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**POST *CITIZENS UNITED*: THE LACK OF POLITICAL ACCOUNTABILITY AND
RISE OF VOTER SUPPRESSION IN A TIME OF NEWLY DEFINED CORRUPTION**

by

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Introduction: The Limits of Democratic Theory

The recall election of Scott Walker on the fifth of June 2012 was the most expensive election in Wisconsin history. Almost \$63 million was spent on the campaign. Governor Scott Walker spent \$29.3 million on the election while his opponent Tom Barrett spent \$2.9 million (“Millions Spent on Recall Election”). During the election Scott Walker outspent Barrett by ten to one (Jilani). That does not include the amount of money spent separately by outside groups. The largest outside spender was Right Direction Wisconsin, a political action committee, operated by the Republican Governors Association that spent \$9.4 million dollars to help elect Walker. Second was the Greater Wisconsin Political Independent Expenditure Fund, which spent over \$5 million. Americans for Prosperity spent \$3.7 million in favor of Walker. All together over \$36 million outside dollars were spent on the race (Wisconsin Democracy Campaign).

The election took place on Tuesday June 5, 2012, the same day Wisconsin State Senator Lena Taylor delivered an urgent notice to the Director and General Counsel of the Wisconsin Government Accountability Board Kevin Kennedy. In that notice, she requested immediate action be taken to investigate election fraud and voter disenfranchisement done by organized groups. Taylor states, “One group is informing citizens, who in the exercise of their constitutional rights signed a recall petition, that they need not vote today as they have already

accomplished their work. A second group... has indicated to citizens that the recall election is on Wednesday” (Taylor). The Wisconsin state statutes, section 12.05 clearly states:

12.05 False representation affection elections. No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election (1993 Wisconsin Act 175, § 12.05).

The information spread was false and clearly breaks Wisconsin law. Unknown organized groups were attempting to disenfranchise presumably Democratic voters who would vote for Tom Barrett rather than Scott Walker.

This is one example of many voter suppression attempts that have been reported to the Wisconsin Government Accountability Board. Numerous complaints have been filed citing inaccurate billboards, misleading robo calls and fliers, false absentee ballots, and illegal voter challenges. There has been a systematic attempt by political advocacy organizations to suppress the vote of undesirable voters in Wisconsin. This is due to the political turmoil that has plagued Wisconsin since the 2010 election of Governor Walker. In the recent past, Wisconsin has been a relatively stable blue state. Wisconsin has not voted for a Republican presidential candidate since Ronald Reagan. In 2008 Obama won Wisconsin with a comfortable 14 point lead. However, in 2010 Republican Governor Scott Walker was elected, and Republicans took control of both houses of the Legislature. This was the “first time in 72 years that the control of state government shifted entirely from one party to the other” (Marley). Not only is Governor Walker a Republican, he is a staunch conservative. Walker enacted controversial labor policies that limited public employee union collective

bargaining rights. The bill outraged unions and public employees in Wisconsin creating a sharp political divide in the state. The immense political tension in Wisconsin has substantially divided both sides. Two recall elections have occurred in the span of two years. In 2011 six Republican State Senators were recalled and Governor Walker was recalled in 2012. Voter suppression tactics have escalated in Wisconsin since 2010. Voter suppression is by no means a new campaign tool to achieve desired election results. Therefore literature on voter suppression is well researched.

Since the ratification of the Constitution, America has disenfranchised voters, especially minority communities. African Americans have been the targets of voter suppression since the Reconstruction era. Following the Fifteenth Amendment overt legislative barriers were put in place to suppress the African American vote. Jim Crow legislation established poll taxes, literacy tests, and grandfather clauses all to disenfranchise African American voters. It wasn't until the Voting Rights Act of 1965 was passed that legal action was taken to eliminate all legislative barriers based on race to vote. Despite the Voting Rights Act, voter suppression has continued albeit in less overt forms. Modern voter suppression tactics include voter intimidation, disinformation, and scare tactics towards minority communities. In 2004, a fictitious organization called the "Milwaukee Black Voters League" distributed fliers in a predominantly black community in Milwaukee Wisconsin. The flier stated:

If you've already voted in any election... If you've ever been found guilty of anything, even a traffic violation... The time to register for voting has expired, if you haven't registered you can't anymore and you can get ten years in prison and your children will get taken away from you (Stringer).

Examples like this are numerous; the Election Incident Reporting System reported that 40,000 complaints were issued in the 2004 election and over 4,000 involved voter intimidations (Election Incident Reporting System). Overwhelmingly these voter intimidation tactics are targeted at minority communities. This is inextricably linked to America's past of voter suppression. Voter suppression targeted at minorities is so successful because it targets groups of people who already feel alienated from the political process, and have feelings of mistrust. In 2004, African Americans "who believe that that their votes will be accurately counted has dwindled to less than one-third"(Stringer). Voter suppression disproportionately affects African Americans and discrete minorities. Race plays a significant role in who is targeted for voter suppression tactics; it does not explain why only certain geographical communities of color are targeted.

