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Money Power in Politics

Jonathan Peterson Fisher
Bard College, jf0113@bard.edu

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By JP Fisher

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Advisor: David Kettler

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Introduction

It seems as if today money and politics go hand in hand. One cannot exist without the other. No citizens, no matter how virtuous, can run for public office in a federal election and succeed without financing by political contributors. The issue that political scientists and concerned citizens alike have with money in politics is not its existence, it is its effects on how campaigns are run and policy is formed. Critics have coined the political term money power to describe the use financial means to influence politics. Michael Bailey of Georgetown University Law School laid out the dilemma of money power in politics when he writes, “On its face, campaign spending is a constitutionally protected right vital to informing and mobilizing ordinary citizens. On the flip side, privately financed campaigns may induce politicians to favor wealthy special interests at the expense of those very same ordinary citizens.”[1] This is money power: it is the influence money has over political policy and elections, and it is expanding. Money power in politics has grown to levels where we must reevaluate how we conduct elections given the costs and benefits of the skyrocketing funds provided by private contributors, especially in a time of ever greater economic inequality.

In his article *Money and Power*, David Baldwin contemplates the complicated nature of money and power, specifically with relations to political power. He draws a connection between studying money and studying politics but shows while the two seem to follow each other, the two studies are not the same. On the complicated nature of power in political contexts he writes, “How lucky are the economists to have money, while our nearest equivalent is that slippery

[1] Michael Bailey, “The Two Sides of Money in Politics: A Synthesis and Framework,” (Election Law Journal, 2004), 653.

concept of power."[2] While money has an increasingly large influence on political power, analysis of its impact is not as precise as dollar figures. It is a more vague, grey-area type of influence that has grown more obscure as regulatory acts have been put in place. The issue with finding these influences, Baldwin writes, is "the media of political exchange, however, seem to be much more limited in scope and domain than the media of economic exchange."[3] This leaves us in an area where "there is no "general purpose" currency that can be used to exercise political power of generalized scope and domain."[4] We are left without a standard to investigate beyond simply the measure of dollars invested into campaigns.

This physical disconnect between political power and fiscal exchange has turned off a variety of recent legislative attempts to restrict the ways in which campaign finance efforts influence elections and policies as a result. However, arguments like Baldwin's that dismiss connections between campaign funding and policy effects because they are not easily transparent, have created gaps in political awareness and ability to prevent these effects of money in politics. Because the study of political power is not the precise examination the way finance is, money power analysis is somewhere between the explicit nature of fiscal figures and the arbitrary ideal of political power. With money power being without a true unit of measurement, we must study the results of legislation and judicial actions both protecting and restricting money power in politics. Through this study, I will show that the expansion of financial power in political systems is not just the natural path of democratic society. Instead, it is a result of active decisions by governing bodies to restrict regulation and promote money power during election cycles. Political power may not be determined in terms of dollar signs and

[2] David Baldwin, "Money and Power," (The Journal of Politics, Vol. 33, 1971), 578.
[3] Ibid., 599.
[4] Ibid.

bank transactions, but the way in which elections are conducted have relied on government intervention and regulatory policies or lack of campaign finance reform.

Identifying Corporate Influence: The 17th Amendment

The Merriam-Webster Dictionary defines politics as “the activities, actions, and policies that are used to gain and hold power in a government or to influence a government.”[5] In every form of politics there is a group with power and those struggling to gain some level of influence. The study of politics is centered on this struggle to gain and hold power over other groups who strive to take authority. With the development of massive corporations came a flood of funds into politics as big business looked to help politicians who would allow them to succeed the most. This concept has fundamentally influenced who holds power in government. Since the Roosevelt Administration in 1910, there has been a wide array of legislation and federal court decisions that target the increase in corporate funds to prevent corrupt outside influence from the private sector. None of these were able to directly restrict money power the way the establishment of 17th Amendment did.

The 17th Amendment to the United States Constitution was passed by Congress on May 12, 1912 and ratified by the states on April 8, 1913. It overrides Article 1, Section 3 of the Constitution that previously stated that senators were to be chosen by state legislatures. The amendment put into place the system we have today in which the state citizens elect two senators from each state for a maximum of six years per term. It was passed largely to combat the ability of the rich to buy a place in the United States government. Previously the Senate was known to some as “the millionaires’ club” due to senators being elected from each state’s legislature who were highly influenced by money power. They would essentially sell senatorial positions to the highest bidder or to those who would bring the most money to their state via business and state revenue. In this circumstance, money power reigned supreme as one of the highest offices in the

[5] *Merriam-Webster Dictionary,* Merriam-webster.com/define/politics.

country that could be bought based on one’s corporate connections and wealth.

The leader who pushed to reform this corrupt practice was William Jennings Bryan. Bryan, who would later go on to become Secretary of State and even run for president, served as a member of the House, and actively campaigned for financial reform in the Senate both through the elimination of selling Senate seats and combatting the normalized rationale of giving Senate seats away in return for moving corporations to the state. He often argued on the House floor for the ratification of an amendment that would ensure politicians nominated purely for their financial profile would not be elected to the Senate, but few could agree on what the proper process would look like. The major issue he faced, however, was the fact that an amendment to the Constitution requires two thirds of both houses of Congress to be ratified. Seeing as the senators in power would not want to change the system that put them into office, he hit a wall.

The House of Representatives had proposed and passed a number of potential resolutions in the form of constitutional amendments, but were continually unsuccessful in the Senate during the 1890’s. Each time the House passed a new, modified version of the amendment the Senators refused to vote all-together, fearing a vote would give the amendment legitimacy. Once it was clear that the senators in power would never give up their ability to buy a ticket to the millionaires’ club, those like Bryan who supported the amendment sought a new route that had never been taken. Article V of the Constitution says Congress must call a constitutional convention for the ratification of new amendments should two thirds of state legislatures appeal for one. The House focused on getting state legislatures to apply and as they approached the two thirds needed, the Senate was put under pressure from the public and the House to hold a vote.

Meanwhile, a particularly scandalous display of the influence of money power was taking center stage at the nomination of Illinois Senator William Lorimer and forced Congress to investigate further. Lorimer was known for climbing from extreme poverty to extravagant prestige and wealth. He acquired his wealth through large scale brick manufacturing and operational real estate businesses. These real estate inquiries allowed him to tap into political power that others without large areas of land in Illinois would not have. By promising to bring the entirety of his businesses and revenue to the state, he used his wealth and connections to gain a spot in the House as a Republican from 1895 to 1901 and then again from 1903 to 1909, where he was known as the "blond boss". As his political aspirations grew Lorimer set his sights on becoming a senator. On June 18, 1909, he was nominated as a Senator of Illinois and given a seat at the table. However, his nomination was contested by those who supported the amendment being proposed in the House. Everything from bribery to electioneering misconduct allegations were in the air. The *Chicago Tribune* was particularly critical of him and played a key role in circulating these accusations. They reported on several state officials that were allegedly paid to secure his seat in the Senate, "Including an admission of a state representative he had received $1,000."[6]

Finally, a year after his nomination in 1910, Lorimer appealed to Senate and asked his colleagues to investigate, confident they would expel all accusations. The investigative committee was known as the Committee on Privileges and Elections and was officially underway on June 20, 1910, almost exactly a year after he first took his seat in the Senate. This first investigation concluded six months later on December 21st and resulted in the committee cleared Lorimer of any corruption and misconduct during his nomination. The Senate ruled that for a such an election (within the state legislature) to be invalidated it required proof of an exchange of money for votes. In other words, they could only take away a Senate nomination if

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[6] David G. Savage, "Early 1900s Illinois Scandal Led to Direct Election of US Senators," (*Chicago Tribune*, 2008).

there is proof of *quid pro quo* exchanges of goods for votes. While the *Chicago Tribune* broadcasted that originally four members of the state legislature came out and admitted they were directly bribed by Lorimer for their votes, the officials' testimonies were retracted and changed to deny the claims entirely by the end of the investigation. These retractions left the investigative committee no choice but rule in favor of Lorimer as the proof that led to the start of the investigation, no longer existed.

One fellow Republican member of the Senate refused to submit to the majority decision and even entered a minority opinion to the floor of the Senate. In his report, Albert J. Beveridge of Indiana, argued that there was no way Lorimer should have a place in government after four officials outright told the committee on several occasions that they were bribed, regardless of their withdrawals. Furthermore, Beveridge notes that they were found to have unusual sums of money in bills of large denominations directly after the briberies were said to have taken place.[7] Democrats and Republicans united around getting corrupt officials like William Lorimer out of office. The peak of this upheaval of dismay was when President Theodore Roosevelt refused to be seated with the Senator at an event in Chicago. With widespread disapproval of the dropping of incriminating testimonies, constituencies pushed for representatives to take action.

