginal restriction upon the contributor's ability to engage in free communication."<sup>61</sup> This is because donating money to a candidate communicates personal support for that candidate, but the quantity of communication of that support "does not increase perceptibly with the size of his contribution."<sup>62</sup> The communication rests solely on the "symbolic act of contributing."<sup>63</sup>

This distinction between contributions and expenditures seems rather arbitrary, as independently spending money in support of a candidate could be viewed as a similarly symbolic act to contributing money to that candidate. The same could be said of the reverse of the Court's reasoning: limiting the amount of money an individual may contribute to a candidate effectively limits the amount of speech in support of that candidate their money can be used for. The Court explains this discrepancy by emphasizing that, for a contribution to become political expression, it must involve someone other than the contributor.<sup>64</sup> Additionally, the Court describes the contribution limit as a restriction on "one aspect of the contributor's freedom of political association," while individual expenditure limits are regulations that primarily and substantially infringe on the freedom of speech.<sup>65</sup>

In addition to the difference in which First Amendment protection is infringed upon by the limits on individual expenditures or contributions, the government interest in regulating the amount of money an individual may contribute to a candidate is much stronger. The main argument, which the Court finds "unnecessary to look beyond" to find a constitutionally sufficient justification for the contribution limit, is the "prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions."<sup>66</sup> This government interest is not present in the regulation of individual

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60. *Buckley*, 424 U.S. at 20.

61. *Id.*

62. *Id.* at 21.

63. *Id.* (By contributing to a candidate, a person associates themselves with that candidate but cannot become more associated with the candidate by contributing more. In contrast, a person can always produce more speech for a candidate by making more independent expenditures for that candidate.).

64. *Id.* at 21.

65. *Id.* at 24-25.

66. *Buckley*, 424 U.S. at 25.

expenditures, because contributions lend themselves much more readily to a political quid pro quo with current or future office holders.<sup>67</sup> The Court emphasizes the importance of eliminating actual quid pro quo arrangements or even the appearance of corruption in the political system, because otherwise “the integrity of our system of representative democracy is undermined.”<sup>68</sup>

Because the government’s interest in preventing corruption or the appearance of corruption in politics was sufficient to sustain the individual contribution limits, the Court did not analyze the two secondary governmental interests at play.<sup>69</sup> However, those interests are worth mentioning here. First, the limits serve to quiet the voices of the wealthy, and hence, to equalize the relative ability of all citizens to affect electoral outcomes.<sup>70</sup> Second, the contribution limits serve as a deterrent on the skyrocketing cost of political campaigns, and gives candidates without access to large sums of money the ability to run for office on a level playing field. These interests are quite compelling, as the Court recognizes the “electorate’s increasing dependence on . . . mass media for news and information,” as well as the effectiveness of those mediums.<sup>71</sup> Unfortunately, the Court failed to recognize the distorting effect that the wealthy who flood those mediums with their message, and effectively shut out all other messages. The government has a compelling interest in preventing this distortion, because it silences the messages of the less wealthy, counteracting the reasons for upholding individual campaign expenditure limits.

Justice White dissented in part from the Opinion of the Court, arguing that individual expenditure limits violate the First Amendment.<sup>72</sup> He emphasized the fact that “Congress has the power under the Constitution to regulate the election of federal officers,” and to protect the election from corruption.<sup>73</sup> Because this power is clear under the Constitution, “the choice of means to that end presents a question primarily addressed to the judgment of Congress.”<sup>74</sup> Congress concluded that limits on both contributions and expenditures were “essential if the aims of the act were to be achieved fully.”<sup>75</sup>

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67. *Buckley*, 424 U.S. at 26.

68. *Id.* at 26-27.

69. *Id.* at 26.

70. *Id.* at 25-26.

71. *Id.* at 19.

72. *Buckley*, 424 U.S. at 259 (White, J., dissenting in part).

73. *Id.* at 257-58.

74. *Burroughs v. U.S.*, 290 U.S. 534, 547 (1934).

75. *Buckley*, 424 U.S. at 258 (White, J., dissenting in part).

Justice White accurately identifies that because both limits are content neutral, the case depends on “whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the incidental effects that the limitations” have on First Amendment rights.<sup>76</sup> He also correctly points to the glaring inconsistency in the Court’s decision to uphold the limits on individual contributions while striking down the limits on individual expenditures, because “Congress was plainly of the view that these expenditures also have corruptive potential.”<sup>77</sup>

Finally, “the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.”<sup>78</sup> Federal and state taxes take money out of citizens’ pockets and company treasuries, but are not unconstitutional for siphoning away “large sums that would otherwise be available for communicative activities.”<sup>79</sup> And under the Court’s decision here, if two people purchased \$1 million in television advertisements in support of a candidate, but one first acquired the approval of the candidate, only that person would be in violation of the law.<sup>80</sup> These inconsistencies show the illogical nature of the Court’s decision to uphold individual contribution limits while striking down individual expenditure limits.

*Buckley v. Valeo* dealt solely with “hard money” contributions, expenditures, and disclosure requirements, and following the decision, both political parties began looking for ways to work around the upheld contribution limits. This work around was found in the use of “soft money,” as discussed earlier.<sup>81</sup> The passage of BCRA led to the second major United States Supreme Court case regarding campaign finance reform laws.

### **B. *McConnell v. Federal Election Commission* (2003)**

BCRA sought to limit “soft money” contributions as well as financing from labor union and corporation general funds, but the constitutionality of those regulations was promptly challenged and decided by the Supreme Court in 2003.<sup>82</sup> Following reasoning similar to *Buckley*, the Court upheld the restrictions on soft money contributions to political parties due to the government’s interest in preventing corruption or the appearance of

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76. *Buckley*, 424 U.S. at 260.

77. *Id.* at 261.

78. *Id.* at 262.

79. *Id.* at 263.

80. *Id.* at 261.