In order to better understand why voter suppression occurs in certain areas of the country and not others, one needs to look to America's Electoral College system. Since America does not have a popular vote, each state votes as a whole for one candidate. Depending on population a certain number of electoral votes are allotted for each state. All states except Maine and Nebraska use a winner take all system, meaning that a candidate receives all Electoral College votes if the candidate receives the majority. Thus, candidates only become concerned with the number of Electoral College votes they receive not the direct popular vote. Consequently, certain states become know as safe states. In safe states the "margin of error in the poll is less than the difference

between the two front-running candidates”(Friedman). Essentially, these states are safe because every election they vote for the same party. States become either red or blue states depending on which party they vote for. However, there are a select few states that remain undecided, which become known as swing states. Such states become the target of political campaigning since they provide the opportunity to gain electoral votes. As a result, voter suppression increases because a handful of votes could determine the election. Unlike in safe states every vote matters. Suppressing the vote in a safe state is unlikely to have any effect since the margin of victory is so large. For example, California has voted democratic in every presidential election since 1992. Therefore, attempting to suppress 2,000 voters would be useless and a waste of time. However in a swing state like Florida, Pennsylvania, or Wisconsin 2,000 votes could determine the election. In the 2000 presidential election George Bush won by just 537 votes (Florida Department of State Division of Elections). Thus voter suppression is much more likely to occur in swing states with the most Electoral College votes at stake. While these voter suppression campaigns may be racially motivated, race does not determine where such voter suppression campaigns begin.

Although the Electoral College explains where voter suppression occurs it does not explain the partisan aspect to voter suppression. One needs to look at the political party effects. How come one party engages in voter suppression more than the other in modern elections? Anne Friedman from Stanford believes that the answer is found in the type of people that comprise each party. The Democratic Party is comprised heavily of lower income earners and racial

minorities. The Republican Party is comprised of higher income people who are typically white. This is significant because ‘individuals with higher levels of education and income, among other socioeconomic factors, participate in elections at a rate greater than their lower resourced counterparts’ (Gomez, Brad, Thomas Hansford, and George Krause). Lower socioeconomic groups suffer greater difficulties and bear greater costs voting. Plus, the Democratic Party suffers from lower voter turnout than the Republican Party. Increasing voter turnout favors Democrats and hurts Republicans. Consequently, voter suppression tactics become very alluring to the Republican Party, because keeping voter turnout low helps them win elections. Freidman argues that voter suppression will increase depending on the strength of Democratic support in a geographical area. The rise of voter suppression complaints in Wisconsin may very well be explained in part by these three theories. Voter suppression attempts are targeted at racial minorities who happen to live in Democratic districts. Also Wisconsin is considered a swing state since the election of Scott Walker in 2010.

However, traditional understandings of voter suppression are based on traditional understandings of democracy. Democratic principles ensure that the people hold politicians and elected officials accountable. Politicians and political parties have a reputation and a sense of character to uphold. Voter suppression becomes very politically costly if you are caught engaging in it. Voters do not want to vote for someone they feel is breaking the law or engaging in unmoral practices. The right to vote is a constitutionally protected right, which many

Americans take very seriously. A politician could lose the election if the public believed he or she was purposely suppressing voters. Politicians are dependent upon the American people voting for them. In the end the American people hold them directly accountable. Therefore, voter suppression has continued to be defined as a tactic that is authorized by the candidates and their campaigns.

However, in 2010, our definition of democracy in America was drastically changed by the Supreme Court case *Citizens United v. FEC*. The Court ruled that under the First Amendment corporations have the right to free speech. The decision removed the final ban that prohibited corporate money to be used for direct advocacy. Corporations may now spend unlimited amounts on independent expenditures. The consequences of this have been tremendous. The decision has allowed for the creation of Super PACs, which are political action committees that can receive and spend unlimited funds towards political advocacy. In addition to the better-known Super PAC, nonprofits can also spend unlimited dollars towards political advocacy. As a result, Super PACs and nonprofits now act as shadow campaigns. Due to FEC and IRS regulations a Super PAC or nonprofit cannot legally coordinate with a candidate. Therefore, any action taken by an outside group can legally never be traced back to the candidate. Outside groups have the ability to engage in voter suppression tactics without politically hurting the candidate. Campaigns can benefit from the actions of outside groups and at the same time publically denounce their actions. Unlike political candidates, there are no direct ramifications for an outside organization to get caught engaging in voter suppression. They are not held

accountable by anyone. For example, in 2002 Allen Raymond, a member of the Republican Party was arrested and sentenced to three years in prison for making harassing calls and jamming the New Hampshire Democratic Party phone lines in the Congressional campaigns (Arkedis, Jim, and Lindsay Mark Lewis). If an outside organization were to get caught jamming phones there would be no political repercussions. Since the passage of *Citizens United* outside political organizations have taken on the role of voter suppression from the campaigns.