This nationwide disgust for Lorimer and the corrupt abuse of money power in Senate elections led to Republican Senator Robert M. LaFollette of Wisconsin to request the Senate to reopen the case into Lorimer's election. He argued that there was proof this time that Lorimer had given over $100,000 in bribes during his nomination.[8] With a newfound alignment of Senate liberals and conservatives rallying behind the investigation, the Privileges and Elections

[7] "The Election Case of William Lorimer of Illinois," (USSenate.gov, 1910; 1912), U.S. Senate.
[8] Ibid.

Committee opened second investigation into Lorimer's nomination. After a gruesome, yearlong examination, which contained over 180 witness testimonies, the committee found "conclusively that at least ten of the votes cast for Lorimer were corruptly obtained."[9] His election was invalidated and the state legislature elected a new Senator to fill his seat.

This kind of unification of the Senate against the corporate influence in politics, coupled with the attention of the American public and the threat of a constitutional convention, was just the momentum the House needed to push through a new amendment that would reform the system to ensure that cases like Lorimer's to not occur again. It became impossible for the Senate not to hold a vote on the proposed amendment after invalidating a Senate nomination due to bribery charges. Proposed in 1912 and adopted in 1913, the House and Senate finally agreed to pass the 17th Amendment with above the needed two thirds vote. With nearly two thirds of the states already petitioning for a constitutional convention the amendment was ratified by the states and Senators officially became elected by the people of their state to six year terms rather than adhering to only the state legislatures.

The 17th Amendment is the first time in American politics where Congress successfully took a stand against private wealth influencing politics by creating legislation that is still in effect today, nearly over 100 years later. With those who attain power through financial means actively fighting reform to limit money power, it becomes extremely difficult to make any long-lasting change in the face of opposition. Before I move forward to explain more modern struggles of determining how to approach the influence of wealth in politics, it is important to view how Congress not only was able to pass laws to prevent corruption, but also accomplish one of the hardest tasks in American politics: the ratification of a constitutional amendment. It is essential

[9] The Election Case of William Lorimer of Illinois," (USSenate.gov, 1910; 1912), U.S. Senate.

to keep in mind that these triumphs over the strength of money in politics are achievable, even in the face of a nomination system that was built for the exploitation of money power.

The FECA and Establishment of the FEC

Studying money power through sequences of legislation acts and judicial reviews is key to understanding the effectiveness and capabilities of campaign finance reform. However, it is worth keeping in mind that the struggle of money power, particularly corporate power, has a long history before the major government actions that I will discuss. Much of the history of corporate political power remains in the story of its struggle with labor power. From this conflict came the strengthening of unions which used their popular support to lobby for legislative changes that political scientists study today. While I am unable delve into the long historic development of labor union power, it is important to also understand that the foundation of corporate regulations lies within the original disputes between labor and corporate management.

Struggles against the authority of money power dominated the industrial boom of the early to mid-1900's. United States labor unions strengthened significantly as they became a major countermeasure to the employer advantage over the employee. The heart of the fight came with the National Labor Relations Act of 1935 (NLRA) which hoped to put the government behind the labor movement in order to check corporate power. Though only "13.2% of nonagricultural labor force participants were members of labor organizations" in 1935, most of these workers were the county's skilled labor that was most difficult to replace. [10] The idea was by rallying the government behind these skilled workers, labor power would be able to counteract growths in corporate power. The real effect of the act though was the unification of corporate interests to fight labor unions tooth and nail. They sought to find ways to preserve corporate power from a government supported labor movement. The first step was making

[10] Charles Craver, "The National Labor Relations Act at 75: In Need of a Heart Transplant," (Hofstra Labor and Employment Law Journal, Vol. 27, 2010), 311.

corporations and unions equal in the eyes of the government, essentially fight back against the NLRA's intention of putting the government on the side of labor.

The Labor Management Relations Act, also known as the Taft-Hartley Act of 1947, set a precedent of regulating both corporations and unions in the same way when it came to campaign finance reform. It barred both types of organizations from making contributions and expenditures to federal elections. In the Federal Election Committee's "Thirty Year Report", they describe the act's goals as being: "To limit contributions to ensure that wealthy individuals and special interest groups did not have a disproportionate influence on federal elections; prohibit certain sources of funds for federal campaign purposes; control campaign spending, which tends to fuel reliance on contributors and fundraisers; require public disclosure of campaign finances to deter abuse and to educate the electorate."[11]

In terms of political struggle, the Taft-Hartley Act focused on taking the power of influence away from unions as they exposed them to the same guidelines as corporations. The act outlines the reasoning for this change as "certain practices by some labor organizations, their officers, and members, have the intent or the necessary effect of burdening or obstructing commerce through strikes and other forms of industrial unrest."[12] Jerome Wohlmuth and Rhoda Krupka of the *Maryland Law Review* write in their article "The Taft-Hartley Act and Collective Bargaining" that the act was an attempt to "restrict the powers of labor" by making sure "nearly all phases of the collective bargaining process have been placed under extensive government regulation."[13] The government that 12 years earlier was seen as being for labor, was now taking a stance that labor and money power struggles should be on an even playing field.

[11] "Federal Election Commission Thirty Year Report," (FEC, September 2005), 4.
[12] Taft-Hartley Act of 1947
[13] Wohlmuth, Krupka, "The Taft-Hartley Act and Collective Bargaining," (Maryland Law Review, 1948), 2.

While the Taft-Hartley Act labeled corporations and unions as equals in the eyes of regulations, it left a flaw in the law's ability to enforce regulations on the way private sector funds influenced public elections from both corporations and unions. This was due to a loophole which included a major provision that did not apply regulations on groups that were not located in two or more states. This meant that as long as corporations and unions held different organizations in each state they could avoid the act all together. This loophole was most easily exposed by corporations who can use capital to create funds in multiple states. Meanwhile, unions who do not have the same level of funding rely on worker movements to spread influence to multiple states. Its second loophole includes a provision that allowed candidates to avoid spending and fundraising limits by claiming they have "no knowledge of spending on their behalf"[14] under the Federal Corrupt Practices Act of 1925 which stated that candidates could not be held responsible for spending violations outside of their campaign if they had no knowledge of the violations. Considering this gap, unregulated funding both private campaign efforts were not the responsibility of the candidate running for office as long as there was a lack of proof of their knowledge, which made it impossible to hold candidates to account for unlawful campaigning without undeniable proof of knowledge of the misconduct. The act is known for targeting unions by forcing them to submit to the same regulations as corporations. Additionally it gave corporations an even larger advantage because organizations with large treasury funds were able to span their agency across multiple states to avoid the act entirely. Wohlmuth and Krupka call this the "crux" of the act and argue that while it "restricts the powers of labor,"[15] it leaves money power a way out through spending heights unattainable by anyone other than a large corporation.

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[14] "Federal Election Commission Thirty Year Report," (FEC, September 2005), 4.
[15] Wohlmuth, Krupka, "The Taft-Hartley Act and Collective Bargaining," (Maryland Law Review, 1948), 2.

Lack of ability to enforce regulations eventually led to the creation of the Federal Election Campaign Act of 1971 (FECA). Originally the act's goal was to promote public disclosure. The FECA expanded campaign finance law to include the full reporting of campaign spending as well as outside expenditures. Under the previous legislation, the electorate was left in the dark as far as financial support of a candidate outside of the campaign. The goal of this expansion was to provide more transparency and inform the electorate. Congress believed that by allowing voters to see where campaign funding came from, they would be better informed on candidate loyalty and prioritization. This logic links back to Bailey's argument of candidates aligning themselves with donor organizations. Without the assumption that candidates change their policy based on contribution organization, then disclosure of campaign funding has no purpose. In promoting transparency, they also acted to eliminate the one-state loophole, ensuring all corporations and unions would be included in the regulatory laws regardless of how few states the group operated in.

James Sample of Hofstra University School of Law, wrote in the Nebraska Law Review pointing out the original FECA was an extension of a political movement started by Theodore Roosevelt in 1907. While nearly 70 years after his presidency, the act carried on the spirit of Roosevelt's State of the Union address when he warned Congress and the nation to "hamper an unscrupulous man of unlimited means from buying his way into office." He called for "an appropriation for the proper and legitimate expenses" of campaign expenditures.[16] Sample explains that the FECA laid out the groundwork for a Matching Funds system that replaced privately raised expenditures from large contributors with public fundraising in which the state

[16] President Theodore Roosevelt, "Seventh Annual Message," (December 3, 1907).

matches smaller donations from disclosed donors.[17] Here we see Congress passing legislation in an effort to heed the warning of Roosevelt and limit the ability of the "unscrupulous man of unlimited means" from influencing politics by funding campaign efforts. Sample goes on to write that he sees "President Roosevelt's campaign financing proposal was finally brought to life in the form of the 1971 Revenue Act and the FECA."[18] Directly after its implementation, the Watergate Scandal would prove the FECA to be necessary.

