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Citizens United and Its Effect on Federal Campaign Finance

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***CITIZENS UNITED* and Its Effect on
Federal Campaign Finance**

Thomas Ritter

Chancellor Honors Project Senior Thesis

Faculty Advisor: Dr. John Scheb

Spring 2012

INTRODUCTION

On January 21, 2010, the Supreme Court overturned precedent that would send reverberations throughout the world of campaign finance. Since the early 20th century, Congress had taken great steps in regulating federal campaigns through a variety of methods: limiting contributions so that the wealthy and special interest groups could not create a stranglehold on the electoral process; directives to moderate campaign spending for federal offices; and finally the requirement of full public disclosure of any and all campaign finances in hopes of providing education and fairness to the electoral process.¹ One of the biggest restrictive measures amidst the goals of legislative policy-making was the ban of corporate money in the involvement of federal elections. The case of *Citizens United, Inc. v. Federal Election Committee*² not only overturned this century long precedent, but more importantly started a cascading effect that would bring more outside spending into federal elections than the country had ever seen before.

This ruling has already produced serious implications in our country's democratic electoral process, particularly at the federal level. Concerns have already been raised over *Citizen's* allowance of corporate money in Congressional and Presidential elections. Looking at these issues and analyzing the effect of corporate money on the electoral process will help us, as citizens, decide how to act in creating a more fair and less financially dependent electoral system. Money continues to flood federal campaigns at an unprecedented rate as Super PACs (political action committees) and the wealthy elite

¹ FEC, *Introduction*, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAW, [HTTP://WWW.FEC.GOV/PAGES/BROCHURES/FECFEQA.SHTML#INTRODUCTION](http://www.fec.gov/pages/brochures/fecfeqa.shtml#introduction) (last visited JAN. 20, 2012).

² *Citizens United, Inc. v. Federal Election Comm'n*, 588 U.S. --- (2010), 130 S. Ct. 876, 122 L.Ed. 2d 415.

control the means to play a monumental role in the election of Washington's public officials. With the impending 2012 Presidential election, *Citizens* has transformed the campaign finance landscape in a variety of ways. I aim to explore how the Supreme Court came to the decision that they did in *Citizens United*, the effect this decision had on political action committees, look at the rise and effect of Super PACS on federal campaigns since *Citizens*, and explore issues like quid pro quo and donor anonymity that threaten the integrity of our electoral system.

The history of corporate spending in political elections is a storied one that fits inside the evolution of a legal framework that involved legislative acts and the validation of these acts by the Supreme Court. Beginning in the early 1900s, corporate spending in federal elections came to a forefront with the passage of the Tillman Act of 1907³. The act was drafted in response to the Presidential election of 1904 featuring Alton Parker and Theodore Roosevelt. After losing the election, Alton Parker publicly questioned whether Roosevelt had clandestinely financed his successful election through the direct contributions of life insurance companies.⁴ After the media substantiated these claims, Democratic Senator Ben Tillman introduced a bill that would prevent corporations from "making money contributions in connection with political elections" that had to do with federal races involving "Presidential and Vice Presidential victors or a Representative in Congress or any election by any state legislature of a United States Senator."⁵ The act

³ 18 U.S.C. § 610 (originally enacted 1907, 34 Stat. 864)

⁴ Congress Watch Division, *12 Months After*, PUBLIC CITIZEN (2011). It's important to note that the Tillman Act was the initial establishment of the precedent that individuals had more leeway than corporations in influencing political campaigns, an issue that would later come to light in *Citizens* when corporations were defined as individual entities.

⁵ *Supra* 3. Act was later incorporated into the Federal Corrupt Practices Act of 1925.

effectively marked the start of federal campaign finance law with the idea that this ban would limit the power and influence of big business on the political process and prevent the idea of business and politics engaging in a sort of quid pro quo.⁶ In 1947, Congress further clarified the prevention of corporate spending on elections with the Taft Hartley Act. This prevented labor unions and more importantly, corporations, from making expenditures and contributions to federal elections.⁷ The unions' response came in the creation of political action committees (PACs), which acted as the channel for members of unions and corporations to donate money that would support specific political candidates.⁸ Federal campaign finance didn't stop there, as the Federal Election Campaign Act of 1972 required the reporting of full campaign contributions and expenditures to the Clerk of the House, Secretary of the Senate and Comptroller General of the United States General Accounting Office (with the Justice Department responsible for prosecuting specific violations).⁹ It wasn't until 1975 that Congress created the Federal Election Commission (FEC) to enforce the FECA, whose duty as an independent regulatory agency involved the disclosure of campaign finance information through the enforcement of statutory provisions that limit certain contributions at the state and federal level.¹⁰ After more than 60 years of drafted legislation governing the practice of

⁶ See Adam Winkler, *Other People's Money; Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 871 (2004).

⁷ FEC, APPENDIX 4, <http://www.fec.gov/info/appfour.htm> (last visited JAN. 20, 2012).

⁸ CQ PRESS, CONGRESSIONAL QUARTERLY, INC., INTEREST GROUP POLITICS, (Allan J. Cigler & Burdett A. Loomis eds., 7th ed. 2007). As Chapter 8 of *Interest Group Politics* points out, PACs were later legally legitimized into federal law through the Federal Election Campaign Act of 1971.

⁹ *Supra* at 7.

¹⁰ FEC, *FEC Mission and History*, ABOUT THE FEC, <http://www.fec.gov/info/mssion.shtml> (last visited JAN. 20, 2012).

campaign finance, the Supreme Court involved itself in the FECA stipulations and the creations of PACs in 1976 with *Buckley v. Valeo*.¹¹

In 1974, the Federal Election Campaign Act¹² had passed a substantial number of amendments outlining more rules pertaining to federal elections and the regulation of campaign contributions. In 1975, New York Senator James L. Buckley joined former Presidential candidate Eugene McCarthy and other plaintiffs in bringing suit against Francis R. Valeo, who served as Secretary of the Senate and the *ex officio* member¹³ of the FEC. The statutes at issue had the following provisions: “ individual political contributions are limited to \$1,000 to any single candidate per election, with an over-all annual limitation of \$25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to \$1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits¹⁴; contributions and expenditures above certain threshold levels must be reported and publicly disclosed¹⁵; a system for public funding of Presidential campaign activities established by Subtitle H of the Internal Revenue Code¹⁶; and a Federal Election Commission established to

¹¹ *Buckley v. Valeo* 424 U.S. 1 (1976).

¹² Federal Elections Campaign Act, Pub. L. 93-443, 88 Stat. 1263 (1974).

¹³ FEC, *Court Case Abstracts*, LITIGATION (Jan. 25, 2012), http://www.fec.gov/law/litigation_CCA_B.shtml#buckley. The Secretary of the Senate, Francis Valeo, and the Clerk of the House were designated non-voting, *ex officio* Commissioners of the FEC. They had this right because of the FECA amendments 88 Stat. 1263 (1974) that thereby designated someone as commissioner of the FEC stemming from their position within Congress.

¹⁴ 2 U.S.C. §441a (2011).

¹⁵ 2 U.S.C. §434 (2011).

¹⁶ I.R.C. §9001-9042 (2011).

administer and enforce the legislation¹⁷.¹⁸ The petitioners argued that these stipulations were in direct violation of the First Amendment freedom and equal protection principle and the right to freedom of association. Furthermore, they argued that the IRC Subtitle H was unconstitutional for two reasons. The first being that it violated the Fifth Amendment Due Process clause and the second purporting that the appointment clause precluded the Constitutionality of the Federal Election Commission by acting as a violation of the separation of powers clause. The court concluded their opinion by affirming the “individual contribution limits, the disclosure and reporting provisions, and the public financing scheme”¹⁹. However, the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds were deemed constitutionally invalid. Lastly, the Court held that most of the powers conferred upon Federal Election Commission by the Act violated the "Officers of the United States," portion of Art. II, § 2, cl. 2, of the Constitution, and therefore could not be exercised by the Commission as presently constituted.²⁰ The Supreme Court believed the limits enacted by the FECA of 1974 effectively stemmed the incoming tide of potential political corruption (*quid pro quo*). Nevertheless, it had important implications on political action committees as it refused to limit the establishment of PACs and made important clarifications on a PACs right to make independent expenditures.²¹ *Buckley v. Valeo* clarified the idea of issue advocacy, wherein a group or individual advocates for or against certain issues to the general public.

¹⁷ Formerly 2 U.S.C. §437 c(a) (1)(A-C))

¹⁸ *Valeo* 424 US at 46 (1976).

¹⁹ *Id.* at 143

²⁰ *Id.*

²¹ *Supra* note 8 at 185.