Traditional criticism of *Citizens United* argues that the decision has allowed for the corruption of the democratic process. There are two traditional understandings of corruption as defined by Samuel Issacharoff. The first is actual quid pro quo arrangements whereby a politician will provide direct benefits to the individual or group who donates money to their campaign. The majority of Supreme Court decisions have an understanding that corruption occurs when political actions surpass the check of political accountability. Thus, specifically in quid pro quo corruption, the gain made by the politician or third party becomes nontransparent. The political actions are no longer available to the public and accountability is lost. The second definition of corruption is “distortion of political outcomes as a result of undue influence of wealth” and the source of corruption becomes “large expenditures capturing the market place of political ideas”(Issacharoff 122). Democracy is threatened when a select few individuals have a greater political voice. President Obama said the *Citizens United* decision will “allow corporate and special interest takeovers of our

elections... it is damaging to our democracy”(The White House). There is a fundamental understanding that the root of corruption stems from money. Money corrupts the political process and is detrimental to our democracy, as it gives greater influence to the wealthy. However, money has been a part of the political process since the formation of America. Corporate influence over public policy and special interest groups are not a new phenomenon. As a result, *Citizens United* is not a drastic shift from previous Supreme Court decisions. Yet *Citizens United* has caused tremendous outrage in the country, and much of that outrage is misplaced. Money is not the root problem in the *Citizens United* decision. The problem is that throughout history money has always been channeled *through* the government in some form. We continually analyze the impact that corporate money has over our government or elected officials. This is apparent in the way we define corruption. Corruption is a nontransparent act that occurs between an elected official and an outside third party. Corruption or monetary influence is always defined by its proximity to the government.

The impact of *Citizens United* is not solely an influx of money, but the elimination of the need to channel that money through a candidate. The ability to take political action, that is independent from the government or campaigns allows for a new form of corruption. Corruption is no longer a coordinated act between corporate money and a candidate, but rather political actions that take place outside the public sphere. Political actions that take place in the private sphere are outside the realm of political accountability. That is not to say that America is immune to corrupt acts by elected officials. However, if the

knowledge of the corrupt act were to reach the public, the people could use their vote as a mechanism of punishment. The people stand powerless against private outside organizations.

Due to limited disclosure laws it is increasingly difficult to obtain financial information from organizations. It makes it almost impossible to prove that x amount of money was spent on a voter suppression attempt. Super PACs are required by the FEC to disclose donors and all independent expenditures. If a PAC or party committee exceeds \$200 then they must itemize its payments for the FEC on a Schedule E form (FEC, "Coordinated Communications and Independent Expenditures"). The FEC then makes all this information public, and anyone can download a copy. For example, the Super PAC Restore Our Future filed an independent expenditure report on January 28, 2012. The report cited the purpose of expenditure as "Voter Contact Phones". Restore Our Future spent \$1,452 on this one expenditure, and the only information known is that it went toward "Voter Contact Phones" (FEC, "Page by Page Report Display"). Who, Why, When, and What was said in these phone calls to voters is unknown. This is one example of the extremely broad language that is used in independent expenditure reports. Other reasons cited range from "Media Production", "Media Buy", "Direct Mail", or "Postage/ Printing/Production". This is the only information that is disclosed to the FEC and the public. Thus it is extremely difficult to discern how exactly that money is used. For example, "Direct Mail" could refer to a series of incorrect absentee ballots sent out to voters. Therefore,

even with this information it can be almost impossible to know for sure where and how the money was actually spent.

Nonprofits or 501(c)s have an even increasingly more complicated disclosure process. The FEC requires that a qualified nonprofit corporation must file a report if they purchase an independent expenditure above \$250. Outside groups like 501(c)s are under tax-exempt status, which means that their political activity can be monitored by the IRS. I looked specifically at 501(c)4s which are considered social welfare organizations. As a social welfare organization it means they can participate in political activity however it cannot be their primary activity. In order to regulate this activity the IRS uses a “facts and circumstances” test to decipher what constitutes political activity (The Campaign Legal Center). According to the IRS an organization that is “designed to secure greater public involvement in the electoral process... disseminating written materials and advertising through the media about the importance of voting” (Chick, Raymond, Amy Henchey) are examples of permissible political activity to receive 501(c)4 tax status. However, in 2011, registered 501(c)4 Americans for Prosperity, declared in their tax return that it engaged in zero political activity (Lehmann). This is the same group that declared spending over 1.3 million dollars with the FEC in 2010 (Center for Responsive Politics, “Outside Spending-Americans for Prosperity). Americans for Prosperity did file with the FEC regarding electioneering communications the organization made in 2010. These are ads that do not directly advocate for the defeat or election of a specific candidate. According to Americans for Prosperity this does not qualify as

political activity and therefore does not need to be recorded to the IRS. Since Americans for Prosperity recorded zero dollars of political activity to the IRS the organization can remain under 501(c)4 tax status without question.

Even if you can gain hold of an organizations tax return it will not necessarily show any record of political activity. Political activity filed with the FEC only holds a few word description of how the money was spent. As a result, it is nearly impossible to gain access to the exact receipts of private organizations. Unless the organization releases the specific details of their finances, their activities remain hidden to the public. Therefore, it is increasingly difficult to charge an organization as the culprit in funding a voter suppression plot. The movement of money between an organization and political advocacy is extremely opaque and well concealed. This is the reason these organizations are so successful in engaging in voter suppression since it becomes nearly impossible to financially link them to incidents. The data available on how outside organizations like Super PACs and nonprofits spend their money is only available through FEC/IRS filings. Organizations like the Center for Responsive Politics, Common Cause, and Follow The Money do a good job at gathering and analyzing the data, but the source of data still comes from the FEC/IRS. The data will show how much money total was spent by an organization and the breakdown of expenditure versus contribution. However, the filing application is so broad that exact purchases remain unknown. Plus, the organization may choose to not even disclose certain spending. Therefore, it is nearly impossible to prove voter suppression attempts by the public financial data.