81. Mears, *supra* note 44.

82. *McConnell*, 540 U.S. at 93.

corruption.<sup>83</sup> The restrictions imposed only a “marginal impact” on the ability to engage in political speech, and that impact was outweighed by the government’s interest in those restrictions.<sup>84</sup>

The restriction on the expenditure of soft money by candidates on advertising, which explicitly advocated for the election or defeat of a political candidate, was similarly upheld.<sup>85</sup> The Court found that the restriction was narrowly tailored to accomplish the goal of limiting corruption or the appearance of corruption in the political system because those donations have “the greatest potential to corrupt or give rise to the appearance of corruption of federal candidates.”<sup>86</sup> General issue advertisements and advertisements which refer only to the candidate making the expenditure are exempted from this restriction because they are less effective and less likely to have a corrupting influence on candidates.<sup>87</sup> For those reasons, the soft money expenditure restrictions survived First Amendment attack.<sup>88</sup>

The plaintiffs in *McConnell* argued that *Buckley* distinguished between express advocacy for a candidate and general issue advocacy, and therefore speakers had “an inviolable First Amendment right to engage in the latter.”<sup>89</sup> This argument, the Court explained, misinterpreted *Buckley* since express advocacy restrictions were upheld as a matter of “statutory interpretation rather than constitutional command.”<sup>90</sup> If *Buckley* had conferred an inviolable right to engage in general issue advocacy, this would have required a means of drawing a clear line between express advocacy and general issue advocacy. This is difficult to do and would likely depend on whether the advertisement contained so-called “magic words” that expressly advocate for the election or defeat of a political candidate. The Court has long recognized, however, that the “presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.”<sup>91</sup> This decision therefore rendered *Buckley*’s magic-words requirement functionally meaningless.<sup>92</sup>

*Buckley* established that corporations and labor unions cannot use general treasury funds to finance explicit advocacy in federal elections;

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83. *McConnell*, 540 U.S. at 142.

84. *Id.* at 138.

85. *Id.* at 188.

86. *Id.* at 184.

87. *Id.*

88. *Id.* at 185.

89. *McConnell*, 540 U.S. at 190.

90. *Id.* at 192.

91. *Id.* at 193 (citing *Buckley*, 424 U.S. at 45).

92. *Id.* at 193.

however, BCRA extended this restriction to soft money contributions.<sup>93</sup> The restrictions on soft money contributions only apply to general treasury funds, and still allow for the creation of PACs by corporations and labor unions to finance electioneering communications.<sup>94</sup> Requiring soft money funds to be segregated in PACs helps eliminate the concern of using corporate funds to advance political causes or candidates at odds with the views of some shareholders or members.<sup>95</sup> While the plaintiffs conceded that the Government has a compelling interest in regulating express advocacy advertisements, they argued that the segregated-fund requirement was overbroad.<sup>96</sup> The plaintiffs claimed that, while the justifications of preventing corruption or the appearance of corruption apply to express advocacy, they do not apply to “significant quantities of speech encompassed by the definition of electioneering communications.”<sup>97</sup>

The Court dismissed this argument because “issue ads broadcast[ed] during the 30-day and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy.”<sup>98</sup> The justifications therefore apply as long as the advertisements aired in the two months leading up to the election are intended to influence voters’ decisions, and have that effect.<sup>99</sup> If issue advocacy advertisements were not subject to the same segregated-fund requirement, then, in the future, corporations and labor unions would simply circumvent the express advocacy restriction upheld in *Buckley* and achieve the same effect by avoiding specific references to candidates in advertisements.<sup>100</sup>

In Justice Scalia’s Dissenting Opinion, he argued that the expenditure of money on political campaigns is equivalent to speech, and therefore should not be abridged.<sup>101</sup> Justice Scalia notes that there are three main arguments in favor of permitting the restriction of political money, but finds none of them convincing: (1) money is not speech, (2) pooling money is not speech, and (3) speech by corporations can be abridged.<sup>102</sup> To support his argument, he references the origins of the concept of freedom of speech from

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93. *McConnell*, 540 U.S. at 203-04.

94. *Id.* at 204.

95. *Id.*

96. *Id.* at 204-05.

97. *Id.* at 206.

98. *Id.*

99. *McConnell*, 540 U.S. at 206.

100. *Id.*

101. *Id.* at 248 (Scalia, J., dissenting in part).

102. *Id.* at 250-56.

the British Stamp Act of 1765, and the fact that the language of the First Amendment does not explicitly reference corporations.<sup>103</sup>

Though Justice Scalia states that corporations were a familiar figure in American economic life at the time of the United States Bill of Rights, he failed to acknowledge that the sheer number of corporations in modern society has increased, and accordingly, their ability to influence politics, to the point where it is well beyond anything the Framers envisioned.<sup>104</sup> At the end of the eighteenth century, American corporations did not have the money or technology to effectively drown out all other voices. Additionally, comparing the expenditure or contribution of money to promote a political view to pure speech, such as printing a newspaper, implies that a person with more money is permitted to have more speech. This flies in the face of the constitutional guarantee that all people, rich or poor, are equal. Similarly, Justice Scalia's assertion that pooling money in the form of political parties should be considered speech goes against his own originalist argument because the Founding Fathers did not want the country to become divided by political parties. President George Washington urged as much in his farewell address, stressing "the danger of parties in the State."<sup>105</sup> While Justice Scalia's arguments comprised the Dissenting Opinion in *McConnell*, they became the Majority Opinion just seven years later in *Citizens United v. Federal Election Commission*.

### **C. *Citizens United v. Federal Election Commission* (2010)**

While *Buckley* and *McConnell* upheld FECA and BCRA prohibitions on corporations and labor unions using general treasury funds for political expenditures, the Court reversed these decisions in *Citizens United v. Federal Election Commission*.<sup>106</sup> The Court's primary reasoning behind reversing thirty-five years of precedent was that independent expenditures constitute speech and the government may not discriminate between speakers when regulating speech.<sup>107</sup> This premise requires viewing corporations as entities which have an equal First Amendment right to free speech as do natural persons, a view that is contested in corporate law. As Justice Stevens points out in his Dissenting Opinion, however, corporations "are not natural persons," and though they contribute enormous amounts to society, they are not members of it.<sup>108</sup>

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103. *McConnell*, 540 U.S. at 250-56 (Scalia, J., dissenting in part).