While the 1972 presidential election could have been remembered for the largest landslide victory in this history of the United States, with Republican Richard Nixon only losing Massachusetts and the District of Columbia, it will instead be remembered for the largest case of political corruption in modern American history. The bid for the 38th presidency came down to a battle between incumbent President Nixon and his Democrat challenger George McGovern. McGovern failed to come close to Nixon's popularity, but he will still be remembered not just as a challenger, but as the victim of a break in at the Democratic headquarters at the Watergate Hotel in Washington D.C. Five men who worked for the Nixon reelection committee, the Committee to Reelect the President (CREEP), and authorized by the Nixon Administration, were caught breaking into the complex in an effort to steal political information and tapes on June 17, 1972. Through the testimonies of White House Staff members, the scandal was exposed extending beyond just stealing political documents. It resulted in Nixon being charged with three articles of impeachment for "obstruction of justice after he refused to release White House tape recordings that contained crucial information regarding the break in."[19] Campaign investigators found links to a scandal beyond just the burglary, with evidence of independent corporation

[17] James Sample, "The Last Rites of Public Campaign Financing," (*Nebraska Law Review,* 2014) 369.
[18] Ibid. 369.
[19] "This Day in History: Nixon Charged with First of Three Articles of Impeachment," (History.com).

donations being received by the Nixon Administration and their affiliate committees.

The fear of corruption sparked by Watergate, coupled with protests for active reform of political finances, led to the 1974 amendments to the Federal Election Campaign Act (FECA). While the original act focused on limiting contributions from individuals directly to federal campaigns for fear of wealthy individuals being able to purchase political favors straight from promising politicians, the amendment added a provision for limitations to be extended not just to direct donations to candidates but also contributions to political action committees (PAC). The addition was largely because of the nationwide perception that PAC money directly influenced the political decision of the Nixon administration. Scholars and journalists like CNN political correspondent John Blake view them as a "series of campaign finance reforms designed to restore the country's faith in government." [20] This major amendment to the FECA allows for the expansion of campaign finance regulations to go beyond the public sphere, and into privately spent funds that are entirely independent of public campaigns.

But the 1974 Congress feared that the amendment would not be enforced as they saw how difficult just mandated transparency was under the Taft-Hartley Act. As a solution, Congress created the Federal Election Commission (FEC), a committee that oversaw implementing the new regulatory changes to make sure that new amendment changes would be enforced effectively. Kirk Nahra wrote in the Fordham Law Review that the FECA Amendments of 1974 "represented a comprehensive regulatory scheme designed to remedy the flaws in the campaign process highlighted by Watergate."[21] The establishment of the FEC successfully accomplished massive increases in corporate and union political expenditure disclosures and

[20] John Blake. "Forgetting a Key Lesson from Watergate," (CNN Politics, February 4, 2012).
[21] Kirk Nahra, "Political Parties and the Campaign Finance Laws Dilemmas, Concerns and Opportunities," (Fordham Law Review, Vol 56, 1987), 54

transparency. The FEC found, "In 1968, still under the old law, House and Senate candidates reported spending $8.5 million, while in 1972, after the passage of the FECA, spending reported by Congressional candidates jumped to $88.9 million."[22] This huge discrepancy in campaign finance transparency confirmed the establishment of the FEC to be necessary to enforce disclosure regulations.

According to the FEC website, its original intent was "to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections."[23] Its goal was to specifically monitor and regulate contributions for political parties and PACs in order to provide some level of security that money power was not influencing political agendas. Nahra claims the regulations were needed as there was a "strong public sentiment favoring a massive overhaul of the nation's campaign financing process."[24] Still in existence today, the autonomous commission was not just given the power to regulate and oversee campaign finances, but Congress also bestowed upon them the ability to write new regulations as they saw fit within the limits of the law. This power, combined with their ability to delve into political committees that were considered private, sparked controversy and inspired challenge from those who saw it as an expansion of government oversight that went too far. This power struggle manifested in court as the conflict of political ideologies between those who argue for free speech through limited government involvement, and those who saw it as the government's duty to regulate financial influences on federal elections.

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[22] "Federal Election Commission Thirty Year Report," (FEC, September 2005), 4.
[23] "Federal Election Commission Thirty Year Report," (FEC, September 2005), 5.
[24] Nahra, "Political Parties and the Campaign Finance Laws Dilemmas, Concerns and Opportunities," (Fordham Law Review, Vol 56, 1987), 54.

Buckley v Valeo

The new extension of the FECA brought the act into a never seen before area of campaign regulation. No longer was the federal government responsible for regulating just the donations to candidates, but they could also limit contributions from private corporations to private political organizations. The concept of government policing individual candidate finances has been largely accepted as bipartisan in the name of restricting financial influence in elections and bribery. However, this new idea of the government pushing into private committees and party funding sparked debate and drew strict party lines. The divide between Democrats promoting regulation of independent actors that fund political communication, and the Republicans who argue for the preservation of free speech of corporations, culminated into the controversial 1976 Supreme Court case *Buckley v Valeo*.

The case was brought to the Supreme Court by Senator James Buckley of New York who was determined to solve this dispute on whether the federal government had the constitutional right to regulate contributions to private political organizations for independent expenditures. The Buckley Court found that independent expenditure caps and ceilings "fail to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."[25] The Court determined that the regulation already in place that prevents independent expenditure organizations from communicating and coordinating with political campaigns is enough to weed out corruption while preserving free speech for all.

Even though the Buckley Court acknowledges that it is sufficiently important to prevent corruption, it is limited to instances of *quid pro quo* corruption that are easily proven in a court

[25] Kennedy. *Citizens United v Federal Election Commission*. 14.

of law. Since this level of *quid pro quo* corruption is already banned through restrictions on coordination between independent expenditures and campaigns, as well as prohibiting direct contributions to candidates, further legislation is not necessary, especially at the cost of First Amendment rights.

For example, when Richard Nixon benefited from the overwhelming involvement of corporate interest groups in the 1972, those benefits were not illegal unless a direct exchange of material goods for political favors was produced. Since FECA's expansion in 1974 enhanced the perception that the Nixon administration was effected directly by corporate donations and gifts, Congress decided the best way to limit such corruption is through the restriction of corporate money. The Court, however, ruled that only definitive proof of a *quid pro quo* exchange warrants such involvement by the federal government in private corporate expenditures. They found the powers vested in the FEC by the 1974 amendment were too broad and violated the constitutional rights of corporations as organizations of private citizens to free speech and association. The Court held that the prohibition of contributions directly to candidates' official campaigns was the threshold for constitutional regulation and that the FEC's ability to go beyond into independent expenditure restriction exceeded the ability of government to curb political speech of corporations. This left corporations free to fund independent expenditures.

Many, like Jessica Levinson, an associate professor of law at Loyola School of Law, argue that the Buckley Court falsely claimed to protect First Amendment rights and resulted in protecting money power instead. In her article "The Original Sin of Campaign Finance Law: Why *Buckley v Valeo* Is Wrong" in the *University of Richmond Law Review* she writes, "The Court's approach has ironically often hindered rather than bolstered the First Amendment interest that it seeks to protect."[26] She instead makes the argument that the "campaign finance restrictions actually promote First Amendment values."[27] These restrictions do so by limiting the role that money power has during election cycles. As Levinson states, "Listeners in effect will hear from a greater depth of and breadth of sources, rather than merely from a relatively small group of moneyed interests that has the ability drown out non-spending or low-spending speakers."[28] By instituting limits on corporate abilities to dominate the media through superfluous spending on advertisement campaigns, the citizenry is left with a more diverse array of interests.