The Court outlawed certain issue advocacy as overtly expressive vocabulary that included words like “vote for,” “elect,” and “support.” The stipulations surrounding the idea of issue advocacy and federal campaign elections would be at issue again in 1986 in the Supreme Court case *FEC v. Massachusetts Citizens for Life, Inc* and would later serve as the basis for *Citizens United*.

A corporation’s political expenditures and FECA stipulations from the 1970s came to the forefront when *FEC v. Massachusetts Citizens for Life, Inc.*²² came before the Supreme Court in 1986. At issue in the case was the non-profit corporation Massachusetts Citizens for Life and their decision to have a special election flyer printed. Located on the election publication was information entitled “Everything You Need to Vote for Pro-Life.”²³ The pamphlet featured the pro-life, pro-abortion positions of state and federal candidates and included statements such as, “Vote pro-life,” and “No pro-life candidate can win in November without your vote in September.”²⁴ Copies were left in public areas and were mailed out to both members and non-members alike. The FEC found this to be a violation of the FECA stipulation 2 U.S.C. §441b²⁵, which prevented corporate spending in federal elections.

²² *FEC v. Massachusetts Citizens for Life, Inc.*, 589 F. Supp. 646 (D. Mass. 1984), aff’d, 769 F.2d 13 (1st Cir. 1985), aff’d, 479 U.S. 238 (1986).

²³ FEC, *Court Case Abstracts*, LITIGATION (Jan. 25, 2012), http://www.fec.gov/law/litigation_CCA_FEC_K.shtml#fec_mcf

²⁴ *Supra* note 21

²⁵ The court record refers to §441b(1) as § 316 of the FECA. §316 later evolved into 2 U.S.C. §441b. The exact wording of 441b defines labor organization as, “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” Therefore, the FEC believed Massachusetts Citizens for Life, Inc to fall under this category.

After the case went through the District Court and Court of Appeals, it went before the Supreme Court. In a narrowly contested decision, the Supreme Court ruled in favor of MCFL (Massachusetts Citizen For Life) but did so in a very roundabout way. Although MCFL argued that their actions didn't constitute those outlined under §441b's definition of expenditure(s), the Court disagreed by saying that the statute "clearly confirms that §441b was meant to proscribe expenditures in connection with an election" and not specifically on behalf of a candidate or political committee.²⁶ Therefore, the Court ruled that MCFL had violated §441b, but found this code to be unconstitutional to MCFL as it applied²⁷. The unconstitutionality of §441b arose because of its "infringe[ment] on protected speech without a compelling justification for such infringement,"²⁸ resulting in a direction violation of the First Amendment Free Speech clause. When the dust had settled, the Court had carved out a narrow exception²⁹ to FECA's ban on corporate political spending in dealing with nonprofit corporations, further examining the use of corporate expenditures in federal elections and reaffirming

²⁶ *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 238 (1986). 2 U.S.C. § 441b (2) (2011) defines 441b (2) as follows: "For purposes of this section and section [791 \(h\)](#) of title [15, \[1\]](#) the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section [431](#) of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication..."

²⁷ Essentially, the two basic challenges made by plaintiffs to the Supreme Court are an as applied challenge and a facial challenge. As applied is usually considered the better choice because it seeks the invalidation of a law in regards to how it applies to the client's case, whereas a facial challenge seeks the invalidation of a law in every instance.

²⁸ *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 263 (1986).

²⁹ The MCFL exemption allows nonprofit corporations to ignore federal electioneering communication restrictions because of its lack of shareholders and the understanding it won't accept contributions from for-profit corporations or unions.

the specifications pertaining to expressive or issue advocacy.³⁰ The Supreme Court cast a wary eye on combining corporate money with politics, citing a need for the protection of the country’s electoral system from “the corrosive influence of concentrated corporate wealth.”³¹

While *Buckley* and *MCFL* dealt with campaign finance law at the federal level, the Court found itself being presented with campaign finance questions at the state level in *Austin v. Michigan Chamber of Commerce*³². In 1985, the nonprofit corporation Michigan Chamber of Commerce took steps to place a quarter-page political ad in the *Grand Rapids Press* that supported a specific candidate to fill a vacant seat in the Michigan House of Representatives.³³ The Chamber sought to pay for this advertisement through funds derived from their General Treasury. Under Michigan federal campaign finance law, “corporations could make ‘independent expenditures’ only from a separate, segregated fund.”³⁴ Knowing this was punishable under state law as a felony, Michigan Chamber of Commerce sought a Constitutional challenge(s) from the United States District Court on grounds that their First Amendment Right to Free Speech and Equal Protection Clause of the Fourth Amendment were being violated by section 54(1)³⁵ of the Michigan Campaign Finance Act. After decisions of the District Court and Court of

³⁰ It’s important to note that the Court discussed issue advocacy through MCFL’s illegal usage of specific words like “vote for.” Citing conclusions previously reached by the Court in *Buckley*, Justice Brennan concluded that MCFL’s pamphlet constituted prohibited expenditures. These key issue advocacy words would later play a prominent role in the *Citizens United* ruling.

³¹ *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 257 (1986).

³² *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, (1990).

³³ Prescott M. Lassman, *Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan Chamber of Commerce*, 78 VA L.REV. 759-792, (1992)

³⁴ Mich. Comp. Laws Ann. 169.254-.255. (1976)

³⁵ *Id.*, .254 Sec. 54(1), which states “a corporation, joint stock company, domestic dependent sovereign, or labor organization shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution pursuant to section 4(3)(a).”

Appeals, the case headed for the Supreme Court. In a six-to-three decision, the Court found the law to be narrowly tailored to appropriately demonstrating a compelling interest in preventing corruption of campaign finance at the state level. The Court agreed that expressed activity or advocacy on behalf of a candidate fell well within First Amendment rights with the Michigan statute burdening that activity. Therefore, the only way the Court could determine the Constitutionality of the statute was by deciding whether it “justified a compelling state interest” through a narrowly tailored channel.³⁶ The Supreme Court threw out the Chamber’s argument stating the statute was a violation of the Equal Protection clause. The Chamber believed that unincorporated associations or media associations were not mandated to comply with the same restrictions under § 54(1) and were given preferential treatment to “similarly situated entities.”³⁷ The Court disagreed by stating that the media had unique societal roles that excluded them from this restriction, and that the Michigan Chamber had to adhere because it was given legal advantages unincorporated associations were not. Justice Thurgood Marshall concluded the majority opinion saying,

Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a

³⁶ *Michigan Chamber of Commerce*, 494 U.S. at 680 (1990).

³⁷ *Id.* at 666.

sufficiently compelling rationale to support its restriction on independent expenditures by corporations.³⁸

Therefore the Court held that political speech may be excluded based on a speaker's identity, serving as an atypical approach to past First Amendment principles.

Ten years later, campaign finance again became a hot-button topic of conversation as the amount of campaign money being raised skyrocketed. Soft money is nonfederal money that falls outside the realm of FEC regulations. Soft money was being used to provide a competitive edge in tightly fought elections through the financing of “administrative and electioneering activities.”³⁹ The usage of soft money in electioneering communications became law when a U.S. District Court in Virginia ruled in 1995 that the spending of soft money in regards to issue advocacy was acceptable under the caveat that the Buckley standard of not explicitly urging voters to do a particular thing would not be violated.⁴⁰ This precedent was further established when the Supreme Court ruled in *Colorado Republican Federal Campaign Committee v. FEC*⁴¹ that political parties were allowed to spend money on behalf of candidates without using hard money.⁴¹ From these decisions, the use of soft money in the 1996 Presidential election between Bill Clinton and Bob Dole skyrocketed. Additionally, soft money was being used to fund electioneering communications in forty-four of the Congressional

³⁸ *Id.* at 660. *Supra* note 33 at 779. The court chose to address campaign corruption of the “corrosive and distorting effect of aggregations of wealth” as opposed to an issue that seemed to clearly outline the topic of “whether corporate expenditures pose a danger to quid pro quo corruption in candidate elections.” Previous precedent served to hallmark financial corruption as quid pro quo.

³⁹ Paul S. Herrnson, *The Bipartisan Campaign Reform Act and Congressional Elections* ” in Lawrence C. Dodd and Bruce I. Oppenheimer, eds. [*Congress Reconsidered*](#), 8th ed., (CQ Press, 2005), 107-135.

⁴⁰ *FEC v. Christian Action Coalition*, 894 F. Supp. 946 (W.D. Va., 1995).