104. *Id.* at 256.

105. See George Washington, *Farewell Address* (Sept. 19, 1796), in CLAYPOOLE'S AM. DAILY ADVERTISER.

106. 558 U.S. 310, 372 (2010).

107. *Id.* at 341.

108. *Citizens United*, 558 U.S. at 424 (Stevens, J., dissenting in part).

The Court has long held that campaign finance restrictions are subject to strict scrutiny because they burden speech, so the restrictions must further a compelling interest and be narrowly tailored to achieve that interest.<sup>109</sup> In past opinions, the Court found that the government has a compelling interest in preventing corruption or the appearance of corruption, along with an interest in preventing the distorting effects created by the expenditure of large sums of money by corporations on political advertising.<sup>110</sup> In this case, the Court continued to acknowledge that the government has an interest in anti-distortion, anticorruption, and shareholder protection, but dismissed each as a justification for limiting independent expenditures by corporations.<sup>111</sup> This is concerning because if those interests are not compelling enough to limit the vast amount of independent expenditures that corporations can make, it is difficult to imagine an interest that would be sufficiently compelling.

The Court found that the interest in anti-distortion is outweighed by the censorship of “millions of associations of citizens,” preventing their voices and viewpoints from reaching the public.<sup>112</sup> In making this argument, the Court failed to recognize that BCRA does nothing to censor those citizens from engaging in political speech themselves, and permits corporations to engage in political speech through PACs. The *Buckley* Court found the interest of preventing *quid pro quo* corruption compelling, but in this case the Court found this argument unconvincing, as expenditures give “influence over or access to elected officials,” but do not necessarily mean those officials are corrupt.<sup>113</sup> The Majority expressed confidence in the belief that the electorate will not “lose faith in our democracy” due to the appearance of corporate influence or access to elected officials.<sup>114</sup> The Majority stated that “the people have the ultimate influence over elected officials,” ignoring the persuasive effect of corporations’ deep pocketbooks.<sup>115</sup> Finally, the Court rejected the Government’s interest in protecting the views of shareholders with dissenting political views from the corporation simply because it would give the government the authority to restrict the corporation’s political speech.<sup>116</sup>

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109. *Citizens United*, 558 U.S. at 340 (citing *Fed. Elec. Comm’n v. Wis. Right To Life*, 551 U.S. 449, 464 (2007)).

110. *Citizens United*, 558 U.S. at 348; *McConnell*, 540 U.S. 93, 204-05; *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 661 (1990).

111. *Citizens United*, 558 U.S. at 348-49.

112. *Id.* at 354.

113. *Id.* at 359.

114. *Id.* at 360.

115. *Id.*

116. *Id.* at 361.



While the Court did consider advances in technology, such as the Internet, it believed that these advances counsel against restricting corporate speech, rather than in favor of restricting it.<sup>117</sup> This statement runs counter to media consumption in the real world, where the expenditure of more money leads to the dissemination of a message to more people, and the drowning out of other views by monopolizing limited advertising space and time.<sup>118</sup> By ruling that no government interest justifies prohibiting corporate political expenditures, the Court overturned the precedent from *McConnell* and *Austin v. Michigan Chamber of Commerce*.<sup>119</sup>

Justice Stevens, joined by three Justices, wrote a scathing and lengthy Dissenting Opinion, emphasizing that although the First Amendment prohibits distinguishing between speakers when restricting speech, it is inaccurate to treat the “identity” of corporations as identical to that of natural persons.<sup>120</sup> Corporations cannot vote or run for office, and may have interests that conflict with eligible voters as they may be controlled by nonresidents.<sup>121</sup> These facts provide lawmakers with a compelling interest, “if not also a democratic duty, to . . . guard against the potentially deleterious effects of corporate spending” in federal campaigns.<sup>122</sup> Additionally, corporations have historically been prohibited from campaign spending since the passage of the Tillman Act in 1907, a precedent so accepted by Buckley that there was no constitutional challenge to the corporation restriction.<sup>123</sup>

In overturning *Austin* and *McConnell*, the Court went against *stare decisis*, and claimed those decisions are “dead wrong in [their] reasoning or irreconcilable with the rest of [the Court’s] doctrine.”<sup>124</sup> Justice Stevens pointed out the contradictions inherent in the Majority’s opinion, such as the fact that political parties are prohibited from spending soft money on express advocacy advertisements, while corporations are now free to spend as much general treasury money on these same advertisements as they wish.<sup>125</sup> This “dramatically enhances the role of corporations and unions—and the narrow

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117. *Citizens United*, 558 U.S. at 364.

118. Corporations are able to use their vast resources to purchase far more advertising than individual people, and therefore can drown out opposing viewpoints by purchasing more advertising time in the lead up to elections.

119. *Citizens United*, 558 U.S. at 366.

120. *Id.* at 394 (Stevens, J., dissenting in part).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 409.

125. *Citizens United*, 558 U.S. at 412.

interests they represent” in the political system, along with the distorting effects of the immense amount of money available to those groups.<sup>126</sup>

The Majority Opinion of *Citizens United* rests on three premises: (1) *Austin* and *McConnell* have banned corporate speech, (2) the First Amendment precludes regulatory distinction based on the speaker’s “identity” as a corporation, and (3) *Austin* and *McConnell* were radical outliers in campaign finance doctrine.<sup>127</sup> Each of these premises are wrong. The statutes do not impose an absolute ban on corporate spending, but rather prohibit spending from the general treasury funds, while leaving open the option to establish separate, segregated funds in the form of PACs.<sup>128</sup> While FECA and BCRA single out corporations, the Court previously held that speech may be regulated on account of the speaker’s identity when understood in institutional terms, such as “students, prisoners, members of the Armed Forces, foreigners, and [government] employees,” so long as the restrictions are justified by legitimate government interests.<sup>129</sup> The Majority in *Citizens United* would appear to “afford the same protection to multinational corporations controlled by foreigners as to individual Americans.”<sup>130</sup> The Majority emphasizes the identity-based distinctions of FECA and BCRA “without ever explaining why corporate identity demands the same treatment as individual identity” of natural persons.<sup>131</sup>