Voter suppression can be categorized into four prominent categories: voter challenges, voter caging, voter intimidation, and deceptive practices. Voter challenges happens when formal challenges by political or private citizens impacts the eligibility of citizens to vote on or before Election Day. Voter caging attempts to disenfranchise improperly registered voters through mailings. If an individual has an incorrect address listed or does not reply to mail sent to him or her she can be removed from the voting list. Voter intimidation threatens voters in hopes of keeping them from voting on Election Day. And finally deceptive practices which distributes misleading information to potential voters through incorrect time, place, or manner of an election. All of these practices are illegal under federal and state law. The law protects voters from efforts that discriminate, intimidate, deceive, or seek to disenfranchise voters on the basis of unreliable information. (Weiser, Wendy, Vishal Agraharkar)

Despite clear voter suppression definitions, determining whether an act is an actual form of voter suppression can be difficult and differs on personal interpretation. Thus, for the purpose of this thesis I consider it an act of voter suppression if there has been a formal complaint filed with the Wisconsin Government Accountability Board. The Government Accountability Board is confidential and all complaints filed are considered confidential and not public knowledge. Therefore it becomes the decision of the individual or group to determine whether they will publish their official complaint. Many complaints are however released to the public by the individual/group, because they want to call public attention to the illegal voter suppression attempt. Since, *Citizens*

United was decided only two years ago there is significantly less published literature on the effects of that decision. As a result, much of the research about *Citizens United* and its consequent effects comes from journalistic reports. The media has been very active and critical in reporting on the activity of outside organizations. In addition, I look at elections that have occurred up until and between the 2010 midterm elections and the 2012 Presidential election, which are so current that most of the information regarding outside organizations' activities comes from news reports. Thus for the purpose of this paper I use news articles along side peer-reviewed articles and books.

My thesis begins with my second chapter, which discusses campaign finance background, and then discusses *Citizens United* and the impact that it has had on the formation of Super PACs and nonprofits. My third chapter is a case study of Wisconsin and specific examples of voter suppression attempts by third party advocacy organizations. My fourth chapter reexamines traditional understandings of corruption. It will address the flawed logic in our current campaign finance laws and how a new look at the political process is necessary. Finally, my conclusion will pull everything together and look at the broader and possible very detrimental effects that *Citizens United* will have on our democracy.

It is too soon to know for sure what the lasting effects of *Citizens United* will be, and as a result much of the current research and literature is speculative. However, that does not mean that it is not worth examining. *Citizens United* drastically changed the way our democracy functions, and we are already

beginning to see the effects of it on our elections. We need to critically analyze the impact *Citizens United* has had on the political process since the ability to spend unlimited amounts of money on expenditures is highly corrupting and encourages a privatization of the election process. This threatens the very foundation of our democracy.

Chapter Two: Campaign Finance and Citizens United

Campaign finance reform has been around since the rise of the modern corporation. In an attempt to regulate the rise of corporate expenditures in elections regulations were first drafted in the early 1890s. President Theodore Roosevelt enacted the Tillman Act of 1907, which banned corporate contributions to federal elections. In 1925 the Federal Corrupt Practices Act was passed, which enforced disclosure requirements for the House, Senate, and political committees. Then in 1940 the Hatch Act set a limit on individual contributions to a candidate and restricted political actions of federal employees. These Acts and campaign finance reform as a whole were created on the assumption that corporate money in elections is detrimental to a fair democracy. Corporate wealth delegitimizes elections on the basis that wealth translates into political power. The vast amount of resources and wealth that corporations control garners unfair advantages over the average American. Richard Briffault from Columbia argues in his article “Nonprofits and Disclosure After Citizens United”, campaign finance reform until the 1976 Supreme Court case *Buckley v. Valeo* was discussed as a necessary way of protecting the integrity of the political process. The narrative throughout American history has targeted big money as a destructive influence in American elections. However, this narrative drastically shifted with the *Buckley* decision when the Court ruled that money is free speech (340). *Buckley* drastically shifted the discourse regarding campaign finance,

which set the course for the *Citizens United* ruling to take place nearly 30 years later.

After the Watergate scandal of 1972 Congress was pushed by a perceived urgency from the public to reform campaign financing. In 1974 Congress passed the Federal Election Campaign Act Amendments. Federal Election Campaign Act Amendments (FECA) became the most comprehensive legislation on campaign finance in America's history (Nicholson 323). The Act was intended to target three key issues; 1) wealthy individual candidates purchasing the election 2) limiting media expenditures 3) increasing disclosure requirements for candidate expenditures running for federal office. The FECA Amendments of 1974 were the first all-inclusive piece of legislation that introduced requirements and restrictions in "federal elections upon the amounts of contributions, independent expenditures on behalf of candidates, expenditures of a candidate's personal or family funds, and total campaign expenditures" (Nicholson 324). Finally, and possibly most importantly, FECA mandated a bipartisan Federal Election Commission (FEC) to enforce the Act.