⁴¹ *Supra* note 8 at 197.

elections.⁴² This culminated in the Democratic and Republican parties raising \$495 million in soft money for the 2000 elections.⁴³ Finding this unacceptable, Senators Russell Feingold and John McCain began advocating for governmental intervention in preventing soft money from controlling federal elections. Their wish came to fruition when Congress passed the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Act.⁴⁴ It outlawed the use of soft money by national parties or congressional campaign committees, pressuring national, state, and local party organizations to pay for electioneering communications with their hard money. Corporations and unions were excluded from using treasury money to broadcast campaign advertisements or participate in “electioneering communications” The only way for corporate influence to be dispersed in the political realm was by coordinating activities through the proper avenue of their Political Action Committees. Therefore, political action committees became even bigger players on the national stage of campaign finance. Corporations and now national parties alike had similar dependence on using PACs to get their political ideologies broadcast.

The BCRA Act’s constitutionality was challenged almost immediately as Senator Mitch McConnell brought suit against the FEC in the District Court of Columbia in *McConnell v. FEC*⁴⁵. More than 80 plaintiffs joined the suit shortly thereafter, proclaiming that the BCRA’s key provisions were in clear violation of First Amendment

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Pub.L. 107-155, 116 Stat. 81, enacted March 27, 2002, H.R. 2356 “The Act had three major components: a ban on soft money, increased contribution limits, and restrictions on issue advocacy advertising,” as Paul S. Herrnson explains in his article, “Bipartisan Campaign Reform Act and Congressional Elections.”

⁴⁵ *McConnell v. FEC*, 540 U.S. 93 (2003).

Free Speech and Fifth Amendment equal protection rights of the Due Process clause. The District Court issued a ruling that extinguished the ban on soft money while upholding the restrictions that had been assigned to electioneering communications. Following the District Court's decision, the case made its way to the Supreme Court. In a narrowly contested decision, the Supreme Court ruled 5-4 to uphold the Constitutionality of key provisions of the BCRA. Once again, corporations and unions were prevented from making their presence felt through independent expenditures and soft money. The Court deduced that PACs provided corporations and unions a "constitutionally sufficient" avenue to participate in federal elections.⁴⁶ Expounding on the same interest discussed in *Buckley* and *Austin*, the Court believed that there was sufficient interest in "preserving the integrity of the electoral process, preventing corruption, and preserving the confidence of citizens in the government."⁴⁷ The Justices believed that all of these things were infringed upon when corporate money had the opportunity of making its presence felt in federal elections. When the book had shut on the *McConnell* case, it seemed like the future for corporate influence in the electoral process was dim at best. Ironically, it took just one case with an expanded scope to throw a curveball into campaign finance.

In January 2008, the wheels were set in motion for corporate spending to be unleashed in political elections. Citizens United was a non-profit corporation intent on distributing a ninety-minute documentary called *Hillary: The Movie*. The documentary was critical of Senator Hillary Clinton's impending effort to win the Democratic nomination for the Presidency. A few problems arose from the non-profits intentions to

⁴⁶ THE BRENNAN CENTER FOR JUSTICE, MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 3 (Monica Youn, 2011).

⁴⁷ *Id.* at 31.

release the movie. Namely, Citizens was in violation of McCain-Feingold’s ban on corporate funded independent expenditures. Citizens also intended to show the movie in the days leading up to the election and tried to get around this by making the movie accessible only through “video-on-demand.” Citizens knew both these things could potentially be a violation of 441(b), along with BCRA’s §201 and §311 disclosure requirements, and therefore sought “declaratory and injunctive relief.”⁴⁸ After bringing their case before the District Court, the District Court granted the FEC summary judgment. After deciding that the BCRA’s disclosure requirements were constitutional and 441(b) was constitutional as applied to *Hillary* using *McConnell* precedent, the Court asked both parties to file supplemental briefs to the Supreme Court addressing the facial validity of *McConnell* or *Austin*⁴⁹. Citizens’ submitted brief to the Supreme Court took the form of an as applied challenge, believing it had a better chance of having 441(b) successfully overturned.⁵⁰ In an unprecedented move, the Supreme Court pointed to Citizens’ brief at the District Court level and its facial challenge of *Austin* and instructed Citizens to challenge the 441(b) legislation as unconstitutional. Justice Roberts believed the distinction wasn’t so definite that it imprisoned a challenger from using one over the other. He added “[nothing] prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved.”⁵¹ The stage had been

⁴⁸ *Citizens United, Inc. v. Federal Election Comm’n*, 588 U.S. 1, 2 (2010).

⁴⁹ *Id.* at 12.

⁵⁰ What made this interesting was that Citizens used the basis of a facial challenge in the District Court proceedings, yet when the case reached the Supreme Court they decided to instead change tactics and challenge 441(b) through an as applied. This was in large part at the Court’s encouragement.

⁵¹ See *FEC*, 588 U.S. at 21. Justice Roberts also cited Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000) in further justifying court’s discretion of instructing appropriate response by quoting Fallon, “Once a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly ‘as-applied’ cases” at 1327-1328.

set for the Court to issue a monumental decision that would overturn years of well-established precedent.

In evaluating the Constitutionality of the claims Citizens had raised, namely independent expenditures, the Supreme Court looked at past campaign finance precedent that involved *Buckley v. Valeo*, *Austin v. Michigan Chamber of Commerce*, the BCRA of 2002, and *McConnell v. Federal Election Commission*. The Supreme Court's decision to strike down limits on independent expenditures in *Buckley* was founded on the belief that "[t]he absence of prearrangement and coordination...alleviates the dangers that expenditures will be given as a quid pro quo for improper commitments from the candidate."⁵² Having already explained the Court's reasoning in *Austin* and *McConnell* earlier, the Citizens Court used *Buckley's* line of reasoning. This was done to reevaluate the decisions handed down in both *Austin* and *McConnell* that were founded on governmental anti-corruption interest. The Court believed that two different lines of precedent had been established pertaining to the restrictions on one's political speech, "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."⁵³ Justice Kennedy believed that the precedent established in *Buckley* (or pre-*Austin*) was the more important of the two conflicting views, citing that independent expenditures could not be banned unless a substantial threat could be established between expenditures and political corruption. Using the basis of understanding that independent expenditures did not correlate to quid pro quo, Justice Kennedy examined cases culminating in *McConnell* to determine the

⁵² Federal Election Comm'n, 588 U.S. at 48, citing *Buckley*, 424 U.S. at 47.

⁵³ Federal Election Comm'n, 588 U.S. at 39.

Court's definition of what constituted corruption. He determined that along with "quid pro quo, dollars for political favors," the Court had over many years expounded upon the definition to include "the appearance of undue influence."⁵⁴ The *Citizens* Court took issue with "undue influence" being a characteristic of the government's definition or interest in corruption and instead returned to the older definition specific to only quid pro quo. Justice Kennedy believed that the influence of one engaging in political activity didn't create the appearance of quid pro quo. "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."⁵⁵ With this deduction, the Court overruled precedent that had been established in *Austin* and part 441(b) of *McConnell* by concluding, "Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."⁵⁶ The Court deduced that it was a violation of one's First Amendment right to have their speech suppressed based solely on one's corporate identity. In a tightly contested vote, The Supreme Court ruled in a 5-4 decision that corporations were now free to spend shareholder money on independent expenditures in an effort to advocate on behalf or against a specific candidate running for political office. "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."⁵⁷

In the end, one's first amendment right to free speech proved to be the deciding factor in the Court's decision to allow corporations to involve their own finances in the electoral process. "The Court cannot resolve this case on a narrower ground without

⁵⁴ *FEC* 558 U.S. at 57.

⁵⁵ *Id.* at 50.

⁵⁶ *Id.* at 49.

⁵⁷ *Id.* at 51.

chilling political speech, speech that is central to the meaning and purpose of the First Amendment.”⁵⁸ Justice Kennedy also made a point in the majority opinion to discuss his belief that PACs didn’t serve as an appropriate enough channel for political speech to be heard. “A PAC is a separate association from the corporation and [they are] burdensome alternatives.”⁵⁹ It was decided that for-profit corporations should have the same rights as human beings when it comes to an individual’s freedom to have their speech heard.⁶⁰ “Speech is an essential mechanism for democracy, for it is the means to hold officials accountable to the people.”⁶¹ With the possibility of spending endless amounts of cash from their treasury checkbook, electioneering communications became one of the most attractive ways for people to advertise their beliefs on why a certain candidate was the right or wrong choice for the job. It seemed only natural that the wealthy would have no problem giving, but these same people didn’t want their name or company directly associated with an ad that airs on television criticizing Senator _____ (fill in the blank). Corporations and unions now had the ability to influence the electoral process, and thanks to FECA’s PAC stipulation, just the machinery to do it for them.

Justice Stevens, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, expressed his disagreement over the Court’s decision. From the beginning, he illustrated a real concern over the kind of effect the ruling could have on the electoral process. “The Court’s ruling threatens to undermine the integrity of elected institutions

⁵⁸ *Id.* at 19.