As to the third premise, Justice Stevens asserted that in assessing the First Amendment’s tradition, corporations were never intended to be permitted the same freedom of speech protections as natural persons.<sup>132</sup> Corporations at the time of the Founding were explicitly authorized by legislative charter, and the Framers considered Free Speech Rights of the *individual* when drafting the First Amendment, rather than that of corporations.<sup>133</sup> Further, the views of the Framers are not altogether useful when applying the First Amendment to campaign finance regulations because of how radically different today’s political universe is from theirs.<sup>134</sup>

The Majority Opinion downplays the Government’s interests in anticorruption, anti-distortion, and protecting the views of dissenting

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126. *Citizens United*, 558 U.S. at 412.

127. *Id.* at 414-15.

128. *Id.* at 415.

129. *Id.* at 420 (Stevens, J., dissenting in part).

130. *Id.* at 424.

131. *Id.* at 425.

132. *Citizens United*, 558 U.S. at 425.

133. *Id.* at 427-28; see Alina Ball, *Contextualizing the Corporate Rights Movement in Transactional Clinics*, 7 TENN. J. RACE GENDER & SOC. JUST. 257, 260 (2018) (emphasis added).

134. *Citizens United*, 558 U.S. at 432 (Stevens, J., dissenting in part).

shareholder in relation to corporate political expenditures.<sup>135</sup> The Majority's view that Congress may only regulate explicit *quid pro quo* arrangements ignores the fact that corruption or the appearance of corruption "operates along a spectrum," and selling access in exchange for campaign financing can be equally damaging to the political system and the public's view of corruption in Congress.<sup>136</sup> The current regime has resulted in members of Congress who will only meet with lobbyists who give them money, rather than listening to views from all sides on any given issue.<sup>137</sup> The Court's narrow reading of the government's anticorruption interest—that it is limited to clear *quid pro quo* corruption—makes this interest essentially useless in regulating, as "proving that a specific vote was exchanged for a specific expenditure has always been next to impossible."<sup>138</sup> This interpretation ignores the Government's interest in protecting the public's faith in its representatives and its government in general, for "a democracy cannot function effectively when its constituent members believe laws are being bought and sold."<sup>139</sup> The Court instead chooses not to show deference to Congress, who have first-hand experience with the corrupting effects of corporate expenditures, while providing "no clear rationale" for doing so.<sup>140</sup>

The Government's interest in preventing the distorting effects of corporate campaign expenditures is compelling as well, because very few natural persons have access to the amount of money maintained by a corporation. A corporation's primary goal is to be as profitable as possible, which causes it to "amass and deploy financial resources on a scale few natural persons can match."<sup>141</sup> Additionally, corporations must engage in the electoral process "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities," which leads them to advocate policies beneficial to themselves, but not always those beneficial to the country.<sup>142</sup> Corporations also "have no consciences, no beliefs, no feelings, no thoughts, no desires," and may be controlled by foreigners.<sup>143</sup> Finally, due to their deep pocketbooks, corporations may "grab up the prime broadcast slots on the eve of an

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135. *Citizens United*, 558 U.S. at 447 (Stevens, J., dissenting in part).

136. *Id.* at 448.

137. Megan Leonhardt, *A Trump Official Said He Only Listened to Lobbyists Who Gave Him Money. Here's Who Gave Him the Most*, TIME MAG., (Apr. 25, 2018), <http://time.com/money/5254233/mulvaney-listens-to-bank-lobbyist/>.

138. *Citizens United*, 558 U.S. at 455 (Stevens, J., dissenting in part).

139. *Id.* at 453.

140. *Id.* at 460.

141. *Id.* at 470.

142. *Id.*

143. *Id.* at 465-66.

election,” flooding the market with advocacy not correlated to the ideas of natural persons, and thereby marginalize the views of real people.<sup>144</sup> Due to these qualities of corporations, their electioneering creates a distorting effect on policies that Congress has a compelling interest in limiting.

Finally, the shareholders of a corporation foot the bill for the use of general treasury funds on political expenditures, which inevitably means that some shareholders’ money is “used to undermine their political convictions.”<sup>145</sup> This problem is eliminated with the statutory exception provided for PACs, ensuring that “those who pay for an electioneering communication actually support its contents.”<sup>146</sup> While this interest on its own is not sufficient to justify restrictions on corporate expenditures, it reinforces the Government’s anti-distortion interest by adding another reason to doubt that corporate political expenditures reflect actual public support for the political ideas espoused.<sup>147</sup>

These points emphasize why corporate campaign expenditures are more likely to impair government interests, and why restrictions on those expenditures are less likely to infringe on First Amendment freedoms: It is difficult to explain “who” is speaking through the corporation.<sup>148</sup> Simply put, corporations “are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”<sup>149</sup> Once *Citizens United* lifted restrictions on corporate campaign expenditures, aggregate limits remained the only restraint on money flowing into elections, until those too were struck down a year later.

#### **D. *McCutcheon v. Federal Election Commission* (2014)**

The final constitutional challenge to FECA attacked aggregate limits to campaign contributions in *McCutcheon v. Federal Election Commission*.<sup>150</sup> Aggregate limits restrict the amount of money a donor may contribute in total, while base limits restrict the amount of money a donor may contribute to a particular candidate.<sup>151</sup> Following the same reasoning as in *Citizens United*, the Court struck down aggregate limits to campaign contributions because Congress may not regulate “simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance

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144. *Citizens United*, 558 U.S. at 470 (Stevens, J., dissenting in part).

145. *Id.* at 475.

146. *Id.*

147. *Citizens United*, 558 U.S. at 478 (citing *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990)).

148. *Citizens United*, 558 U.S. at 466 (Stevens, J., dissenting in part).