With limits on money power during election cycles allowing a more even playing field for "low spending players," Levinson argues First Amendment rights would be preserved for a larger portion of the citizenry, instead of lesser number of corporate donors who are capable of outspending most "players." However, the Buckley Court took to protecting independent expenditures from government involvement, for fear that the Constitution would not allow them to interfere with privately funded and privately conducted campaigns so long as they were not in coordination with the candidates they support. Levinson sees this prioritization of free speech of corporations as putting "a liberty or personal autonomy ideal over an equality ideal to strike down limits on campaign spending."[29] The real effect of the decision she argues is "the Court, in an effort to protect First Amendment rights, instead has often harmed them."[30] This harm comes through "prohibiting the government from enacting legislation to protect freedom of expression in the political marketplace from unlimited spending that harms the rights of listeners and non-

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[26] Jessica Levinson, "The Original Sin of Campaign Finance Law: Why *Buckley v Valeo* Is Wrong," (University of Richmond Law Review), 881.
[27] Ibid., 884.
[28] Ibid.
[29] Levinson, "The Original Sin of Campaign Finance Law: Why *Buckley v Valeo* Is Wrong," (University of Richmond Law Review), 935-936.
[30] Ibid., 936.

and low-spending speakers alike."[31] She finds that the preservation of free speech for corporations through unrestricted access to independent expenditures causes those who do not have the ability to fund expensive private campaigns not to be hear. While *Buckley* ruled against these concerns, Levinson's fears of inequality of voices in the electoral process would be displayed three decades later when a new amendment to FECA reopened a door to independent expenditure regulation.

[31] Ibid.

BCRA: Targeting Soft Money

Nearly thirty years after the Buckley Court's decision, a similar amendment to the FECA was passed in the form of the Bipartisan Campaign Reform Act of 2002 (BCRA). Also known as the McCain-Feingold Act, it expanded the power of the FEC similar to the original 1974 amendments with the goal of stopping soft money's influence in federal elections and creating more transparency overall in private contributions to political campaigns and organizations. The FEC defines soft money as "money raised outside the limits and prohibitions of federal campaign finance law for activity affecting federal elections."[32]This terminology became synonymous with independent expenditures as corporate spending expanded dramatically after the *Buckley* decision, going from 433 registered corporate action committees in 1976 to 1,477 in 2014.[33] The FEC stated that they would limited soft money under the BCRA by: "Prohibiting national parties from raising or spending nonfederal funds, and limiting fundraising by federal and nonfederal candidates and officeholders on behalf of party committees, other candidates, and nonprofit organizations."[34]

In addition to the restrictions on soft money fundraising, the BCRA also acted by restricting political advertisements that mention a candidate at all, regardless of expressed advocacy, within 60 days of a general election and 30 days of a primary election. Republican Senator John McCain of Arizona was the largest proponent of the act, as he was faced with seemingly endless attacks from corporate funded private campaigns during his 2000 bid for the Republican nomination for president against challenger George W. Bush. As described by

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[32] "Campaign Finance Law Quick Reference for Reporters," Federal Election Commission, (FEC.gov).
[33] "Number Political Action Committees," (The Campaign Finance Institute), Table 3-9.
[34] "Campaign Finance Law Quick Reference for Reporters," Federal Election Commission, (FEC.gov).

Jennifer Steinhauer of *The New York Times,* the breaking point came when a soft money funded "smear campaign during the primary in February 2000 had many in South Carolina falsely believing that Mr. McCain's wife, Cindy, was a drug addict and that the couple's adopted daughter, Bridget, was the product of an illicit union. Mr. McCain's patriotism, mental well-being and sexuality were also viciously called into question."[35] After losing the primary, he sought to even the playing field by limiting the amount of independent campaigning that is permitted in the days leading up to a primary or general election. This stipulation was passed through Congress as McCain lobbied among his fellow conservatives to show that such limits during immediate election are an effective way to restrict soft money when it matters most.

Although the act is known as 'bipartisan,' it actually only received support from 55% of House representatives, with 175 of the stronger conservative Republicans voting in opposition.[36] Roy Schotland of Georgetown University Law School is one of those who opposed the passage of the BCRA as he writes in his article "Analyzing the Bipartisan Campaign Reform Act of 2002." He claims, "The negative aspects of BCRA… are daunting and far outweigh the benefits."[37] He gives the argument that by restricting money power at any time during the election cycle, especially in the pivotal days leading up to election, the "BCRA significantly increases incumbent's advantage because a key source of support for challengers is party money and BCRA diminishes party money."[38] In this case, money power is tool for challengers to speak out against incumbents who already have funding and a voter base established. Since incumbents are less reliant on the funds being restricted, he sees the BCRA as a job protection act for

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35 Jennifer Steinhauer, "Confronting Ghosts of 2000 in South Carolina," (The New York Times, Oct. 19, 2007).
36 "HR 2356 (107th): Bipartisan Campaign Reform Act of 2002," (Gov. Track).
37 Roy Schotland, "Analyzing the Bipartisan Campaign Reform Act of 2002," (Georgetown University Law Faculty Publication Review, 2004), 869.
38 Ibid.

politicians already in office by suppressing challenger funding.

Schotland was not the only one with concerns like these, and just like the first FECA amendments in 1974, the BCRA was challenged in the Supreme Court in *McConnell v FEC.* Conservative leader, and corporate free speech advocate Mitch McConnell challenged the legislation in court on the grounds it violated the precedent set by the Buckley Court with corporate and union rights to free speech in the time building up to an election. Unlike the FEC's loss during the *Buckley* decision, however, the commission would win the *McConnell* case. The Court upheld the amendment of the BCRA as constitutional because the regulations dealt strictly with soft money contributions that the court deemed were ideally used for voter mobilization and registration. To limit these during the time close to an election would not violate anyone's freedom of speech because they do not prevent speech throughout the time leading up the 30 and 60 day limits. Since the BCRA strictly limits soft money meant for the voter education and mobilization, the Court deemed the restrictions to stay within the precedent *Buckley* ruling.

In reality, the money was used to fund ads that had clear political messages about candidates that may express advocacy for or against a candidate, such as those that targeted McCain in South Carolina. To incur the least amount of federal regulation, PACs continued to support the claim that the money spent on advertisements were in the name of supporting democracy by motivating voters. This claim would ultimately be the downfall of McConnell's case as it allowed for the justification of added regulations. The judgment gave the FEC and the BCRA power not possessed since the establishment of the FEC in 1974: the power to once again restrict private political contributions, limited to the window of time leading up to an election or primary.

Thomas Mann and Norman Ornstein find the *McConnell* decision to override concerns about the BCRA, like those presented by Schotland. In their article "Separating Myth from Reality in *McConnell v FEC*," they explain that rather than undercutting the chances of a challenger in political race, the BCRA actually "restores the FECA regime affirmed by *Buckley* that was undermined in recent years by the rise of party soft money and the explosion of electioneering in the guise of issue advocacy."[39] The Court concurred, as they found "that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny."[40] Mann and Ornstein argue that the BCRA avoids Buckley Court and Schotland concerns of free speech suppression thanks to the legal acceptance of a distinction between advertisements that expressly advocate for or against a candidate and those that are for the purpose of voter mobilization. By making this distinction in intent, the BCRA can constitutionally target those groups who file as organizations that do not publicly announce advocacy in advertisements.

Immediately after the *McConnell* decision, the nation saw a huge boom in funds to organizations that could bypass the BCRA regulations. One of these types of political organizations devised for the purpose of voter mobilization were those that filed under section 527 of the Internal Revenue Code, known as 527 organizations.[41] These groups were able to accept donations from unions and corporations that political parties and committees could not. With 527's being unrestricted in who they can receive donations from, there are no caps to these contributions. Nor were there limits to spending by a 527 group. The only stipulations to a 527 were that they required complete disclosure of donor identity to the Internal Revenue Service (IRS), and they may not expressly advocate for the election of an individual candidate, nor

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[39] Thomas Mann, Norman Ornstein, "Separating Myth from Reality in *McConnell v FEC*," (Election Law Journal, 2004), 291.
[40] *McConnell* v Federal Election Commission, (2003).
[41] Internal Revenue Code. 26 U.S.C. 527.

associate or communicate with a campaign.[42] As 527s are limited to the goal of voter mobilization and issue explanation, any expressed political advocacy is punishable by revoking of the 527 title. With these organizations becoming the main form of soft money allowed by political organizations under the *McConnell* decision, political strategists sought to push the limits of expressed advocacy. This became the major response by those PACs and independent expenditures that previously claimed their advertisements were already purely for voter education.

As 527 gained popularity and non-advocacy advertisements boomed, contention over what is considered expressed advocacy began to spawn. Because the *Buckley* decision defined expressed advocated for or against candidates as the use of specific language such as 'defeat,' 'vote for,' or 'elect,' just mentioning a candidate or issue is not the equivalent. Meanwhile, the BCRA's intent was to prevent groups like 527's from citing candidates at all. This meant that 527's were not regulatable under the BCRA so long as they do not use the terminology defeat, vote for, or elect in a politically suggestive context. With momentum from the *McConnell* victory on its side, the FEC challenged application of the *Buckley* decision to 527s arguing that the mere mention of a candidate, regardless of expressed advocacy, violates the BCRA.