⁵⁹ *Id.* at 28.

⁶⁰ As Burt Neuborne explains in his article, “*An Accidental Democracy Built by Judges*,” it’s ironic that the Court came to this conclusion a hundred years after *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) defined for-profit corporations to fall outside the realm rights protected to human beings, like the Fifth Amendment self-incrimination clause.

⁶¹ *Federal Election Comm’n* 558 U.S. at 30.

across the Nation, [with] the path it has taken to reach its outcome, I fear, do damage to this institution.”⁶² Justice Stevens believed that the Court erred from the get-go, answering questions fundamental to campaign finance that the litigants didn’t even ask, a procedure he remarked was “unusual and inadvisable for a court.”⁶³ He concluded his displeasure over the questions the Justices chose to answer by summarizing, “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”⁶⁴ He also had a real problem with the Court influencing the challenge Citizens presented, pressuring them to issue a facial instead of an as applied. “The parties have advanced numerous ways to resolve this case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United without toppling statutes and precedents.”⁶⁵ Stevens completely disagreed with the majority opinion’s anticorruption interest, citing grounds that focused all too narrowly on just quid pro quo. “We have never suggested that such quid pro quo debts must take the form of outright vote buying or bribes.” He continued, “Rather [quid pro quo] encompass[es] the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”⁶⁶ Finally, he pointed out the importance of the American people having confidence in the system our nation was founded upon. “A democracy cannot function effectively when its

⁶² *Id.* at 91.

⁶³ *Id.*

⁶⁴ *Id.* at 93.

⁶⁵ *Id.* at 101.

⁶⁶ *Id.* at 149.

constituent members believe laws are being bought and sold.”⁶⁷ While Stevens displayed a great deal of validity in his disagreement over the ruling, it was all for naught as the damage had already been done.

In a poll conducted by the Washington Post after the ruling was handed down, “80 percent of Americans opposed the decision, including 65% who strongly opposed it.”⁶⁸ Political analysts and campaign lawyers alike believed that the influence of outside interest groups would dwarf that of political parties.⁶⁹ In an article featured in the American Bar Association journal, lobbyists expressed their concern over the ruling affecting not just that of the Presidency, but legislative and judicial elections as well.⁷⁰ Justice Stevens’ concern over citizens’ faltering confidence in the electoral process was a commonly expressed sentiment among many after the ruling. “The framers intended Congress to be “dependent upon the People alone.” But the private funding of public campaigns has bred within Congress a second, and conflicting, dependency.”⁷¹ The idea of the Court deeming money to be no different than political speech contributes to the ideology that corporate and wealthy voices alike will drown out those of the politically-engaged lower and middle class. A system is needed that “forces politicians to pay attention to their constituents, not just their constituents who pay”, and the current post-

⁶⁷ *Id.* at 150.

⁶⁸ Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s decision on Campaign Financing*, WASHINGTON POST (Feb. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>

⁶⁹ Debra Cassens Weiss, *Swayed Judicial Races and Pushy Lobbyists: Analysis of Citizens United*, ABA JOURNAL (Jan. 22, 2010), http://www.abajournal.com/news/article/swayed_judicial_races_and_pushy_lobbyists_analysis_of_citizens_united/.

⁷⁰ *Id.*

⁷¹ Lawrence Lessig, *Democracy After Citizens United*, BOSTON REVIEW (Sept/Oct 2010), <http://bostonreview.net/BR35.5/lessig.php>.

Citizens system of campaign finance is incapable of doing this because of its decision to combine “corporate personhood and money is speech into one decision.”⁷² Michael Beckel, a representative of the Center for Responsive Politics, commented on Citizen’s affect on campaign finance by stating, “For the first time, independent groups would be legally allowed to say pretty much whatever they want, whenever they want, with corporate money, union money or money from individuals.”⁷³ The only thing left to do for political analysts, lobbyists, citizens, and candidates alike was to wait and see how the changes would affect the electoral system.

Two years after the controversial ruling, it’s incredible to see the amount of money being spent as independent expenditures flood federal elections. Millions of dollars are being spent on electioneering communications that openly advertise on behalf or against a candidate and their campaign. At the heart of it all are political action committees. PACs face a much easier road of navigating the channels of federal law that mandates how much money can be received and how it can be spent. By laying the foundation of how campaign finance evolved over the course of the 20th century, it’s now possible to explore the effects independent expenditures and PACs have had on federal elections. Before I do that, it’s important to understand the evolutionary framework of PACs and the expanded role they now play.

⁷² Jeanne Jeong, *Democracy for Sale: An Ambivalent Analysis of Citizens United*, THE COLLEGE HILL INDEPENDENT (Nov. 28, 2011), http://students.brown.edu/College_Hill_Independent/?p=6019.

⁷³ Thomas Ritter and Michael Beckel, *Interview with Michael Beckel*, CENTER FOR RESPONSIVE POLITICS, (Oct. 11, 2011), EMAIL.

FROM PACS TO SUPER PACS, THEIR EFFECT ON 2012

As previously mentioned, political action committees had been around long before *Citizens United*. *Buckley v. Valeo* had provided unions and corporations the ability to express their political speech through political action committees. Through the 1976 FEC regulations, donors were restricted from giving more than \$5,000 to a PAC.⁷⁴ As elections continued to evolve, donors found a way around this requirement through 527 non-profits, which were allowed to accept donations in excess of the \$5,000 limit. A 527 committee is defined as a “tax-exempt, private political organization that is created to engage in political activities” and to “influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office.”⁷⁵ 527s dominated the campaign finance landscape in the early 2000s, causing soft money fundraising to skyrocket and leading many to believe the 527 was the vehicle of choice to influence elections.⁷⁶ For a long time this held true, but that would all change shortly after the *Citizens* decision. Once the *Citizens* ruling had been handed down, many wondered how the Court’s decision on independent expenditures would affect PACs. It took less than two months for their question to be answered in the form of the case *SpeechNow.org, et al v. Federal Election Commission*.⁷⁷

SpeechNow was an unincorporated nonprofit classified as a 527 under the Internal Revenue Code. Although the 527 had yet to perform specific actions, its leaders

⁷⁴ 2 U.S.C. § 441a(a)(1)(C).

⁷⁵ Diana Dwyre, *527s: The New Bad Guys of Campaign Finance*, in *INTEREST GROUP POLITICS* 212 (Allan J. Cigler & Burdette A. Loomis eds., 2007).

⁷⁶ *Id.* at 84.

⁷⁷ *SpeechNow.org v Federal Election Commission*, No. 1:08-cv-00248-JR, 2010 U.S. App., at 13 (WestLaw).

had made future plans concerning fundraising and independent expenditures. With plans to accept donations in excess of \$5,000 and run electioneering communications for the 2010 midterms, SpeechNow's President and Treasurer, David Keating, was concerned the organization's actions would violate federal law. Keating and a few others asked the FEC to issue an advisory opinion to determine if they would have to register as a political action committee and if contributions made to the organization would be subject to regulations like §441.⁷⁸ The FEC quickly ruled that SpeechNow would be considered a PAC and that contributions would be limited to federal PAC limits. Keating and four others then took the initiative to file a complaint in District Court requesting declaratory relief against the FEC. The only problem was that they had done so under 2 U.S.C. §437h, which provides that a "district court immediately shall certify all questions of constitutionality of the FECA Act to the United States court of appeals for the circuit involved." The only parties permissible under 2 U.S.C. to seek declaratory relief were the FEC, political parties, or individuals and SpeechNow constituted none of these. The only reason the court of appeals agreed to hear the case was because the plaintiffs had also taken the initiative to seek a preliminary injunction against the FEC from enforcing PAC limits on the contributions that SpeechNow planned on accepting. Therefore, the questions raised in the complaint combined with the plaintiff's preliminary injunction were consolidated into a single case appearing before the court of appeals.

One of the first things the court of appeals sought to address was the federally mandated contribution limits that had been placed upon PACs. The government's past

⁷⁸ Regulations that mandate an individual's contribution to a PAC as being no greater than \$5,000 and an individual's total contributions to all PACS being greater than \$69,900 biennially.

precedent in dealing with contribution limits lay within their anti-corruption interest. Yet, the court of appeals cited *Citizens* in determining their ruling. Because *Citizens* had ruled that independent expenditures do not corrupt or create quid pro quo arrangements, “contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption.”⁷⁹ Therefore, the court of appeals ruled that it was a direct violation of First Amendment rights to limit contributions made to an independent expenditure group. While *Citizens* opened the door for corporations and unions to spend their own money on federal elections, it hadn’t effectively answered the question in regards to donating money to PACs. The court of appeals did as PACs could now legally accept contributions of any size from any donor. The creation of Super PACs was now complete, as Super PACs became known as independent expenditure only political action committees intent on raising and spending unlimited funds campaigning on behalf or against a candidate.