It was however only a matter of time before the Constitutionality of the Act was questioned. A group of liberals and conservatives joined together to file a lawsuit that charged FECA as limiting free speech, which would in turn hurt candidates from minority parties (Maisel 378). The lawsuit went before the Supreme Court in 1976, titled *Buckley v. Valeo*. The Court was forced answer whether the Act violated the First Amendment, and if so did the government have a compelling interest to abrogate individual free speech rights. To answer

this question, the Court approached the decision as a balance between the burden placed on free expression against the government's justification to limit those burdens (Bingham 1039). *Buckley* was a complex decision in which it is not overly clear which side won. To start the Court asserted that FECA did operate in First Amendment territory since it affected political discussions. The Court then created a conceptual divide between expenditures and contributions.

The Court determined that the government has a legitimate state interest to limit contributions to avoid corruption. Restrictions on contributions are only a marginal burden since the political expression is dependent upon the receiving candidate to spend the money however they see fit. The money is not being spent directly by the contributor. As a result, the Court sustained all contribution limitations of FECA. That is, the government has the constitutional right to limit contributions to political campaigns.

Alternatively, the Court invalidated all expenditure limitations created by FECA. The Court ruled that limits on expenditures create a greater burden on an individual's free speech, since expenditures are a direct use of money by the individual. How the money is spent is not contingent upon a candidate. Thus, it poses less risk of corruption since it lacks coordination with a candidate or campaign. Consequently, the Court invalidated all of FECA's expenditure restrictions. The Court repealed FECA's limits on expenditures, however did not address limits on expenditures in conjunction with federal elections. The Court did however create the requirement of "express advocacy" in a footnote.

Express advocacy creates a limit on political spending relative to an identified

candidate (Bringham 1040). This means that expenditures are legal if they do not directly express advocacy for a specific candidate. This means that ads that use expressions like vote for, vote against, and defeat are subject to prohibition. Consequently, ads that simply discuss issues and ideas are permitted since they do not directly advocate. This became known as the “magic words” test since ads can legally advocate for a candidate as long as they do not use the “magic words”.

FECA was enacted to limit contributions and expenditures in order to protect the integrity of our democracy. However, the *Buckley* decision shifted the narrative away from corruption in the political process to an issue of free speech in conjunction with the ability to spend. The ideological split that *Buckley* created between contribution and expenditure is crucial for understanding campaign finance and *Citizens United*. The outright rejection of independent spending limits set the path for future rulings on campaign finance reform. The Court did however understand that free political speech is a protected right, and the government has a sufficient interest to regulate that speech in order to eliminate corruption. However, the Court incorrectly assumes that corruption occurs as illicit quid pro quo arrangements. The Court leaves expenditures outside this realm of corruption.

Just two years later the case *First National Bank of Boston v. Bellotti* went before the Supreme Court. The decision was groundbreaking as the Court ruled that individual speech is not determined on where the source of speech comes from, whether it is an individual, corporation, or union. The case surrounded a

Massachusetts law that banned corporate spending in support or opposition of ballot propositions. The Court struck down the law on the basis that there is not a substantial risk of corruption surrounding money spent to further the debate surrounding public issues. The Court famously declared:

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is this type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual (*First National Bank of Boston*).

The Court furthered the notion that under the First Amendment corporate speech cannot be regulated simply out of fear that it will lessen the voice of others. However, the Court made it clear that corporations can only speak on public issues, and cannot directly advocate for a candidate or election. The combination of *Buckley* and *Bellotti* clearly defined corporate and individual speech as the same in regard to expenditures. Together the two cases cast doubt on the constitutionality of corporate speech regulations (Briffault, “Nonprofits and Disclosure” 340).

The FECA Act outlined campaign finance laws for the next three decades, and was fully enforced except for the removal of expenditure limitations made in *Buckley*. However, in 1998 the Senate Committee on Governmental Affairs released a report citing campaign finance abuses through the use of soft money. The issued report cited “a meltdown of the campaign finance system caused by the “twin loopholes” of soft money and bogus issue advertising”(Bringham 1043). In the 1997-1998 election “the amount of soft money given to political parties nearly doubled the amount reported in the last congressional off-year

election, 1993-1994” (Maisel 407). The Senate Committee report cited the use of soft money by political parties, in which political parties would funnel corporate money through affiliated parties to avoid contribution limits. In addition, corporations were producing numerous “issue ads” that were not considered “expressed advocacy” determined in the *Buckley* decision since they left out the “magic words”. Consequently, a push was made to create stronger and more comprehensive campaign legislation. As a result, in 2002, Congress passed the Bipartisan Campaign Reform Act. The Act created a new form of campaign speech called “communication electioneering” to replace “expressed advocacy”. Electioneering communications consists of communication targeted at a specific candidate for federal office. This communication is publicly broadcasted and distributed within 30 days of a primary and 60 days before a general election (FEC “Electioneering Communications”). The goal was to avoid any confusion regarding corporate expenditures.