On September 18, 2009, a Federal Appeals Court in Washington D.C. struck down the FEC's case and ruled that 527s have a First Amendment right to receive and spend contributions as long as they do not coordinate with or advocate for a candidate using the specific promotional language. With the decision creating momentum against the BCRA, this set the stage for another campaign finance Supreme Court case, *Citizens United*. Failures to expand campaign finance laws and the BCRA to include 527 organizations gave momentum to private sector lobbyists

[42] Internal Revenue Code. 26 U.S.C. 527.

who struck hard to gain ground in the fight for spending rights during elections.

Citizen United

Few court cases are as controversial and as misunderstood as *Citizens United v Federal Election Committee.* Each political party stands on opposing ends of the decision. It has been seen as either a beacon of hope protecting constitutional rights, or as the epitome of corrupt politics perpetrated by corporate agendas. However, what exactly does the case known as Citizens United mean to the state of politics? And more specifically, where does it leave Americans in terms of money power in the United States?

On January 21, 2010 Justice Anthony Kennedy read out the majority opinion decision in the *Citizens United v Federal Election Committee* case. His opening lines portrayed an image of the current state of legislation regarding the appeal brought by the non-profit corporation Citizens United:

> "Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate."[43]

This prohibition of independent expenditures from corporation and union general treasuries are justified under law at time by what Justice Kennedy lays out as a series of two district court decisions. The most recent being *McConnell v FEC*, which upheld the BCRA's limits and bans can be placed on political independent expenditures based on the speaker's "corporate identity." The reason being, corporate interests and political rights are not the same as citizens' interests and political rights. At the start of this case, the government had deemed it fit to restrict money power during times of federal election in order to protect democratic elections from being

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[43] Kennedy, *Citizens United v Federal Election Commission*, (2010), 1.

swayed too heavily by funding supremacy and money power as they saw the agendas supported by this funding was not always in line with public interest.

While clarifying the limitations of corporate interests in politics via independent expenditures, *McConnell v FEC* was largely depended on a previous decision: *Austin v Michigan Chamber of Commerce*. *Austin* held that the Michigan Campaign Finance Act was constitutional and did not violate the First and Fourteenth Amendments. The act "prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony."[44] The Michigan Chamber of Commerce violated this law by trying to use general treasury funds to support a specific candidate through a newspaper. The Court upheld the law and prohibited corporations from using treasury money to buy independent expenditures for political campaigns. Citing an overarching cause for the decision, the court stated, "Corporate wealth can unfairly influence elections."[45] However, state law still allowed corporations to donate to independent expenditures from a segregated account that could be more closely monitored. While mentioning *Austin*, Justice Kennedy, speaking for the majority of the *Citizens United* court, cites a statement made by Justice Antonin Scalia during *Wisconsin Right to Life Inc. v FEC* (2007) where he said, "*Austin* was a significant departure from ancient First Amendment principles."[46] Kennedy promptly states for the record that the court agrees with Scalia's obiter dictum of three years before, taking a side against the *Austin* decision.

The Court also examines Citizens United as a corporation. Citizens United is a nonprofit corporation with a $12 million annual budget. They produced a documentary film on the Democratic primary nominee for president, Hillary Clinton called *Hillary: The Movie*. Citizens United was given the commission to make the movie on-demand by a fee of $1.2 million. The

[44] Kennedy, *Citizen United v Federal Election Commission*, Opinion of the Court, 31.
[45] Ibid.
[46] Scalia, *Wisconsin Right to Life Inc. v Federal Election Commission*, (2007), 18.

film would then be available to anyone with a cable on-demand subscription and would be entirely free for the subscribers. What makes *Hillary* an ‘electioneering communication’ in the sense of the legislation under review, are the advertisements they produced and ran on air within 30 days of the Democratic primary elections.

It is worth noting that the Court did not accept the arguments of the appellants. Citizens United appealed to the Court saying that *Hillary* should be viewed as a historical documentary not a form of electioneering communication. The first argument Citizens United puts forward is one of statistics. Because federal law states that an electioneering communication must reach at least 50,000 viewers, *Hillary* does not fall under the label. The argument rests on the claim that it is not realistic to expect more than 50,000 people to rent the on-demand movie. Justice Kennedy strikes down this argument quickly, pointing out that regulations on determining the number of viewers is not based on how many choose to see the film but instead how many people have access to it. In this case, *Hillary* was available to 34.5 million cable subscribers nationwide, surpassing the 50,000 limit immensely. The Court also visited an appeal by Citizens United to revise this regulation to base it solely on the number of expected viewers instead. Justice Kennedy again shot this down saying it would be unreasonable and unconstitutional to ask for that much litigation on a case-by-case basis. The Court affirmed that *Hillary* is a form of electioneering communication based on the definition provided by *McConnell*, which states that a court must test an advertisement or communication as to its “functional equivalent of expressed advocacy for or against a specific candidate.”[47] In this context an electioneering communication is based on its expressed advocacy of a candidate or policy. Since the advertisements produced for *Hillary* were critical of the Democratic candidate, they qualified to be labeled as such.

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[47] *McConnell v Federal Election Commission*, (2003), 206.

Justice Kennedy then addresses the next argument by Citizen United that *Hillary* cannot be an electioneering communication because it is only a documentary that examines certain historical events and facts. To this point Kennedy was direct: “We disagree. There is no reasonable interpretation of *Hillary* other than its appeal to vote against Senator Clinton.”[48] He points out several traits of both the film and advertisements that show it relies more on testimonials, opinions, and speculation than any kind of facts. These speculations cause the Court to see them as nothing short of expressed advocacy against Hillary Clinton.

Citizens United also claimed that the regulation should not be applied to on-demand films as they do not distort the political process as much as television ads do because they are not broadcasted as widely to the public. Similar to their ruling on the prior appeal for calculating the number of viewers, the Court decided that if corporations like Citizens United were able to appeal on the grounds of their specific technical difference in communication, the courts would be overrun by litigation from all kinds of industry. According to Justice Kennedy, this would be neither reasonable, economical, nor constitutional. Despite siding with the defense of the FEC up to this point, Justice Kennedy holds that because Citizens United is concerned with government intrusion on their right to free speech, First Amendment preservation should not be taken lightly. This became a jumping off point for the opinion as it quickly dives into the *Austin* decision’s status under the First Amendment.

On the broader theme of corporate political speech, the Court’s two most important cases are *McConnell* and *Austin. Austin* becomes the main reference of Citizens United’s reconsideration of the First Amendment implications of campaign expenditure restrictions as it set a precedent of independent expenditure regulation before *McConnell*. Justice Kennedy lays

[48] Kennedy, *Citizens United v Federal Election Commission*, (2010), 33.

this out by stating, "The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them."[49] The majority opinion found that too much of the 2007 *Austin* decision was based on "deeming a particular group 'too powerful'" and was thus "not justification for withholding First Amendment rights from any group – labor or corporate."[50]

Kennedy approached the conflict between preventing corruption and preserving constitutional rights by citing a precedent with a Supreme Court case from 1974, *Buckley v Valeo.* The Buckley Court "recognized a sufficiently important governmental interest in the prevention of corruption and the appearance of corruption."[51] But the Buckley Court ruled against the applicability of these concerns about corruption to the campaign expenditures they were asked to assess. They stated that independent expenditure cap and ceilings "fail to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,"[52] as Kennedy summarized. The Buckley Court found instead that the regulation already in place prevents independent expenditures from communicating and coordinating with a political campaign is enough to weed out corruption while preserving free speech for all, to which Kennedy says he agrees. In contrast to *Austin* upholding expenditure restrictions against The Michigan Chamber of Commerce to prevent corrupt influences of money power in campaigns, the Court ruled that justifications like these were unconstitutional, as they go beyond preventing *quid pro quo* corruption.

Kennedy cites that 26 states have not instituted such bans on corporate independent expenditures and there has not been an argument that in states without the ban there has been

[49] Kennedy, *Citizens United v Federal Election Commission*, (2010), 32.
[50] Ibid., 28.
[51] Ibid., 29.
[52] Ibid.

more corruption. On the other hand, states that do hold a ban on these independent corporate expenditures express that there have been a large number of complaints and cases against the regulation by citing First Amendment rights violations. With such an overwhelming majority of constitutional complaints against expenditure restriction and no proof of corruption to support them, Kennedy shows the Court's alignment with the Buckley Court on the unconstitutionality of such interventions by the government.