In just a few months, the structure of political action committees had completely changed. With the *Citizens* and *SpeechNow* rulings, an important distinction had now been made separating standard PACs from a new breed: independent-expenditure-only political action committees. While they could accept unlimited amounts of money, the two main requirements that remained in place were that of donor disclosure and a clear distinction of incoordination between the committee and the candidate. As the court of appeals said in the *Speechnow* case, “[But] the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the

⁷⁹ *Federal Election Commission*, 2010 U.S. App., at 14 (WestLaw).

contributions were made towards administrative expenses or independent expenditures.⁸⁰

Super PACs have let their presence be felt immediately in federal elections, most notably in the upcoming 2012 Presidential election. As prominent super PACs raise and spend more and more money, many serious implications arise from their participation. Is there an appropriate level of incoordination between Super PACs and candidates? Are donors, political action committees and non-profits like 401(c) 4's and 527s circumventing disclosure requirements? These series of questions lead to even bigger discussions such as: are PACs making their presence felt in federal elections and does their presence inhibit our democratic electoral system? I want to explore all of these things and more in examining the effect of political action committees at the federal level in a post-*Citizens United* world.

When the Supreme Court in *Citizens* and the Court of Appeals in *Speechnow* made the decision to allow an unlimited amount of money to be donated to independent expenditure groups, they did so because they believed independent expenditures offered no threat to the government's anti-corruption interest of preventing quid pro quo. I believe recent events surrounding Super PACs can lead one to question this belief. It's important to look at how Super PACs are affecting politics and the impending Presidential election. The most obvious beneficiaries of the rulings and the actions by donors and Super PACs are the candidates themselves. Heading into next year's November election, every major candidate in the GOP, as well as President Barack

⁸⁰ *Federal Election Commission* 2010 U.S. App., at 20 (WestLaw).

Obama, has aligned themselves with a Super PAC. The major Super PACs supporting GOP candidates are as followed: Restore Our Future, supporting Mitt Romney; Winning our Future, supporting Newt Gingrich; The Red, White, and Blue fund, supporting Rick Santorum; and Endorse Liberty, supporting Ron Paul. Interestingly enough, one of the biggest opponents of the *Citizens* ruling was Barack Obama himself, stating shortly after the ruling, “This opens the floodgates for an unlimited amount of special interest money into our democracy, [this] gives the special interest lobbyists new leverage to spend millions on advertising to persuade elected officials to vote their way – or to punish those who don’t.”⁸¹ However, he recently changed course by publicly endorsing Super PAC Priorities USA, a move that proved to be controversial after his public disdain over the *Citizens* ruling. Below is a chart⁸² listing the five primary Super PACs endorsing the candidates I mentioned, how much money those Committees have raised, and the amount of money that’s been spent campaigning on behalf of or against another candidate. I think it provides some pretty staggering figures.

⁸¹ President Barack Obama, Weekly Address, THE WHITE HOUSE (Jan. 23, 2010), <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-vows-continue-standing-special-interests-behalf-amer>. The President went on to say it infringed upon our democratic process.

⁸² This information comes from the Center for Responsive Politics, otherwise known as [opensecrets.org](http://www.opensecrets.org). They study FEC filings that detail the money being raised and spent by Super PACS. All information in this graph comes from filings made at the beginning of March.

SUPER PAC	SUPPORTS	\$ RAISED	\$ spent on IND. Exp
Restore Our Future	Mitt Romney	\$36,797,202	\$33,768,405
Winning Our Future	Newt Gingrich	\$13,114,797	\$16,147,653
Red, White, and Blue	Rick Santorum	\$2,817,675	\$5,820,757
Endorse Liberty	Ron Paul	\$3,396,997	\$3,117,207
Priorities USA Action	Barack Obama	\$4,459,431	\$750,104

These five Super PACS have raised a combined \$60,586,102 and spent \$59,604,126 on independent expenditures. These Super PACS and the money they've raised make up only a fraction of committees filed with the FEC and the money that has so far been raised in this election cycle. As of March's FEC filing, there were 364 groups filed as Super PACs and they had raised \$130,353,017 while also spending \$75,113,928 in the 2012 election cycle.⁸³ This figure only looks to rise as the GOP race continues to move closer to the choosing of a clearly defined candidate. It's hard to put that number into historical context, as the only data to refer to for comparison's sake is the money raised and spent by Super PACs in the 2010 midterm elections, which occurred after the *Citizens* and *SpeechNow* rulings. However, looking at limited data provided by the Center for Responsive Politics, it's clear the amount of independent expenditures and

⁸³ Data comes from [opensecrets.org](http://www.opensecrets.org).
OpenSecrets.org, SUPER PACS (Mar. 25, 2011, 10:50 PM),
<http://www.opensecrets.org/pacs/superpacs.php?cycle=2012>.

electioneering communications being raised are at a far greater rate than history's ever seen before.

The data provided below marks outside spending through April 9th of the election years of 2006, 2008, 2010, and 2012.⁸⁴ This outside spending excludes candidate and party committee fundraising numbers. The reason I included years in which the Presidential election is not going on is to show how much outside spending has exponentially risen in federal elections, especially since the post-*Citizens United* ruling.

OUTSIDE SPENDING THROUGH APRIL 9TH OF ELECTION YEAR				
Year	2006	2008	2010	2012
Independent Expenditures	\$1,725,268	\$23,337,391	\$15,393,102	\$93,545,491
Electioneering Communications	\$466,200	\$8,809,647	\$3,129,614	\$4,704,660
Communication Costs	\$168,256	\$11,976,076	\$499,495	\$88,989
Total	\$2,359,724	\$44,123,114	\$19,022,211	\$98,339,140

While the money raised in 2010 wasn't as high because of the many months left preceding the midterm election, almost every subcategory of outside spending so far in the 2012 cycle dwarfs the 2010 cycle through April. This also doesn't take into account

⁸⁴ OpenSecrets.org, *Outside Spending Through April 9th of Election Year, Excluding Party Committees*, OUTSIDE SPENDING (Apr. 9, 2012 1:45 PM), <http://www.opensecrets.org/outsidespending/index.php?cycle=2012&view=Y&chart=N#viewpt>. This data is updated daily, so the numbers will be bigger than the ones listed above.

factors like an undecided GOP race, midterm elections, and the potential for party majority in Congress. As all of these things draw near, the amount of outside spending is certain to go to unprecedented levels unlike anything our country has seen in campaign finance. As I continue to explore the effect of Super PACs, I want to examine some important details. I want to take a closer look at the Super PACs I listed in my chart by exploring the people running them, some of the largest donors to these PACs, and implications these have had on the race for the Republican nomination for the Presidency.

One of the most interesting aspects about Super PACs roles in the Presidential election thus far are the men behind them and their relationship to specific candidates. As I mentioned previously, the Court of Appeals ruling largely hinged on a level of incoordination clearly existing between a political action committee and the candidate it supported. This caveat is already being put to the test as many of the GOP candidates and President Obama have connections to the Super PACs supporting them in more ways than one. Friends, former colleagues, or in rare instances even family members sit atop powerful political action committees that play an integral role in helping a candidate get their message out to the American people. Mitt Romney made headlines by speaking at a Restore Our Future fundraising event⁸⁵ in July, an act that the FEC deemed to be legal. It seems that the only unacceptable level of interaction between a candidate and their Super PAC is direct communication with one another, an action that seems extremely difficult

⁸⁵ Scott Conroy, *Obama, Romney Getting Cozier with Super PACs*, CBSNEWS (Feb. 14, 2012), http://www.cbsnews.com/8301-503544_162-57377525-503544/obama-romney-getting-cozier-with-super-pacs/.

to prove. Below is a chart explaining some of the key figures behind specific Super PACs and the relationship these men and women have had to candidates.⁸⁶

WHO'S RUNNING WHO??		
SUPER PAC	CANDIDATE	MAJOR PLAYERS
Restore Our Future	ROMNEY	CARL FORTI-Romney's 2008 Campaign Director now one of the leading front-men for ROF CHARLES SPIES-Romney's 2008 general counsel, treasurer of ROF
Priorities USA Action	OBAMA	SEAN SWEENEY- former OBAMA White House aide. Co-founder of PRIORITIES with BILL BURTON- former White House deputy press secretary
Winning Our Future	GINGRICH	RICK TYLER- former Gingrich campaign spokesperson, now face of WOF. BECKY BURKETT-former Gingrich aide, started WOF
RED, WHITE, and BLUE	SANTORUM	NICK RYAN- former Santorum aide, founder of RW&B.