The case *Citizens United v. FEC* went before the Court in 2010, in which the Court addressed the larger question of corporate spending. The Court ruled that under the First Amendment it is unconstitutional to prohibit the use of corporate funds to finance independent expenditures and purchase electioneering communications. *Citizens United* is a nonprofit corporation categorized as a 501(c)(4)-tax exempt conservative advocacy organization. In 2008 the organization produced a documentary film criticizing Hilary Clinton. Clinton was running for the Democratic nomination for President of the United States at the time. The film was released in theaters and available on DVD.

However, the organization wanted to air the film on cable and satellite through video-on-demand to cable subscribers. Under the Bipartisan Campaign Reform Act, the distribution of a campaign film that directly identified a candidate for federal office is considered electioneering communication. Thus, the film cannot be aired thirty days before a primary election, but would have been available 30 days “on demand” before the election.

Justice Kennedy wrote the opinion for the court in which he affirmed that the government could not suppress speech based purely on corporate identity. Under the First Amendment the government cannot ban independent expenditures. An independent expenditure is a form of communication that,

Expressly advocates the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents (FEC 11 CFR 100.16(a)).

The Court ruled that since an independent expenditure is done without prearranged organization between a candidate and corporation than corruption does not occur. The government argued that corporations should not be given First Amendment rights because large sums of money accumulated by a corporate firm and used in the political process can have corrosive and distorting effects. The court however did not agree. The court ruled that independent expenditures do illicit or give the appearance of corruption. The First Amendment cannot be denied to a corporation based on the fear it could use the money for corrupt purposes. As the Court stated:

It is irrelevant for purposes of the First Amendment that corporate funds may have little or no correlation to the public’s support for the corporation’s political ideas...all speakers, including individuals and the

media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech (*Citizens United*).

The Court rejected the argument altogether that large sums of money can have distorting effects on the political process, and can control the political narrative.

The Court saw this argument as nothing more than the argument to limit independent expenditures, which were already shot down by *Buckley* in 1976.

The contributions and expenditures distinction made in *Buckley* was crucial to the *Citizens United* decision. Since a clear distinction was made between the two already, *Citizens United* simply reinforced that distinction between expenditures and contributions. The Court did not touch contributions and continued to ban corporate contributions directly to a campaign. However, as in the *Buckley*, the Court ruled expenditures as fundamentally different from contributions as they do not carry the same corrupting effects, and therefore are permissible and constitutional. As a result, the Court lifted the final ban, which prohibited corporations from directly spending on electioneering communications.

The actual decision of *Citizens United* did not break significantly from the Court's past decisions. *Buckley* already allowed corporate expenditures as long as they didn't use the "magic words". Corporations have been able to purchase advertisements as long as they do not advocate for or against a candidate. There has however been a universal part of campaign finance that has remained universal which is that ban on direct campaign contributions and *Citizens United* upheld that ruling. The ruling also upheld all FEC regulations. Thus, the real impact of *Citizens United* has been on the effects it has had on outside political

organizations. The rise of Super PACs and nonprofits' ability to spend unlimitedly on independent expenditures has been the most affected by the decision.

Super PACs were created in 2010 following the *Citizens United* and *SpeechNow v. FEC* decision, which allowed corporations to donate unlimited funds to traditional PACs. *Citizens United* allowed corporations and unions to use their funds for the direct advocacy of a candidate in the form of independent expenditures. *SpeechNow v. FEC* which was decided later in 2010 ruled that donations to PACS that only make independent expenditures could not be constitutionally limited (Garret 6). The media coined the term Super Pac in reference to these newly funded independent expenditure organizations. Super PACs since the *SpeechNow v. FEC* decision are able to spend unlimited amounts of money on independent expenditures towards political advocacy; this can be anything from television commercials, voter canvassing, or get out the vote attempts. Super PACs cannot however, communicate directly with a candidate or campaign. Complete isolation from candidates, ensures "that the entity making [Super PACs] and the affected candidate may not communicate about certain strategic information or timing surrounding the IE"(Garret 3). Therefore the worry that Super PACs are simply a means to circumvent contribution laws is eliminated. Super PACs are forbidden from donating directly to a candidate and are regulated by the FEC. The FEC requires that:

Independent expenditures aggregating at least \$10,000 must be reported to the FEC within 48 hours: 24-hour reports for independent expenditures of at least \$1,000 must be made during periods immediately

preceding elections (FEC, “Coordinated Communications and Independent Expenditures”).