Scholars like George Brown, a professor at Boston College Law School, view that the biggest influence independent expenditures have on politics is the ability for donors and donating organizations to have access to their candidate. While discussion of policy for contributions would be considered *quid pro quo* criminal corruption, additional ability of donors to access meetings with candidates is not viewed the same as influence. To this Brown writes in his article "Applying Citizens United to Ordinary Corruption: With a Note on Blagojevich, McDonnell, and the Criminalization of Politics" that access and influence should not regarded entirely different due to a focus on strictly regulating only *quid pro quo* corruption. He writes, "Preventing purchased political influence, whether generalized or particularized, is central to the federal anticorruption enterprise."[53] Similarly, the fear of Bailey is that this access would allow for the inequality of influence on candidate policy agendas based on financial ability to support an independent campaign effort. His concern lies with the need for candidates to appeal to donors in order to keep up in political races in a way that gives contributors an advantage of influence and access above the average voter. Both these scholars take aim at the *Citizens United* and *Buckley* decisions respectively, due to their strict interpretation that political influence is only corrupt through a direct exchange of contribution for policy, not a grey area of added accessibility to

[53] George Brown, "Applying Citizens United to Ordinary Corruption: With a Note on Blagojevich, McDonnell, and the Criminalization of Politics," (Notre Dame Law Review, Vol. 91, 2015), 178.

candidates that each is concerned with.

Connecting another case to the *Austin* decision, Justice Kennedy references a case from just two years after the *Buckley* case, *First National Bank of Boston v Bellotti.* The Bellotti decision also supported the preservation of the First Amendment to corporations above precautions dealing with corruption. Kennedy relates to the case by saying, “Government cannot restrict political speech based on the speaker’s corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues.”[54] He makes sure to point out that the decision here “rested on the principle that Government lacks the power to ban corporations from speaking”[55] and not a previously existing viewpoint.

Justice Kennedy points out that there was a “single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption.” However, Kennedy continued to swiftly cut down this footnote concern, “For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”[56] Kennedy uses this small reference to make a supporting claim for his argument and to emphasize that the Court has found that there is no link between independent expenditures and corruption of any kind. It is noteworthy to add that the *Bellotti* decision was a Massachusetts State Court case that would not have authority over a federal decision such as *Austin.* In this circumstance, he uses a relevant state decision to support the Court’s argument that expenditures do not lead to the corrupt influence of money power in the electoral process.

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[54] Kennedy, *Citizens United v Federal Election Commission*, (2010), 30.
[55] Ibid. 31
[56] Ibid. 42.

It came down to the Court choosing between two Supreme Courts, the Buckley Court or the Austin and McConnell Courts. Support for *Austin* was comprised of an anti-corruption argument that prioritized preventing corporate funds from influencing government policy and elections above the appeals that such regulations suppress the right to free speech based on corporate identity. The Court found the government's anticorruption logic flawed and invalid due to the regulation already in place that prevents *quid pro quo* corruption, just as *Buckley* and *Bellotti* did. Furthermore, the Court stated, "An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy. Here Congress created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption."[57] The Court directly addressed concerns about the BCRA unconstitutionally regulating independent expenditures during the time leading up to an election. Instead of implementing a ban on electioneering communication within the 30 days of a primary and 60 days of an election, the court stated, "it is our law and our tradition that more speech, not less, is the governing rule."[58] The Court decided that allowing corporate contributions and campaigns created more voices and promoted First Amendment speech during the most pivotal time in an election. By restricting corporate speech during this time, the BCRA not only limits corporate speech in the eyes of the Court, but also the plurality of political discourse.

In conclusion, *Citizens United v Federal Election Committee* resulted in the overruling of both *Austin v Michigan Chamber of Commerce* and *McConnell v Federal Election Committee.* This effectively lifted restrictions nationwide on corporate independent expenditures and allowed corporations to use general treasury funds to donate to or purchase independent expenditures that produce electioneering communications to expressly advocate for or against a candidate or

[57] Kennedy, *Citizens United v Federal Election Commission*, (2010), 45.
[58] Ibid. 34.

policy. The overturning of *Austin* also banned discrimination of political speech rights based on corporate identity. Meanwhile, the overturning of *McConnell* abolished the limits on electioneering communications as well as BCRA's ability to restrict these campaigns during the time leading up to an election. Although most of the arguments produced by Citizens United in defense of their film *Hillary* were struck down by the Court, the actual decision allowed corporations like Citizens United to produce political advertisements and movies. This included films like *Hillary* to be produced without restriction, so long as the films were not in coordination with a specific candidate's campaign. This case is viewed as the decision that gave corporations and unions the same political speech rights as individual citizens under the protection of the First Amendment.

After the court's decision, 24 states were left vulnerable to litigation against their corporate state law. Each state held different responses to the new standard in corporate campaign finance law. States like Arizona passed laws like SB 1444, which required corporations and labor unions that make independent expenditures in candidate campaigns to register and file disclosure reports in order to make corporate interests and agendas more transparent. Other states like Minnesota immediately repealed their state laws that banned independent expenditures by corporations in fear of an impending lawsuit. More recently, California upheld CA Proposition 59, which calls for the creation of a new state amendment to overturn the *Citizens United* decision within the borders of California. While the proposition is somewhat vague, it advocates for the abolishment of the decision within the state as well as for all federal officials representing the state of California to lobby for the creation of a federal amendment that addresses corporate independent expenditures and reverses the *Citizens United* decision.

The end result of the case was the overruling of many of the provisions of the BCRA, most importantly the restrictions of electioneering communications leading to the emergence of soft money in the form of super PACs. Super PACs are similar to traditional PACs as political organizations that advocate for donor policy. However, they are funded by independent expenditures largely donated by corporate and union general treasury funds for the purpose of electioneering communications. These groups tend to spend much more money during a given election cycle on average due to large corporate contributions. While the decision holds unions and corporation to the same standards of unrestricted independent expenditure donations, corporations have been able to take the most advantage through outspending unions immensely. This was especially visible during the 2016 election cycle, as non-union super PACs took 19 of the top 20 ranks for independent expenditure spending, with the only top-20 union being the American Federation of State/County/Municipal Employees Super PAC at number 19.[59] Dramatic gaps in spending between corporate and union super PACs leads to a larger influence on elections for corporations.

In the post-Citizen United era, campaigns are dominated by independent expenditures that use private money fund campaigns to pursue the political aims of the donors. In the 2016 election cycle alone 2,389 super PACs were created to raise $1,790,907,556.[60] The money is spent with few stipulations and regulations as the Supreme Court upheld that so long as contributions in the form of independent expenditures to super PACs have no coordination or communication with any candidate's campaign. This gives super PACs the freedom to pick and choose who they support and attack without being tied to an individual candidate forever.

While the Supreme Court viewed the disconnect between independent expenditures and

[59] "2016 Outside Spending By Group," OpenSecrets.org, 2016.
[60] "Outside Spending Details 2016 Election Cycle," OpenSecrets.org, 2016.

public campaigns as the main factor that prevents corporate corruption in politics, it may have just sparked a different kind of corruption. Instead of corrupt politicians taking bribes in back alleys, money power has changed the way in which politicians are elected entirely. Both Justice Kennedy and Scalia argued throughout the case that independent expenditures give corporations and unions a voice in politics, and with more voices heard in an election, the more pluralist and democratic the process can be. However, instead of promoting the pluralist political climate that Kennedy envisioned, political campaigns now have to cater to super PACs' corporate agendas. These actions supercede the democratic votes of the people because their funding causes a disproportionate ability to change public opinion.