149. *Id.*

150. 572 U.S. at 192.

151. *Id.*

the relative influence of others.”<sup>152</sup> The Court found that aggregate limits “do little, if anything” to prevent the circumvention of base limits to campaign contributions, and struck down aggregate limits as violative of the First Amendment.<sup>153</sup>

In striking down aggregate limits, the Court overturned *Buckley*, which found that the Government’s compelling interest in preventing corruption or the appearance of corruption was sufficient to justify the restrictions on aggregate contributions in a political cycle.<sup>154</sup> The Court held that *Buckley* “does not control here” with regard to the constitutionality of aggregate limits because *Buckley* “spent a total of three sentences analyzing that limit,” and “safeguards against circumvention have been considerably strengthened” since that decision.<sup>155</sup> The Court also relied on the fact that the First Amendment “safeguards an individual’s right to participate in the public debate through political expression,” though *Buckley* distinguished campaign contributions from campaign expenditures under the notion that contributions were more of an exercise of the right to associate, while expenditures exercised the right to express political beliefs.<sup>156</sup>

*McCutcheon* finds that aggregate limits “prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates,” and thereby impermissibly infringes on First Amendment protections.<sup>157</sup> While the *Buckley* Court characterized the aggregate limit as “quite a modest restraint upon protected political activity,” the *McCutcheon* Court disagreed, stating that a limit on the number of candidates to whom a donor may contribute money “is not a ‘modest restraint’ at all.”<sup>158</sup> The Court characterizes the Government’s interest in preventing corruption or its appearance as legitimate, seemingly downgraded from its characterization as compelling in *Buckley*.<sup>159</sup> But as in *Citizens United*, the Court takes the narrow view that the government may only target actual *quid pro quo* arrangements of contributions for votes.<sup>160</sup>

The Court finds that “spending money in connection with elections, but not in connection with an effort to control the exercise of an office holder’s official duties” does not give rise to the *quid pro quo* corruption that

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152. *McCutcheon*, 572 U.S. at 191.

153. *Id.* at 193.

154. *Id.* at 200.

155. *Id.*

156. *Id.* at 203.

157. *Id.* at 204.

158. *McCutcheon*, 572 U.S. at 204 (citing *Buckley*, 424 U.S. at 38).

159. *McCutcheon*, 572 U.S. at 207.

160. *Id.*

Congress may regulate.<sup>161</sup> This scope of regulatory power is functionally impractical in the real world because any *quid pro quo* agreement is nearly impossible to prove, and the sale of access for campaign donations can be just as corrupting and cause just as much disillusionment in voters as actual votes for contribution agreements. The Court focuses on the fact that FECA's aggregate limit would permit donating the base limit of \$5,200 to nine candidates, but not ten.<sup>162</sup> While this argument makes the limits seem arbitrary, it ignores the fact that having no limit at all makes it impossible to advance, as the Majority concedes, the Government's "legitimate interest" in preventing corruption or the appearance of corruption.<sup>163</sup> Simply put, the line must be drawn somewhere, and the Majority attacks the hard limit based on the fact that it is a hard limit, without showing alternatives that would effectively replace those aggregate limits.<sup>164</sup>

In his Dissent, Justice Breyer explains that while the expansive record compiled in *McConnell* did not turn up a single instance of *quid pro quo* corruption, it did reveal that enormous soft money contributions provided disproportionate access to lawmakers and the ability to influence legislation.<sup>165</sup> This form of corruption is exactly the type that the Majority's narrow definition of corruption or its appearance excludes, and is the type that Congress sought to prevent through FECA and BCRA. Aggregate limits serve to prevent corruption because there is "an indisputable link between generous political donations and opportunity after opportunity to make one's case directly to a Member of Congress."<sup>166</sup> The ruling in *McCutcheon* substitutes Judges' understandings of how the political process works for the understanding of Congress, overturns key precedent, and creates expansive loopholes in the law that "undermines, perhaps devastates, what remains of campaign finance reform."<sup>167</sup>

### III. Money as Speech in Current Congressional Elections

At this point, base contribution limits are the only campaign finance restrictions that have survived constitutional attack, which has led to an exponential increase in the amount of money spent on each national election. The disillusionment of voters that the Supreme Court dismissed as improbable has led to a rise in the popularity of candidates who refuse to

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161. *McCutcheon*, 572 U.S. at 208.

162. *Id.* at 210.

163. *Id.* at 207.

164. *McCutcheon*, 572 U.S. at 257-58 (Breyer, J., dissenting).

165. *McCutcheon*, 572 U.S. at 241 (Majority Opinion).

166. *Id.*

167. *McCutcheon*, 572 U.S. at 260-61 (Breyer, J., dissenting).

take corporate PAC money, because voters believe those candidates will represent them rather than the corporations who contributed to their campaigns.<sup>168</sup> One recent example is Congresswoman Alexandria Ocasio-Cortez, who defeated ten-term Congressman Joe Crowley in the 2018 midterm primary election despite being outraised by a 10-to-1 margin.<sup>169</sup> Ocasio-Cortez won without taking any “corporate lobbyist money,” with over 89,000 donations that averaged only \$20.86 per donation.<sup>170</sup> This message that “it’s not OK to put donors before your community” has resonated with voters due to the increasing feeling that members of Congress represent their donors rather than their constituents.<sup>171</sup>

This is not a baseless sentiment, as financial records have shown that 86% of contributions for some congressmen come from businesses.<sup>172</sup> When such a large percentage of the funds necessary to win reelection comes from corporations, it affects the votes of representatives in Congress. Those representatives are told by donors to pass bills beneficial to those donors “or don’t ever call me again.”<sup>173</sup> As a result, those representatives vote in favor of bills even if they would negatively affect a large number their constituents, because of the need to please their donor class—“i.e., corporate and wealthy America”—and to be able to raise the large sums of money required to win re-election.<sup>174</sup> Representatives vote how their donors want them to vote, rather than how their constituents want them to vote, because they need the “speech” in the form of independent expenditures protected by the First Amendment to win reelection. While not the explicit quid pro quo corruption agreements that the Supreme Court defined as within the government’s power to regulate, this form of corruption or at least the appearance of corruption is the reason that Congress passed FECA and BCRA.<sup>175</sup>

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168. Lee Drutman, *The Case for Cautious Optimism on Campaign Finance Reform*, VOX (Aug. 21, 2018, 1:50 PM), <https://www.vox.com/polyarchy/2018/8/21/17764362/campaign-finance-reform-optimism>.