In addition, donor information must be reported if an individual contributes at least \$200 or more to a Super PAC (Garret 11). The FEC also enforces disclosure requirements, specifically electioneering communications must include a statement that the ad is not supported or purchased by the candidate, and all information is provided by the PAC (Briffault, “Nonprofits and Disclosure” 345). This means that a television ad must display the funder’s name at the end of the commercial. However, the funder’s name may be ambiguous and hard to determine where on the political spectrum the PAC falls. For example, American Crossroads is the largest Super PAC in the country and has been extremely active in the 2012 election. However, simply publishing the PAC’s name would not inform the people that it is a conservative PAC. Super PACs have received much of the media’s attention, and as a result have higher disclosure and disclaimer regulations. However, independent expenditures are not exclusively done through Super PACs, but can come from nonprofit intermediaries, such as 501(c)(4) advocacy organizations or 501(c)(6) trade associations and chambers of commerce. 501(c) tax-exempt political organizations have different disclosure requirements than Super PACs and are not heavily regulated by the FEC (Briffault, “Super PACS” 1648).

501(c) organizations were created in 1913 when the Chamber of Commerce initiated the passage of legislation that would create tax-exempt civic organizations. Traditionally these organizations have been split into two categories 1) social welfare organizations and 2) local associations of employees

(Kalanick 2260). In practice these social organizations engaged in activities to enhance community. The IRS makes it clear that a nonprofit:

Operates exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community” and “the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office (IRS).

However, nonprofits are not entirely prohibited from engaging in political activity. A nonprofit simply has to prove that it devotes at least half of its resources to social welfare and not political activity. Public education and lobbying are considered activity that will further social welfare, and is not considered political activity by the IRS (Kalanick 2262). Overall, 501(c) organizations cannot spend unlimited funds towards political activity but they do not have to disclose their donors. In September 2010 the FEC responded to a complaint filed against Freedom’s Watch, Inc., which stated the organization, “made a prohibited disbursement for an electioneering communication... and failed to make required disclosures”(FEC “Freedom Watch Inc.”). The complaint alleged that Freedom’s Watch aired a television advertisement that criticized the voting record of a Democratic candidate prior to her re-election. And while the organization did file an expenditure report they did not disclose the donor or reasoning for furthering its electioneering communications. However, the FEC decided in a vote of 2-3 that Freedom’s Watch Inc. did not do anything wrong.

Following that decision, The New York Times ran an article that reported Sheldon Adelson was behind “roughly 30 million” in donations to the organization and was heavily responsible for dictating how that money was

spent (Luo). This is important because the Supreme Court case *FEC v. Wisconsin Right to Life* ruled that corporations and unions could finance electioneering communications, as long they did not express advocacy for a candidate. The FEC then adopted a regulation:

To ensure the disclosure of funds received for the purpose of furthering those electioneering communications, while avoiding disclosure of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of electioneering communications (FEC “Freedom Watch Inc.”).

The purpose of the regulation was to expose those individuals who are trying to affect the political outcome through large donations and allow those who simply donate to the organization the ability to remain anonymous. A donation made to a nonprofit “must be itemized on a nonpolitical committee’s independent expenditure report only if such donation is made for the purpose of paying for the communication that is the subject of the report”(FEC, “Freedom’s Watch Inc”). As a result, the FEC essentially declared that the agency would not enforce declaration of donations unless the donations are given on presumed knowledge that it was given for specific electioneering communications (Flaherty 253).

Consequently, nonprofits have become the ideal vehicle for political communications since donors can remain anonymous. Nonprofits are not required to disclose who their donors are unlike Super PACs. As a result, corporations or wealthy private individuals who chose not to have their names disclosed can act through third party nonprofits anonymously. The worry is that contributions to nonprofits can then be spent as an independent expenditure to a registered Super PAC. For example, a corporation could donate money to

nonprofit, which would then donate to a Super PAC. The initial corporation would never be listed as a donor, only the nonprofit would be. This becomes a mechanism to transfer money anonymously. In fact, it is not uncommon for a Super PAC to have an affiliated nonprofit in order to transfer funds. For example, according to the Center for Responsive Politics, American Crossroads a conservative Super PAC that spent \$104,756,670 dollars in the 2012 Federal Election (Center For Responsive Politics, “American Crossroads Independent Expenditures”). Affiliated with American Crossroads is American Crossroads GPS, a registered 501(c)4. In the 2012 federal elections American Crossroads GPS spent \$70,653,600 dollars in independent expenditures (Center for Responsive Politics “Crossroads GPS”). Crossroads GPS, according to the Center for Responsive Politics, spent more than \$70 million in the 2012 election and only reported more than half to the FEC.

The role of *Citizens United* in conjunction with a lack of FEC enforcement has created a loophole mechanism for nonprofits to raise and spend vast amounts of money towards political communications with out any regulation. As Brian Flahtery argues in *Election 2010*, the loophole is created when Corporation A and Corporation B use their constitutionally protected right to pay for political communication. Corporation B is a registered nonprofit corporation that can legally engage in political spending while corporation A is a traditional for profit company. Corporation A can donate unlimited amounts to corporation B anonymously. Thus, corporation A has no idea how the money will be spent and corporation B can freely purchase political communications