This close association between a candidate and the people running the PAC supporting that candidate raises serious implications. It allows the candidate to feel comfortable having someone do the dirty work of raising and spending money on electioneering communications that advance their political message. It is true that men and women have long been hired to raise and spend money in the political realm. However, I see one

⁸⁶ Andy Kroll, *Candidates and the Totally Unrelated Super-PACs That Love Them*, MOTHER JONES (Jan. 20, 2012), <http://motherjones.com/mojo/2012/01/stephen-colbert-citizens-united-super-pac>.

notable difference with Super PAC leaders in this new era of campaign finance and people hired to raise money by candidates or committees in the past. The Super PAC vehicle and those driving are now more powerful than the candidate and his/her fundraising teams. Rick Tyler and Carl Forti are two men that know what Newt Gingrich and Mitt Romney believe in and what their political ideologies are having worked with the candidates on previous campaigns. Why work for these two candidates directly when Mr. Forti or Mr. Tyler can have a much greater impact on political activity with a Super PAC? While many would view this as an advantage for the candidate to be able to sit back and watch a committee do their work for them, it can be argued that this could potentially have detrimental affects on the public's perception of the candidate as well. If a candidate aligns his or herself too closely with a Super PAC and that PAC makes claims that are ultimately false or perceived in a negative light, there is a chance this negative perception could be transferred to the candidate.⁸⁷ This happened recently when one of Rick Santorum's biggest Red, White, and Blue donors, Foster Friess, made controversial statements about birth control. Friess has contributed hundreds of thousands of dollars to Santorum's super PAC and offered to continue donating as much money as the PAC needed to stay afloat in the GOP race. Santorum, when asked about Friess's comments responded, "This is someone who is a supporter of mine, and I'm not

⁸⁷ Romney was criticized when Restore Our Future ran an ad attacking Newt Gingrich that contained inaccurate statements involving Gingrich's voting record with Nancy Pelosi. When media uncovered this, many blamed Romney for allowing Restore Our Future to run the ad. One can argue he was not at fault when he has no control over what is said in advertisements and who runs them.

responsible for every comment that a supporter of mine makes.”⁸⁸ He further remarked it was “not reflective of me or my record on this issue.”

I believe the line is being skirted too closely for the American people not to fear quid pro quo rising up out of the framework of super PACS and candidates. When a candidate like Rick Santorum is traveling the country with arguably his Super PAC’s biggest donor, Foster Friess, and Mr. Friess is introducing him at fundraising events, I think the average voter should feel uncomfortable over the possibility of future quid pro quo.⁸⁹ Also, FEC filings of recent Super PAC’s receipts have raised quid pro quo questions as well. For example, in the late January FEC filing of the Red, White, and Blue fund, receipts showed half a million dollars were spent paying a direct mail firm created by none other than Nick Ryan. Nick Ryan is a former Santorum aide and founder of the Red, White, and Blue Super PAC. “People who are raising the money are paying themselves with these funds, [something] I don’t think that’s appropriate,” said Dale Emmons, president of the American Association of Political Consultants.⁹⁰ Other Super PACs receipts reveal interesting spending habits as well. Winning Our Future, the pro-Newt Gingrich Super PAC, paid the President of the committee, Becky Burkett, \$206,000 in January for “executive management and fundraising services.”⁹¹ When asked about this, Winning our Future spokesperson Rick Tyler defended the Committee’s actions

⁸⁸ Tim Mak, *Rick Santorum Disavows Foster Friess’ Comments*, POLITICO (Feb. 17, 2012), <http://www.politico.com/news/stories/0212/73020.html>.

⁸⁹ Friess even introduced Santorum at the Conservative Political Action Conference in Washington. Jennifer Rubin, *Meet Foster Friess, Rick Santorum’s Super PAC Patron*, WASHINGTON POST OPINIONS, (Feb. 13, 2012), http://www.washingtonpost.com/blogs/right-turn/post/meet-foster-friess-rick-santorums-super-pac-patron/2012/02/11/gIOAJgZO9Q_blog.html.

⁹⁰ Melanie Mason & Matea Gold, *‘Super PAC’ Leaders Profit From Lack of Oversight*, L.A. TIMES, (Feb. 22, 2012), <http://articles.latimes.com/2012/feb/22/nation/la-na-superpac-spending-20120223>.

⁹¹ *Id.*

saying the payment was based on “fundraising successes” and that salaries of committee employees were determined by himself, Burkett, and managing director Gregg Phillips. This leaves an uneasy feeling in how transparent Super PACs really are even when disclosure requirements are mandated.

While PACs are raising millions of dollars and being operated by friends and former colleagues of candidates, Fred Wertheimer argues that, “Super PACs allow relatively few super-rich individuals to have greatly magnified and undue influence over the result of our elections.”⁹² The man who is known as being “the country’s leading proponent of campaign finance reform,⁹³” Wertheimer runs Democracy 21, one of the most well known watchdog groups that advocate on behalf of campaign finance reform. Using data listed in a New York Times Article⁹⁴, the chart below lists the five major Super PACs and their biggest donors. The data comes from the FEC filings released in January and offers a few interesting conclusions.

⁹² Fred Wertheimer, *Super PACs a Disaster for Democracy*, CNN OPINION (Feb. 15, 2012), <http://www.cnn.com/2012/02/15/opinion/wertheimer-super-pacs/index.html>.

⁹³ *New York Times* said this about Fred Wertheimer. He’s also been called “a godfather of the campaign finance reform movement” by *Time* magazine.

⁹⁴ NEW YORK TIMES, *Who’s Financing the “Super PACs”*, POLITICS (updated Mar. 26, 2012), <http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html?ref=politics>.

SUPER PAC	Percentage of “Large Donors”	Biggest Donors
Restore our Future	97%	Bob Perry- \$4m from Houston homebuilder Julian Robertson- \$1.3m from Tiger Management founder
Winning Our Future	99%	Sheldon and Miriam Adelson- \$10m from billionaire Las Vegas casino moguls
Priorities USA Action	95%	Jeffrey Katzenberg- \$2m from DreamWorks Animation chief executive Bill Maher- \$1m from Hollywood comedian
Red, White, and Blue Fund	94%	Foster F. Friess- \$1.6m from mutual fund manager
Make Us Great Again	97%	Contran Corporation- \$1m from holding company owned by Harold Simmons

First, the most interesting statistic is the percentage of large donors. Large donors are categorized as people whose donation exceeds \$25,000. With every PAC receiving more than 90% of its donation in \$25,000 or more donations, it’s easy to see why some people believe wealthy elitists are the only ones taking advantage of avenues that reflect undue influence over the electoral system. In the particular case of the GOP race, some political analysts believe that the backing of wealthy donors has allowed some candidates to stay in the race longer than they ordinarily would have in the pre-Super PAC era. This makes sense for a variety of reasons. The candidates no longer have to spend as much of

their own money on the advancement of their political agenda because Super PACs now do that for them. When Sheldon and Miriam Adelson give Winning Our Future a \$10 million dollar donation, it allows Newt Gingrich less urgency in raising the necessary cash for competitive advantages like electioneering communications. As Mitt Romney's lead in the race to acquire the 1,144 delegates needed to win the party nomination continues to increase, Newt Gingrich and Rick Santorum find themselves more dependent than ever on the cash their Super PACs are willing to spend on their behalf. If Sheldon Adelson or Foster Friess decide to stop giving money to Gingrich or Santorum Super PACs, that could spell doom for the candidates Presidential aspirations. It's also interesting to note that of the three major GOP candidates, Mitt Romney's Super PAC not only has raised the most money, but also has the most million dollar contributions. Restore our Future has had twelve different contributions of one million dollars each. Rick Santorum's Red, White, and Blue fund has had three different one million dollar donations made to it, while Gingrich's Winning Our Future has had two separate one million dollar donations.⁹⁵ Once again this reinforces the idea that Super PACs are primarily a tool for the rich and their political voice to be heard.