169. Gregory Krieg, *A 28-Year-Old Democrat Socialist Just Ousted a Powerful, 10-Term Congressman in New York*, CNN (June 27, 2018, 2:34 AM), <https://www.cnn.com/2018/06/26/politics/alexandria-ocasio-cortez-joe-crowley-new-york-14-primary/index.html>.

170. Alexandria Ocasio-Cortez (@Ocasio2018), TWITTER (Oct. 18, 2018, 1:41 PM), <https://twitter.com/ocasio2018/status/1053023260068200448>.

171. Krieg, *supra* note 169.

172. Leonhardt, *supra* note 137.

173. Dylan Scott, *House Republican: My Donors Told Me to Pass the Tax Bill “or Don’t Ever Call Me Again”*, VOX (Nov. 7, 2017, 11:30 AM), <https://www.vox.com/policy-and-politics/2017/11/7/16618038/house-republicans-tax-bill-donors-chris-collins>.

174. *Id.*

175. *Buckley*, 424 U.S. at 26-27.

The skyrocketing amount of money required to win a congressional election has allowed donors to exercise more undue influence on members of Congress. Due to the Supreme Court's decisions in *Citizens United* and *McCutcheon*, nearly unlimited spending in elections means that members of Congress must spend much of their time "dialing for dollars."<sup>176</sup> The average cost of winning a Senate seat in 2016 was \$10.4 million, while a House seat cost the winner \$1.4 million.<sup>177</sup> This means that Senators must raise \$4,748 per day from the day they are sworn in, while members of the House must raise \$1,917 per day in order to win reelection. These numbers are only higher in competitive states and districts, and as a result, newly elected members of Congress must spend at last thirty hours per week calling donors to raise money, which takes time away from legislating for the good of their constituents, which they were elected to do.<sup>178</sup> *Citizens United* is a direct cause of this, as the hours spent fundraising per day jumped from an hour and a half to three or four hours following the decision.<sup>179</sup>

Due to the enormous price tag associated with congressional campaigns, it is no wonder that so many candidates accept the large paychecks offered by corporations, rather than spending more time on the phone soliciting donations. While many democratic candidates (at least 170 candidates in the 2018 midterm election) have refused to take corporate PAC money, they are fighting an uphill battle against those who do take corporate PAC money in exchange for access to those candidates once they are elected for lobbying purposes.<sup>180</sup> Until the exorbitant amount of money spent on campaigns is controlled, voters will continue to believe the system is corrupt, and that their "vote does not matter because of the influence that wealthy individuals and corporations have on the electoral process."<sup>181</sup> A November 2015 poll showed that 93% of Democrats and 88% of Republicans said the government "tended 'very' or 'somewhat well' to the interests of the wealthy," while 90% of Democrats and 86% of Republicans said the government did the same for big corporations.<sup>182</sup>

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176. Norah O'Donnell, *Are Members of Congress Becoming Telemarketers?*, CBS NEWS (Apr. 24, 2016), <https://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/>.

177. Soo Rin Kim, *The Price of Winning Just Got Higher, Especially in the Senate*, OPEN SECRETS (Nov. 9, 2016), <https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/>.

178. O'Donnell, *supra* note 176.

179. *Id.*

180. Drutman, *supra* note 168.

181. *Id.*

182. Harold Meyerson, *Americans See a Government of, by and for the Rich*, WASH. POST (Nov. 18, 2015), [https://www.washingtonpost.com/opinions/americans-see-a-government-of-by-and-for-the-rich/2015/11/18/8c8e001a-8e19-11e5-acff-673ae92ddd2b\\_story.html](https://www.washingtonpost.com/opinions/americans-see-a-government-of-by-and-for-the-rich/2015/11/18/8c8e001a-8e19-11e5-acff-673ae92ddd2b_story.html).



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#### IV. Fixing the Problem: How to Return Power to Real, Living Constituents

##### A. United States Supreme Court: Constitutional Limits and Disclosure Requirements

Perhaps the most important arena where a change in sentiment towards campaign finance should occur is in the jurisprudence of the Supreme Court of the United States. Freedom of speech, at least in the area of political contributions and expenditures, must be reclaimed for natural persons alone, and not for corporate entities. Without changing the permissibility of certain campaign financing regulations, any legitimate attempts at reform will be struck down on constitutional grounds. The combination of *Citizens United* and *McCutcheon* appears to leave few avenues of acceptable campaign finance reform for the current Supreme Court. The most likely avenue for comprehensive campaign finance reform would be a return in thinking by the Court to that of *Buckley*, *Austin v. Michigan Chamber of Commerce*, and *McConnell*.<sup>183</sup>

In *Austin*, the Court followed the reasoning of *Buckley* and held that it was constitutional to ban corporations from making independent campaign expenditures.<sup>184</sup> The *Austin* Court upheld the restriction on corporate campaign expenditures based on the same government interests of anticorruption, anti-distortion, and shareholder protection, which the court later found were not sufficiently compelling or narrowly tailored in *Citizens United*.<sup>185</sup>

The Supreme Court has ruled favorably on some issues relating to campaign finance regulations, such as ordering disclosure for donations to “dark money” political nonprofit groups, which previously were not required to disclose the identity of donors.<sup>186</sup> These dark money nonprofits are organized as Internal Revenue Code Section 501(c)(4) social welfare or 501(c)(6) business associations, and previously did not have to disclose their donors as long as less than 50% of their donations went to political contributions or expenditures.<sup>187</sup> However, the Court has consistently upheld disclosure laws relating to campaign financing, only striking down

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183. *Buckley*, 424 U.S. 1 (1976); *Austin*, 494 U.S. 652 (1990); *McConnell*, 540 U.S. 93 (2003).