Bailey states that influencing policy through meeting with legislatures is not the only way large contributors can have an effect over policy. He argues that there is a more benign route of what he calls an "electoral strategy." "In this strategy, contributors do not seek access or *quid pro quo* arrangements, but simply give to candidates with whom they agree or they think will advance their firm or organization's goals."[61] Bailey says this strategy of donating to get a candidate elected who will favor a firm will have two distorting effects on policy. The first is "if candidates who appeal to contributors have an electoral advantage, the direct effect will be to increase the number of pro-contributor candidates who win. The indirect effect will encourage all candidates to become pro-contributor in order to increase their chances of electoral success."[62]

This focus on gaining contributors by politicians was most evident in the 2012 presidential race between Republican Mitt Romney and incumbent Democrat Barack Obama. As the first presidential election after the *Citizens United* ruling, this was the first time corporate contributors were completely unrestricted by federal regulations in decades. Not only did each

[61] Bailey. The Two Sides of Money in Politics: A Synthesis and Framework. Election Law Journal. 654.
[62] Ibid., 655.

candidate appeal to contributors for support, but each candidate shattered records for how much money had ever been fundraised in any election. Kenneth Vogel of Politico reported that the final tallies in fundraising came down to Obama raising $1.123 billion versus Romney's $1.019 billion raised. In the election four years prior, 148 candidates from all parties collectively raised $1.644 billion with Obama beating challenger John McCain $778 million to $383 million.[63] Since federal restrictions on who can contribute based on corporate identity was abolished, fundraising skyrocketed leaving both candidates to fall into the trend Bailey predicted: focusing on being 'pro-contributor' to outspend their opponents. Jessica Levinson reported after the 2012 election that between the two candidates, political parties, and independent expenditures the final tally of spending hit $6 billion.[64]

With the creation of super PACs also came a fundamental shift in how political campaigns are run. Instead of choosing candidates to support, super PACs have made advocating exclusively against candidates the norm. This is reflected in how private expenditures are spent by their political organizations. The largest of these 2016 super PACs was Priorities USA Action which supported Hillary Clinton by raising $192,065,767.[65] In an increasingly common ratio, the committee spent just $6,455,293 on supporting Democratic candidates with the other 96% on attacks against Republicans, namely Donald Trump. While this group released donor identities, others like the Congressional Leadership Fund and the Conservative Solutions PAC had little to no transparency when it came to donor identity. This is a result of public campaign finance disclosure being put in the hands of state powers if the money is raised in a state that does not require full transparency. While 47 of the 50 states have some form of disclosure regulations,

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[63] Kenneth Vogel, "Obama, Romney Both Topped $1B," (Politico.com, 2013).
[64] Jessica Levinson. The Original Sin of Campaign Finance Law: Why *Buckley v Valeo* Is Wrong. 881.
[65] Priority USA Action, Outside Spending Details 2016 Election Cycle. OpenSecrets.org.

many of the largest conservative super PACs base themselves in states that have either limited or no requirements at all. An example of this would be the Congressional Leadership Fund who raised over $40 million in the 2016 election cycle with nearly complete donor anonymity. Of that money spent, $39,368,590 was spent on attack campaigns against Democrats across the country, leaving only $757,101 spent on actually supporting candidates.[66]

As an independent expenditure fueled super PAC that operates independently of any federal candidate or officeholder, the Congressional Leadership Fund views its expenditures as "investments" stating on their website, "Our return on investment was extraordinary: 29 wins, 3 losses. On November 8, 2016, the American people wholesale rejected the liberal, big government mentality that has ruled Washington for past eight years."[67] Despite the lack of coordination and communication with these candidates, there is a clear concern for each individual candidate that the group chooses to support by attacking their opponents. Through the spending of corporate donations, the group is able to launch specific wars on individual candidates in order to elect many conservatives who have similar goals as the corporate leaders.

Citizens United has left a political climate that is hugely influenced by the largest amount of money in politics the nation has ever seen. The money is so crucial that the way it has been spent has altered the way American elections are run. Instead of focusing on supporting candidates and policies, independent expenditures focus on going after opponents, as it has proven to be a more effective strategy at molding the public opinion of a candidate. While it may be true that the aftermath of *Citizens United* manifests how it is nearly impossible to prove that major instances of *quid pro quo* exchanges of political favors for money are occurring, the decision hugely amplified money power in United States federal elections. With each candidate

[66] Congressional Leadership Fund, Outside Spending Details 2016 Election Cycle. OpenSecrets.org.
[67] "About CFL," CongressionalLeadershipFund.org.

scrambling for contributor support, Bailey fears that the political agendas of the candidates shift to gain the maximum amount of support from organizations designed for political donations. With this concern for candidates shifting priorities to value the contributor above the voter, we must look at a case that similarly allowed donors to affect elections nationwide. This concern is particularly amplified in the type of private campaigns that the decision protects as "privately financed campaigns may impose costs on society even if contributors do not directly seek to buy votes or policy."[68]

[68] Bailey, "The Two Sides of Money in Politics: A Synthesis and Framework," (Election Law Journal, 2004), 655.

McCutcheon v FEC: The Expansion

With concrete limits set on government regulation of independent expenditures that only allow for intervention in instances of provable *quid pro quo* corruption, the stage was set for a continued defense of private political expenditures. The *McCutcheon v FEC* ruling on April 2, 2014, continued *Citizens United* and *Buckley*'s trend of First Amendment preservation through the protection of money power in the form of independent campaign financing. The case struck down the limits on the amount of money an individual may contribute to candidates in a two-year election cycle as provided by the FECA in section 441. While there is still a limit to the amount of money an individual can give to a single candidate, individuals were previously given a cap as to how much they could donate to different candidates nationally as a whole.

It is important to note that up to this point, I had discussed financing campaign efforts that are independent of official candidate operations. *McCutcheon* differs from these previous decisions as it limits regulations on donating directly to campaign offices. At the time of the case, these caps were $2,500 per election to individual federal candidates, $30,800 per year to a national party committee, $5,000 per year to any non-party committee. The overall limits in place by the act were main target of judicial review. These limits included a $46,200 cap on donations to all federal candidates and $70,800 to federal political action committees and political party committees. This totals to an individual donation cap of $117,000 every two years across the country.[69]

The act was challenged in a district court by Alabama resident Shaun McCutcheon who wanted to donate more than the allotted amount permitted by federal law to the Republican

[69] Roberts, *McCutcheon v Federal Election Commission,* (2014), 134.

National Convention. The plaintiff claimed that both the $46,200 cap on candidate donations, and the $70,800 cap on party donations were unconstitutional as they violated his First Amendment right to freedom of speech. Based on the findings in *Buckley v Valeo* and *Citizens United* that additional political expenditures do not result in corrupt politics, McCutcheon believed that overall caps on individual donations to candidates should be deemed unconstitutional as well. Because the Buckley Court ruled that independent expenditures do not lead to even the appearance of corruption and further that political spending provides additional plurality in elections, then individual donations should not lead to any more corruption than corporate donations.

The district court rejected this notion and sided with the Federal Election Commission. Justice John Roberts summarized the district court logic writing, "The difference between contributions and expenditures is the difference between giving money to an entity and spending that money directly on advocacy. Contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interest in other ways."[70] The district court chose to shy away from the argument that large scale contributions directly to campaigns would lead to corruption, possibly due to strict interpretation of corruption by both *Buckley* and *Citizens United* that limits corrupt politics to those few instances of provable policy transaction for financial support.

In addition, the district court also ruled that limits to how much individuals can donate to parties and political action committees can be given a cap as well because "the regulated money

[70] Roberts, *McCutcheon v Federal Election Commission*, (2014), 134.

goes into a pool from which another entity draws to fund its advocacy."[71] This means that in the court's eyes, once an individual has donated to a party committee, that money is used for the same intent as if the money was donated directly to a candidate: for the direct advocacy of the candidate. They saw this coordination with an individual candidate's campaign as being regulatable under Supreme Court precedents that barred this level of harmonization from independent expenditures in both *Buckley* and *Citizens United*. The appellant's argument relied on the distinction between independent expenditures and donations directly to party funds. The court dismissed the argument and denied Mr. *McCutcheon's* motion for preliminary injunction along with granting the FEC's motion to dismiss.

On October 9, 2012, McCutcheon filed a Notice of Appeal to be heard by the Supreme Court. Once before the Supreme Court, the appellants argued that the act in place violated McCutcheon's First Amendment right to freedom of speech by denying him the ability to donate beyond $70,800 to the Republican National Convention. In a close split 5 to 4 decision, the Court ruled that under the *Buckley* decision they agreed with the appellant that limits to which individual can donate either to campaigns or parties nationally are unconstitutional as they violate the individual's First Amendment right to freedom of speech. The Court decided that because contributions have a precedent of being viewed as political speech, limitation on these would be direct intrusions on democratic values of plurality.

Justice Roberts wrote the majority opinion stating, "The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against

[71] Ibid.

corruption or the appearance of corruption."[72] Roberts dives into the implication of the *Buckley v Valeo* case and the importance it holds to the interpretation of how much anticorruption action the government may take. He went on to reaffirm the precedent interpretation of corruption, stating, "Congress may target only a specific type of corruption – 'quid pro quo' corruption."[73] This is the same definition of corruption that allows for *Citizens United* and *Buckley*'s decisions to limit the scenarios in which the government can prevent private contributions to situations in which there is undeniable proof of a corrupt exchange of goods for public policy.