While I believe the data reinforces the idea that the majority of Super PAC donations come from the wealthy, that doesn't preclude anyone from creating their own Super PAC. It's an easy and relative painstakingly free process. Just ask Stephen Colbert. Colbert, the host of the popular Comedy Central show, *The Colbert Report*, detailed how easy it is for one to form their own Super PAC while also shrouding the committee and

⁹⁵ Phil Hirschorn, *Super PAC Donors by the Numbers*, CBSNEWS POLITICAL HOTSHEET (Mar. 22, 2012), http://www.cbsnews.com/8301-503544_162-57402073-503544/super-pac-donors-by-the-numbers/.

its donors in a veil of secrecy. After filing a one-page letter to the FEC chronicling it's intentions to raise and spend an unlimited amount of independent expenditures, Colbert's Super PAC, entitled "Americans for a Better Tomorrow, Tomorrow," quickly raised over one million in contributions.⁹⁶ Colbert's self-deprecating attempt at mocking the current FEC regulations gained him many laughs, but more importantly it showed Americans how inherently flawed the whole system was. After submitting the one page report to the FEC and the FEC acknowledging its existence, a PAC then has to follow disclosure requirements when filing subsequent donor receipts with the FEC. Colbert showed how easily one could circumvent this problem through the creation of a 501(c) 4. A 501(c) 4 is a tax-exempt nonprofit organization founded upon the idea of promoting or furthering social welfare. These organizations have become commonplace in the world of political lobbying because of a nifty rule that allows the nonprofit to bypass disclosure requirements to the FEC as long as a few basic guidelines are followed. For example, 501(c)'s cannot participate in expressive advocacy or electioneering communications unless registered "specifically as independent expenditure or electioneering communication nonprofits, where they are subject to disclosure requirements."⁹⁷ However, if 501 (c)'s are not clearly defined as independent expenditure or communication nonprofits, they do not have to publically disclose donor information to the IRS.⁹⁸ Therefore, as long as rules are followed donor information is exempt from public intrusion. Using this avenue, money can then be transferred from the 501(c) 4 to

⁹⁶ Sarah Maslin Nir, *Colbert's Super PAC Raises More Than \$1 Million*, N.Y. TIMES THE CAUCUS (Jan 31, 2012), <http://thecaucus.blogs.nytimes.com/2012/01/31/colberts-super-pac-raises-more-than-1-million-dollars/>.

⁹⁷ CONGRESS WATCH, PUBLIC CITIZEN, *Permissible Political Activities of PACs and Non-Profit Organizations Under Federal Campaign Finance and Tax Laws* (2004).

⁹⁸ *Id.* The donations are disclosed to the IRS, but these are not open to public records.

Super PACs so that the PAC can spend money on behalf of a candidate, and the lack of donor disclosure between the 501 and the FEC now applies to the PAC and the FEC.

To me, the most troubling thing about the current framework of campaign finance is the potential for donor anonymity. In a study released by two advocacy groups, 6.4% of contributions to PACS since 2010 could not be traced to the original source.⁹⁹ Multiple incidents have already shown how prevalent the possibility for donor anonymity in the 2012 election cycle could really be. Mitt Romney's Restore Our Future has twice come under fire for accepting donations shrouded with secrecy that left media outlets and the American public alike scrambling to trace the money to the correct source. In April, a one million dollar contribution was made to Restore Our Future from the corporation W Spann LLC. After *NBC news* journalists began investigating the donation, information revealed that the company was founded a month before giving the money and dissolved shortly thereafter.¹⁰⁰ The address of the company was listed as being located in a high-rise building in downtown Manhattan. The only problem was that no such company existed at address 590 Madison Avenue, 42nd floor. After Restore Our Future caught considerable flak for the donation, Edward Conard stepped forward as the donor. The former colleague of Romney's worked with him at Bain Capital, a huge private equity investment firm Mitt Romney helped co-found in 1984. It was believed that Conard stepped forward after an exorbitant amount of public pressure was placed upon Restore Our Future to disclose the true identity of the W Spann donation. Shortly after the FEC

⁹⁹ Blair Bowie & Adam Lioz, *AUCTIONEERING DEMOCRACY: THE RISE OF SUPER PACS & THE 2012 ELECTION 6* (Dēmos & U.S. PIRG eds., 2012).

¹⁰⁰ Michael Isikoff, *Mystery Million-Dollar Donor Revealed*, NBC NEWS (Aug. 6, 2011), <http://www.msnbc.msn.com/id/44046063/ns/politics/>.

filings were released January 31st, the *New York Times* blog, The Caucus, began combing over Super PAC records that involved a few mysterious donors. Many of the mysterious donations were made through limited liability companies that appeared to exist only on paper, much like W Spann LLC did.¹⁰¹ One donation in particular made national headlines when The Caucus put out an ad asking readers to help them solve the mysterious donation from Glenbrook LLC.¹⁰² The limited liability company based out of California had given a \$250,000 donation to Restore Our Future in August. The address given by the company was to an office suit occupied by a public accounting firm called Seiler L.L.P. Four days after The Caucus put out a plea for help, the mystery was solved as Restore Our Future amended their filing for the \$250,000 donation from Glenbrook LLC to two separate \$125,000 donations from Jesse and Melinda Rogers.¹⁰³ It was discovered that Jesse Rogers was a former executive at Bain and Company. Mitt Romney had worked for Bain and Company before starting Bain Capital. He returned in the 1990s to help save the firm from financial collapse. Like the W Spann LLC donation, this once again raised the question why individuals were feeling the need to create “shell” companies to hide behind when participating in political advocacy? These corporations like W Spann and Glenbrook LLC exist for the sole purpose of being the curtain behind which donors hide.

¹⁰¹ Gloria Shur Bilchik, *Crowdsourcing Helps Solve the Super PAC Funding Puzzle*, OCCASSIONAL PLANET (Feb. 10, 2012), <http://www.occasionalplanet.org/2012/02/10/crowdsourcing-helps-solve-the-super-pac-funding-puzzle/>.

¹⁰² Michael Luo, *Readers: Help Us Discover a Secret Donor*, N.Y. TIMES THE CAUCUS (Feb. 3, 2012), <http://thecaucus.blogs.nytimes.com/2012/02/03/a-crowdsourcing-experiment-help-us-discover-a-secret-donor/>.

¹⁰³ Michael Luo, *A Secret Donor Revealed*, N.Y. TIMES THE CAUCUS (Feb. 7, 2012), <http://thecaucus.blogs.nytimes.com/tag/glenbrook/>.

If it's easier for wealthy people to create a phony corporation to hide their political activity, what is preventing foreign donations from joining the fray of United States elections? In a system of campaign finance that offers many methods of circumvention, money from overseas governments or companies serve as a legitimate concern to both FEC officials and the United States government. The prevention of political contributions and expenditures from foreign nationals has been a law since 1966¹⁰⁴, yet avenues like the money exchange between Super PACs and 501(c)4's are making this almost impossible to monitor. Trevor Potter, head of the Campaign Legal Center and former chairman of the FEC, was recently quoted as saying, "Clearly, it is more difficult to enforce the ban on foreign spending when the source of the money is not publicly disclosed."¹⁰⁵ The 1966 law was reinforced by the Supreme Court in their January ruling of *Bluman, et al., v. Federal Election Commission*¹⁰⁶, nonetheless an incident of this nature has since proved danger does exist. In February, Rick Santorum's Super PAC, The Red, White, and Blue Fund, publically admitted to returning a \$50,000 donation that came from a foreign source.¹⁰⁷ The source was Liquid Capital Markets Ltd., a London based equity firm. Red, White and Blue Fund's confusion lay within their belief that the donation was made from an American executive within the firm. It was

¹⁰⁴ This was an amendment to the Foreign Agents Registration Act (FARA) 22 U.S.C. § 611 *et seq.* FEC, *Introduction, FOREIGN NATIONALS* (Mar. 24, 2012) http://usgovinfo.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=usgovinfo&cdn=newsissues&tm=24&f=00&su=p284.13.342.ip_&tt=2&bt=0&bts=0&zu=http%3A//www.fec.gov/pages/brochures/foreign.shtml.

¹⁰⁵ Stephen Braun, *Super PAC Foreign Donations A Risk in 2012 Presidential Election*, POLITICS (Feb 2, 2012), http://www.huffingtonpost.com/2012/02/10/super-pac-donations_n_1267750.html.

¹⁰⁶ *Bluman et al. v. Federal Election Commission* 565 U.S. (2012). Foreign individuals living in the United States believed it to be unconstitutional that they were banned from the participation in giving independent expenditures. Court disagreed.

¹⁰⁷ ASSOCIATED PRESS, *Santorum 'Super' PAC Returned Big Foreign Donation*, NBC POLITICS (Feb. 21, 2012), http://nbcpolitics.msnbc.msn.com/_news/2012/02/21/10468987-santorum-super-pac-returned-big-foreign-donation.

their belief the money came out of this American executive's pocket, whereas in actuality it came from the firm's accounts. "The new reality presented by the decision in *Citizen United* and the rise of the Super PACs raises concerns about the challenge of discovering such illegal activity [foreign contributions], said FEC commissioner Cynthia L. Bauerly.¹⁰⁸

ARE SUPER PACS REALLY TO BLAME?