184. *Austin*, 494 U.S. at 668.

185. *Id.* at 660.

186. Peter Overby, *Supreme Court Orders Disclosure For Dark Money, As New Report Unveils Some Donors*, NAT'L PUB. RADIO (Sept. 18, 2018, 5:01 PM), <https://www.npr.org/2018/09/18/648722358/supreme-court-orders-disclosure-for-dark-money-as-new-report-unveils-some-donors>.

187. *Id.*; I.R.C. § 501(c)(4); I.R.C. § 501(c)(6).

restrictions on contributions and expenditures due to their First Amendment implications.<sup>188</sup>

There seems to be little hope for a return to the thinking of *Buckley*, *Austin*, and *McConnell* in the near future as the two newest Supreme Court Justices, Justice Gorsuch and Justice Kavanaugh, both support the rationale of *Citizens United* and *McCutcheon*.<sup>189</sup> Justice Gorsuch wrote a Concurring Opinion in *Riddle v. Hickenlooper*, arguing that contributing to political campaigns implicates the basic constitutional freedoms to speak and associate, and should not be infringed upon.<sup>190</sup> In a memo written in 2002, Justice Kavanaugh argued that the way to fix the campaign finance system is “to eliminate contribution limits,” rather than regulating the overall amount of money spent independently.<sup>191</sup> While he believes contribution limits should be struck down, Justice Kavanaugh upheld a prohibition on foreign participation in United States elections because “foreign citizens do not have a constitutional right to participate in” United States elections.<sup>192</sup> Therefore, it appears unlikely that *Citizens United* will be overturned by the current Supreme Court, at least until one of the remaining members of the *Citizens United* Majority is replaced, and thus, advocates for campaign finance reform must look elsewhere in search of means for reform.

## B. Congressional Legislation

Another avenue for campaign finance reform is through congressional legislation that attempts to comply with the rulings of the Supreme Court. Democratic Speaker of the House of Representatives Nancy Pelosi stated before the 2018 midterm elections that a Democratic House would push for changes to campaign finance laws.<sup>193</sup> To follow through on this statement, House Democrats unveiled the first bill they planned to pass when seated on January 3, 2019, which includes provisions requiring “all political organizations to disclose donors and an overhaul of the Federal Election

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188. See *Buckley*, 424 U.S. 1; *McConnell*, 540 U.S. 93.

189. Justin Fox, *How Money Became Speech*, BLOOMBERG (Sept. 6, 2018, 9:48 AM), <https://www.bloomberg.com/opinion/articles/2018-09-06/brett-kavanaugh-and-the-history-of-campaign-spending-law>; Ciara Torres-Spelliscy, *Neil Gorsuch Understands Campaign Finance—And That’s The Problem*, BRENNAN CENTER FOR JUSTICE (Feb. 3, 2017), <https://www.brennancenter.org/blog/neil-gorsuch-understands-campaign-finance-%E2%80%93-and-that%E2%80%99s-problem>.

190. 742 F.3d 922, 930 (10th Cir. 2014) (Gorsuch, J., concurring); Torres-Spelliscy, *supra* note 189.

191. Fox, *supra* note 189.

192. *Bluman v. Fed. Elec. Comm’n*, 800 F.Supp.2d 281, 288 (D.C. Cir. 2011).

193. *Nancy Pelosi: I’m Confident Democrats Will Retake the House*, ASSOCIATED PRESS (Oct. 16, 2018), <https://apnews.com/7417eaae2163475ea289a29373d2de18>.

Commission.<sup>194</sup> As promised, the House of Representatives introduced the “For the People Act” on January 3, 2019, and passed the bill on March 8, 2019.<sup>195</sup> While this bill likely will not even receive a vote in the Senate, it shows that Democrats are focused on addressing the issue, and may include parts of the bill “as policy riders in government spending bills or other large pieces of legislation.”<sup>196</sup>

Because the Supreme Court has made clear that restrictions on contributions and expenditures are unconstitutional under the First Amendment, Democrats are promising to pass a “small-donor campaign finance matching system” to help bolster the power of less wealthy individuals.<sup>197</sup> This system would match small-dollar contributions six-to-one with public money in order to incentivize members of Congress to seek funds from their constituents rather than corporations.<sup>198</sup> Some caution is warranted in believing these bills will fix the campaign finance system, as campaign finance reform is “easy to promise and hard to deliver.”<sup>199</sup>

Oponents of a public financing system argue they should not be forced to pay for the campaigns of politicians they do not support.<sup>200</sup> However, this argument rings hollow—the Court found this argument unconvincing when it was made in favor of the Government’s interest in protecting dissenting shareholders in *Citizens United*.<sup>201</sup> The idea behind the bill is to “fight and end the dominance of big money in politics,” and to promote the issue on the national stage, even if it will be rejected by Senate Majority Leader Mitch McConnell, who has long been outspoken against efforts of campaign finance reform.<sup>202</sup> Any congressional legislation would have to survive constitutional challenges however, which will likely entail an uphill battle with the current Supreme Court.

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194. Maggie Severns, *First Bill for New House Democratic Majority: Campaign Finance, Ethics Reform*, POLITICO (Nov. 30, 2018, 11:12 AM), <https://www.politico.com/story/2018/11/30/house-democrats-campaign-finance-ethics-laws-1034657>.

195. H.R. 1, 116th Cong. § 1 (2019).

196. Severns, *supra* note 194.

197. Drutman, *supra* note 168.

198. *Id.*

199. *Id.*

200. Akela Lacy, *In Democrats’ First Bill, There’s a Quiet Push to Make Public Campaign Finance a Reality*, THE INTERCEPT (Dec. 2, 2018, 5:23 AM), <https://theintercept.com/2018/12/02/public-campaign-finance-hr1/>.

201. 558 U.S. 310, 361 (2010).