The Court addresses the concerns expressed by the FEC and district court that direct donations to campaigns have a higher likelihood of sparking corrupt politics as the money is used directly by the candidate being supported. They state, "Spending large sums of 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 quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties."[74] All of these statements and quotes hold direct standing in the *Buckley* case. Seeing as from the time the plaintiffs stepped into the district court his argument predicated on this exact interpretation of *Buckley*, the odds seemed to be in their favor. The Court concluded that "aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley v Valeo*. They instead intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'"[75] Since *Buckley* suggested that *quid pro quo* corruption does not transpire when corporations donate money, the same logic should apply when individuals donate. The big leap made here is the logic

[72] Roberts, *McCutcheon v Federal Election Commission,* (2014), 137.
[73] Ibid., 134.
[74]Roberts, *McCutcheon v Federal Election Commission,* (2014), 138.
[75] Ibid.

used by the FECA is that individual donations directly to candidates do in fact have some influence over what that candidate prioritizes while in office so a cap is necessary to limit that influence. The FEC argues that they avoid the issue of free speech due to their avoidance of independent expenditures. Instead the Court ruled just the opposite: donations even when directly to candidates have no influence over their decision making while governing, and therefore limits on such donations do not serve a purpose other than the hindrance of political speech.

The Court's decision eliminated the two-year election cycle cap on individual donations to candidates and parties on a national level. This meant that a single person or organization can spend an unlimited amount of money nationwide on campaign financing as long as the individual donations stay within the caps already in place such as the $2,500 donation limit directly to candidates. That maximum amount can be donated to every single candidate in the entire country, or the more likely option of donating to every single candidate who is in their party. The largest overall donation sum by an individual went from $117,000 to this year alone it is $4,611,800 donated by Sheldon and Miriam Adelson of Las Vegas, Nevada.[76] 100% of their donations went to Republican candidates around the country, all of which satisfied the limits of $2,500 per federal candidate, $10,000 per state party, $32,400 national party committee, and $5,000 per PAC. These figures suggest that a lot of Republican candidates and committees around the country received a big check from a couple in Nevada, whom the candidates are likely to never meet nor address any of their local issues.

Many argue that these donations have a direct impact on politics in an anti-democratic fashion. Liz Kennedy wrote in her article in the *Valparaiso University Law Review* "The World

[76] Open Secrets. Top Individual Contributors: All Federal Contributions.

According to, and after, *McCutcheon* v FEC, and Why It Matters" writes, "The Roberts Court has applied a blinded, highly abstract First Amendment doctrine, which ignores the distortion of democratic responsiveness caused by big money in politics."[77] She argues that any claim that contributions do not affect elections and policy are false and are as close to *quid pro quo* exchange that we will find.

> "We see this play out in anti-majoritarian policy outcomes that demonstrate the lack of meaningful representation experienced by the non-wealthy. This type of endemic political inequality constitutes a corruption of democracy because a democratic system of government is one in which elected officials are responsive to the views of each citizen considered to be political equal."[78]

By creating a political climate in which the wealthy and well-funded political organizations are capable of influencing elections around the country, whereas voters are limited to a single vote in their local district, an inequality of electoral power is produced. To Kennedy, this concept is worthy of being viewed as corrupt based on democratic prioritization of equality. Her concern with *McCutcheon* lies within the ability of money power to affect elections and policy in a way that is undemocratic. In Kennedy's view, the ability to donate unlimited amount of money nationwide gives money power this opportunity of influence.

Bailey is likely to agree with Kennedy, as he is concerned with the "electoral strategies" in campaign spending. Bailey's primary concern is an alignment of candidate priorities with those of big spending individual donors who contribute to any campaign that align with their ideology. To this end, "simply giving to candidates with whom they agree or who they think will

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[77] Liz Kennedy, "The World According to, and after, *McCutcheon* v. FEC, and Why It Matters," (*Valparaiso University Law Review*, September 5, 2014).
[78] Ibid., Abstract.

advance their firm or organization's goals," is difficult to see "the effects of money in this case will be very difficult to observe."[79] This obscuring effect of money power in campaigns is difficult to prove until, as Kennedy argues, "anti-majoritarian" policies are passed that benefit specific donors. Bailey argues these "distortions can occur even if contributors are not seeking access or specific policy favors, but simply giving to candidates whom they favor ideologically."[80] Distortions of elections through unlimited nationwide campaign financing affirm Kennedy's argument of such unrestricted donations are undemocratic in their favoring of candidates who Bailey calls "pro-contributor."[81] To him, this is true negative effect of money power in politics during the election cycle: causing candidates to value donor priorities above those of the people.

McCutcheon leaves behind a campaign finance world that is trending further away from reform and towards the deregulation of political contributions. Although only three years old, the decision has already allowed donors, like the Adelsons of Las Vegas, to influence elections around the country through the supply of campaign funding. An important distinction of this case is the allowance of funding that, unlike independent expenditures, is in direct coordination with candidate campaign efforts. While low caps on how much can be donated to single candidate keep the two separated, the argument for the expansion of free speech through the abolition of federal restrictions on spending is shared. *McCutcheon*'s legacy is told by the increase in campaign spending by wealthy individuals as money power in politics is on the rise.

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[79] Michael Bailey, "The Two Sides of Money in Politics: A Synthesis and Framework," (*Election Law Journal*, 2004), 655.
[80] Ibid.
[81] Ibid.

Conclusion

Professor G. William Domhoff of the University of California at Santa Cruz asks the question, "Who has predominant power in the United States?" To which he answers, "Those who have the money – or more specifically, who own income-producing land and businesses – have the power."[82] He argues this comes from the fundamental ability of the corporation to influence political struggles and policy outcomes, writing the rich "set the rules within which policy battles are waged."[83] He is not alone in this concern as *The New York Times* published the poll "Americans' Views on Money in Politics" which stated that 84% of Americans believe that "money has too much of an influence on political campaigns and politics."[84]

The influence of money power, as pointed out by Bailey, is not a natural result of democracy. In fact, our democracy should be doing the opposite by regulating the level of impact money power is able to have on policy and elections in the spirit of populism that democracy is founded on. In some cases, like the BCRA and FECA of 1974 Congress has successfully pushed through opposition to make real regulatory changes to corporations' ability to use funds to sway voters through massive advertising campaigns. However, these successes have been muted by the continued interpretation at the Supreme Court level that handcuffs anti-corruption and money power regulatory policies. Some, like Schotland, argue that such government limits are necessary on the principle that corporate funds are needed to express the voices of political challengers and corporate interests. Others, like Mann, Ornstein, and Bailey, effectively disarm this argument by showing copious negative effects of money power through the allowance of corporate spending

[82] William Domhoff, "The Class-Domination Theory of Power," (WhoRulesAmerica.net, University of California at Santa Cruz).
[83] Ibid.
[84] "Americans' Views on Money in Politics," New York Times, June 2, 2015.

to influence real policy decisions. This results in the "anti-majoritarian" decisions that Liz Kennedy sees as evidence of a disproportionate impact of money power to shape political campaigns.

The 1910 Congress was faced with a situation in which money power directly influenced who is chosen to represent each state in the Senate. Those who pushed for the reform of these practices, like William Jennings Bryan, were blocked by obstacles such as the need for proof of *quid pro quo* corruption to justify federal overhaul of Lorimer's corrupt Senate nomination. With the Senate's Committee on Privileges and Elections eventually being given this proof after eight years of Lorimer serving in Congress, the flaws with money power being used to buy Senate seats were exposed. The United States is in a similar situation where current legislation allows for an expansion of money power in campaigns by deeming unconstitutional both restrictions on private campaigns through independent expenditures and private financing of public campaign through unlimited nationwide donations. Our country is blocked by an arbitrary limit to only intervene in situations of provable *quid pro quo* corruption. The battle for the 17th Amendment overcame this obstacle as result of scandal in Senate nominations.

Would a similar scandal of bribery and extortion push our federal government to advocate for real change of campaign finance laws? While we wait for this impending scandal, billions of dollars are spent to advocate for "pro-contributor" politicians that, while they may not be willing to trade policy for political contributions, are certainly dependent on funding to maintain a career in politics. In the words of Bailey, in campaign finance "the money comes from a very small slice of the population,"[85] a slice of the population whose vested interests are with corporate agendas, not the public good. Money power will always impact politics as without

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[85] Bailey, "The Two Sides of Money in Politics: A Synthesis and Framework," (Election Law Journal, 2004), 653.

campaign funding voter education, and mobilization would be greatly hindered. However, with the protection of money power and its near complete deregulation "endemic political inequality"[86] will continue to dominate elections around the country.

[86] Liz Kennedy, "The World According to, and after, *McCutcheon* v. FEC, and Why It Matters," (September 5, 2014), Valparaiso University Law Review.

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