As Super PACs take middle stage amid the chaos of election season, one of the biggest arguments between campaign finance pundits is whether or not Super PACs are to blame for the host of problems that pervade the campaign finance world. As legal analyst Dan Abrams has explained¹⁰⁹, individuals have been able to spend unlimited amounts of money on behalf of candidates since *Buckley v. Valeo*. It's also true that before Super PACs existed, 527 organizations had the capability of accepting an unlimited amount of contributions from individuals, labor unions, and corporations alike.

If individuals have always raised money and 527s have influenced elections with stealth and FEC circumvention, why are Super PACs such a big deal? To begin, individuals spending an unlimited amount of their own money in the past had to be done so directly. It could not be given to the proper conduit because limitations existed on all of them (party committees, candidate, and political action committees). Therefore, it was

¹⁰⁸ *Supra* 105

¹⁰⁹ Dan Abrams, *The Media's Shameful, Inexcusable Distortion of the Supreme Court's Citizens United Decision*, COLUMNISTS (Feb. 8, 2012), <http://www.mediaite.com/online/the-medias-shameful-inexcusable-distortion-of-the-supreme-courts-citizens-united-decision/>.

highly unlikely that individuals were willing to contribute both the time and the effort afforded to seeing huge amounts of their money spent on political advocacy. This is where Super PACs have played such a prominent role. They provide the perfect outlet for individuals to see their money spent for them without doing anything more than writing a dollar amount on a check bearing their name. While 527s catered to this same principle, they did so with a few stricter guidelines than the ones that pertain to Super PACs. Whereas Super PACs have no restrictions preventing them from expressively advocating for the election or defeat of a candidate, 527s are limited to engaging in issue advocacy only. This prevents them from expressively saying whom a voter should vote for or against. While it's fair to argue that issue advocacy has the capability of being done as effectively as expressive advocacy, the creation of 527s also require a little bit more work than Super PACs. As Stephen Colbert has proved, the creation of a Super PAC is probably the easiest method for spending other people's hard-earned money on the electoral process. While Super PACs are still in an infancy stage, the Supreme Court and the Court of Appeals have left little room for their method of raising and spending money to be deemed illegal barring a complete overturn.

Therefore, I believe the answer to whether Super PACs are the ones to blame for the current state of disarray in campaign finance is a yes and no. The evolution of soft money and in particular non-profit organizations like 501(c)4's and 527s have substantially contributed to the unprecedented levels of spending we see today. However, it was *Citizens United* and *Speechnow.org* that took spending to a whole new level and made it easy for a wealthy person to make their money and/or voice be heard. Electioneering communications are bombarding the average voter like never before and

Super PACs seem to be an extension of a candidate as their influence runs deep in television, on radio, and in campaign bank accounts. With a rise in spending, political coordination, donor anonymity, and the threat of influence outside of the American sphere, where does this leave what appears to be a broken system of campaign finance?

CONCLUSION: PROPOSED SOLUTIONS TO REFORMING CAMPAIGN FINANCE

How likely is it that the Supreme Court would reverse their decision-making in future proceedings involving unlimited donor independent expenditures or Super PACs? While I consider myself by no means an expert on the Supreme Court's thought process, I think it would be difficult for a future Court comprised of different Justices to overturn the precedent that has been established in *Citizens*. At the heart of *Citizens* is a fundamental First Amendment freedom of speech issue. As Justice Kennedy says in his majority opinion, "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech, [and] Citizens must be free to use new forms, and new forums, for the expression of ideas."¹¹⁰ The current Supreme Court believes that the freedom of speech cannot justifiably be chilled by something such as independent expenditures because independent expenditures do not constitute a substantial enough threat to political corruption. A future Court will have to prove otherwise if *Citizens* is to be overturned. I don't believe the Court understood the ramifications their decision would

¹¹⁰ *FEC* 588 U.S. at 57 (2010).

have in regards to PACs. It will be interesting to see if the overabundance of political activity Super PACs have engaged in during this election cycle will create enough of a stir to eventually bring them before the Supreme Court.

Even though, barring an unlikely reversal, groups will continue to have influence on political elections, it's important to explore potential safety measures that could be utilized to limit problems like donor anonymity and potential PAC-candidate coordination. One possible solution is the recently introduced Disclose Act of 2012 or the "Disclosure of Information on Spending Campaign Leads to Open and Secure Elections of 2012."¹¹¹ Already introduced in the House of Representatives, the Disclose Act of 2012 was recently brought before the Senate Rules Committee. The House and Senate Disclose bills have minor differences. Both bills call for a much greater sense of transparency in outside spending. The Act introduced in the House hopes to achieve this goal through a variety of regulations.¹¹² The first is a call for enhancing public disclosure, which the Act proposes to achieve through ways like requiring outside spending groups such as corporations, committees, or individuals to report a donation in excess of \$10,000 to the FEC. This would help the FEC monitor interactions between non-profit organizations and Super PACs, as well as provide an easier way to keep an eye on what individuals are giving and to whom they are giving to. The second important aspect of the Act is the desire to see corporations and outside spending groups standing by their advertisements. If Priorities USA puts out an ad attacking Republican candidate Mitt

¹¹¹ Disclose Act of 2012: H.R.4010 or S.2219.

¹¹² The four key aspects I outline are summarized on the Democracy 21 website. DEMOCRACY 21, *Summary of Disclose Act 2012* (Feb. 9, 2012), http://www.democracy21.org/index.asp?Type=B_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={CF4AA209-3429-4D5E-91CF-8BE015E5C89F}.

Romney, it is expected to “approve of the message” being included in the ad. This guideline doesn’t exclude individuals classified as key donors as well. If one of the biggest donors like Sheldon Adelson wants to continue to contribute to Newt Gingrich, the Act would require his name to be disclosed to the American public in electioneering advertisements. From the corporate and labor union perspective, the Act calls for shareholder and member interests to be met through full disclosure of campaign-related expenditures. Going a step further, the Act also demands that companies and labor organizations provide a link to their political spending on corporate and union websites. If enacted, it would allow ordinary citizens to see where corporations/labor unions were spending money in the political sphere in a much more convenient and painstakingly free process. This would potentially eliminate phony shell corporations like Glenbrook LLC and W Spann LLC. The idea is to cut down on the paper trail that’s littering the campaign finance landscape, where *New York Times* writers are left to expose to the public questionable outside spending habits. Finally, the last major aspect of the bill calls for lobbyists to disclose outside spending habits in conjunction with their lobbying activities.

The Disclose Act and many of its principles were first envisioned shortly after the *Citizens United* ruling. United States Representative Chris Van Hollen (D, Maryland) and Senator Charles Schumer (D, New York) were the faces behind the Disclose Act as Van Hollen introduced it to the House¹¹³ and Schumer to the Senate.¹¹⁴ In April of 2010, the Disclose Act of 2010 was introduced and by June had passed in the House. By July, Senate Majority Leader Harry Reid invoked cloture for the bill to be voted on in the

¹¹³ H.R. 5175

¹¹⁴ S. 3628

Senate. The required mandate of 60 supporting senators fell short when the final tally was fifty-seven to forty-one. Senator Reid switched his vote from a yes to a no to preserve his right to bring back the bill in a motion for reconsideration. A few months later, the bill reappeared before the Senate resulting in the same outcome. The final vote was 59-39 as no Republicans offered to put their support behind the bill. Two years later, Senator Sheldon Whitehouse is now backing the modified bill as it appears once again before the Senate.

The disagreement between the two parties seems to be over the constitutionality of the bill. Republicans see it as an infringement upon one's First Amendment rights while Democrats believe it's a necessary safeguard against the ever-increasing risk of corruption in campaign spending. Republicans also see it as a desperate attempt by Democrats to minimize damage that will come from negative electioneering communications and longer, more-drawn out campaign battles. While Republicans long cried for transparency in federal elections, conservative groups like Karl Rove's American Crossroads have cashed in as deep-pocketed Republicans have given millions of dollars to PACs. Meanwhile, the traditional Democratic opponents long against harsher disclosure requirements now find themselves scrambling to level the playing field.

The amount of outside spending and the avenues through which unidentifiable money can infiltrate the electoral system is a real threat to democracy. As Super PACs continue to gain power, the average voter's ability to critically assess political candidates and their messages becomes more and more difficult. While money has and always will be a large part of being elected to political office, the erosion of the two basic principles

of contribution limits and disclosure requirements have left campaign finance in need of reform more than ever. By understanding how *Citizens United* and cases like *Speechnow* have changed the dynamics of fundraising for political candidates, it is my hope that people will be better equipped to handle the overabundance of undue influence that cloud our country's electoral process. In order for that understanding to be put to good use, it's up to the government to help citizens cast a light on the shadowy sources that are helping fund the election of public officials. I believe the Disclose Act would go a long way towards making that possible.

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