202. Lacy, *supra* note 200.

### C. Constitutional Amendment

The most difficult method of enacting campaign finance reform, but also the only way that does not require a change in opinion by the Supreme Court, is to pass a constitutional amendment reversing *Citizens United* and *McCutcheon*. A constitutional amendment must receive votes by “two thirds of both houses,” and must be “ratified by the legislatures of three fourths of the several states.”<sup>203</sup> Alternatively, a constitutional convention may be called for by two-thirds of the state legislatures, and any amendment that is ratified by three-fourths of the state legislatures is passed.<sup>204</sup> However, no constitutional amendment has been passed since 1992, when the 27th Amendment, requiring any pay changes for Congress to take effect after the next election, was ratified.<sup>205</sup>

This sounds like an insurmountable challenge in today’s hyper-polarized political world, but recent studies have shown that three-fourths of survey respondents, including 66% of Republicans and 85% of Democrats, support a constitutional amendment reversing *Citizens United*.<sup>206</sup> The same study shows that 88% of Americans “want to reduce the influence large campaign donors wield over lawmakers at a time when a single congressional election may cost tens of millions of dollars.”<sup>207</sup> Additionally, 60% of survey respondents viewed the reduction of influence of big campaign donors as “very important.”<sup>208</sup> Less than half of those surveyed considered an anti-*Citizens United* amendment to be an attack on Free Speech Rights and more than four out of five agreed with the statement that “the rich should not have more influence just because they have more money.”<sup>209</sup>

This public support did not appear following the decision of *Citizens United* in 2010—since at least 2001, more than three-fourths of Americans continue to believe there should be tighter limits on political campaign

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203. U.S. CONST. art. V.

204. U.S. CONST. art. V.

205. U.S. CONST. amend. XXVII.

206. Ashley Balcerzak, *Study: Most Americans Want to Kill ‘Citizens United’ with Constitutional Amendment*, CENTER FOR PUB. INTEGRITY (May 15, 2018, 12:04 PM), <https://publicintegrity.org/federal-politics/study-most-americans-want-to-kill-citizens-united-with-constitutional-amendment/>.

207. *Id.*

208. *Id.*

209. *Id.*

contributions.<sup>210</sup> This vast public support for the “most drastic step that can be taken” reflects public frustration that elected representatives are influenced by major donors rather than by the needs of their constituents.<sup>211</sup>

There have been several amendments proposed, but the “We The People Amendment” is the one that has garnered the most support, with sixty-five cosponsors in the House of Representatives.<sup>212</sup> This amendment would reserve the rights protected by the Constitution for “natural persons only,” and enable federal, state, and local governments to regulate political contributions and expenditures in order to ensure all citizens have access to the political process while preventing any person from gaining substantially more influence than others due to their wealth.<sup>213</sup> Critics of these types of proposed amendments argue they are not sufficiently focused on campaign finance because they would strip corporations off all constitutional protections, rather than just First Amendment speech protections.<sup>214</sup> These criticisms are justified as any constitutional amendment must be careful not to go too far and risk protecting outright regulation of any political speech.<sup>215</sup> The overwhelming majority of the public supports campaign finance reform, however, which makes a constitutional amendment much more likely than it would appear at first glance.

### Conclusion

Congress recognized the corrupting effects of money in politics early on and passed regulations in an attempt to stem the influence of big donors on politicians with the Tillman Act of 1907, FECA, and BCRA. These regulations were effective, but the Supreme Court’s decisions in *Citizens United* and *McCutcheon*, overturning *Buckley*, *Austin*, and *McConnell*, have led to a flood of money into political campaigns, and disillusionment among voters about their actual influence on government and their political representatives. Large corporate donations buy access to legislators while

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210. Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RES. CENTER (May 8, 2018), <http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>; David W. Moore, *Widespread Public Support for Campaign Finance Reform*, GALLUP (Mar. 20, 2001), <https://news.gallup.com/poll/1885/widespread-public-support-campaign-finance-reform.aspx>.

211. Balcerzak, *supra* note 206.

212. H.R.J. Res. 48, 115th Cong. §1 (2017).

213. *Id.*

214. Mark Schmitt, *The Wrong Way to Fix Citizens United*, NEW REPUBLIC (Jan. 19, 2012), <https://newrepublic.com/article/99833/constitutional-amendment-citizens-united>.

215. Mike Kyvik, *Constitutional Amendment Could Vastly Improve Campaign Finance*, THE HILL (Apr. 26, 2017, 6:28 PM), <https://thehill.com/opinion/letters/330777-constitutional-amendment-could-vastly-improve-campaign-finance>.

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the Supreme Court has ruled that Congress may only target explicit *quid pro quo* arrangements of contributions or expenditures in exchange for votes. The current campaign finance system results in members of Congress spending multiple hours a day fundraising rather than legislating, and in voters clamoring politicians to “drain the swamp” and fight corruption.<sup>216</sup>

Barring a change in the ideological makeup of the Supreme Court, a ruling overturning *Citizens United* and returning to the rationale of *Buckley* and *McConnell*, permitting regulating to prevent corruption or the appearance of corruption, seems unlikely. Democratic members of the House of Representatives have promised to pass campaign finance reform by bolstering the influence of smaller contributions, but these bills are unlikely to become law unless Democrats take control of the Senate and Presidency at the same time in the future. These potential laws would also be subject to constitutional challenge, and whether they would survive that challenge remains to be seen.

A constitutional amendment to overturn *Citizens United* and give political influence back to natural persons would go a long way to solve problems with campaign financing and voter disillusionment. Additionally, an amendment would return voting power to the people because candidates could no longer win elections simply by relying on large expenditures from corporations. The high bar required to pass such an amendment would be difficult to reach in today’s hyper-polarized climate however, despite support by more than three-fourths of Americans. Ultimately, accomplishing effective campaign finance reform will require immense effort and political capital on the part of elected representatives, but is absolutely worth the fight to protect the foundational idea of our democracy: that the government is established by the People and for the People.

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216. Trump, *supra* note 5.

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