(265). This is the loophole that allowed The Chamber of Commerce, a registered 501(c)6 nonprofit organization to spend over “\$32 million on electioneering communications and an additional \$7.3 million on independent expenditures”(265) in the 2010 midterm elections. This form of corruption has erupted since the 2010 mid-term elections. The aftermath of the *Citizens United* decision allowed for a flood of money to enter the 2010 elections. However, most critics predicted and expected the flood of money to come from high profile corporations. In actuality, many corporations have been lenient and hesitant to publically support political causes. In the 2010 election \$293 million dollars was spent by outside organizations and \$138 million of that came from anonymous donors (Center for Responsive Politics, “2010 Outside Spending, by Group”). In the 2010 election nonprofits increased spending by 130% compared to 2008 (255). In 2010, “the top ten purchasers of electioneering communications in 2010, which spent a total of \$70,280,549, eight were nonprofit organizations, seven were conservative-leaning, and six of the top eight did not disclose their contributions”(255). Third party advocacy organizations drastically increased spending and political activity in the 2010 elections all while hiding behind the façade of social welfare. It is through the nonprofit loophole that these organizations have taken on increased political activity while remaining anonymous. The implication of this is extremely detrimental for democracy. This heightened level of political activity occurs outside the realm of government and campaigns. In fact, nonprofits are legally forbidden from engaging directly in political campaigning. This means a nonprofit cannot participate at all in a

campaign, either by supporting or opposing a candidate. They can only act in ways that provide “nonpartisan” information such as legislative or issue advocacy (FEC, "Coordinated Communications and Independent Expenditures").

The increased activity of third party advocacy organizations is increasingly worrisome and problematic for democracy. Democracy functions on the presumption that we have direct elections. As Scott Ashworth stated, “competitive elections create a relationship of formal accountability between policy makers and citizens-electoral rewards and punishments can be handed out on elections day” (Ashworth 184). Elections are the mechanism that hold elected officials accountable to the people, which empower the people against the government. In theory elected officials/candidate will behave/campaign in a manner that will be well received by voters. The candidate will then be rewarded with votes. Campaigning then becomes the most effective tool used to influence voters and gain popular support. Brandon Delay and Erik Snowberg argue that campaigning may be criticized as wasteful of financial resources and time by the public, however “campaign activity does effectively signal competence, and voters, being rational and forward-looking, respond by rewarding incumbents” (Ashworth 188). Therefore, candidates/politicians not only have to produce positive results while in office, they also need to run successful and effective campaigns.

This is where Super PACs and nonprofits have become increasingly active and important after the *Citizens United* decision. These third party organizations are drastically shifting the entire way campaigns function. Due to the public

nature and regulation of campaigns candidates are reluctant to engage in behavior that resonates negatively with people and could damage election. For example, most Americans find negative advertising to be undemocratic and they do not like candidates who engage in such activity. The Institute for Global Ethics found that “8 in, 10 people believe that negative attack-orientated campaigning is unethical and damaging to our democracy”(389). Brooks and Murov argue that negative ads create a backlash in which voters will penalize the candidate for engaging in undemocratic behavior. The candidate will loose votes as a means to show that such behavior is unacceptable. Voters repeatedly express the desire to have campaigns focus on the broader issues rather than engaging in smear tactics. Brooks and Murov found that an “attack ad sponsored by an unknown independent group is more effective than an identical ad sponsored by a candidate in the eyes of the public overall” (402). Consequently, this study demonstrates that candidates have every incentive to work with independent groups that are void of accountability to the voters. These groups can engage in the dirty work, like attacks ads, and the candidate will not suffer the backlash.

It is important to recognize that the identity of these independent groups is often unrecognizable and unknown to the public. As a result:

The fact that the pubic cannot indentify the contributors to so many of these groups consequently makes it easier for these groups to go on the attack and helps to explain why negative ads by these groups are now so much more prevalent than in previous eras” (Brooks, Deborah Jordan, Michael Murov ,405).

These groups are legally considered independent, however the level of independence is questionable. As Brooks and Murov argue it would be increasingly difficult to outsource attack ads if there was truly no communication between groups. Richard Briffault argues, that in fact “a candidate and the candidate-specific Super PAC supporting the candidate can establish a successful working relationship without formal conditions”(Briffault, “Super PACs” 1681). Candidates can legally raise money for Super PACs and political consultants can work for Super PACs and campaigns. It is not uncommon for Super PACs to be run by former campaign aides, thus it is not necessary to have formal communication in order to have coordination. As Briffault argues the two groups share common understandings of political tactics that a formal coordination is unnecessary. The result is that campaign decisions that were once heavily weighed by candidates as potentially politically damaging are outsourced to third parties with no accountability to the public. For example, Fred Davis is a Republican advertising strategist who received roughly ten million dollars from a single billionaire to establish a campaign linking Obama to Rev. Jeremiah A. Wright. The campaign was denounced by many including Mitt Romney who expressed concern that the conversation should be targeted towards the economy. The campaign was clearly an attempt to portray Obama as a radical black man, using clear racial undertones in the ads. This would have been detrimental to the Romney campaign had it come from his camp. However, because of the legal separation between the two groups Romney could distance himself from the ad without consequences, and still

gather support from certain areas of the country that were influenced positively by the campaign. Mr. Davis's plan was financed by one singular billionaire and had significant impact on people almost instantly whether good or bad (Zeleny, Jeff, Jim Rutenberg).

With this new freedom and wealth, nonprofits and Super PACs have taken on the role of campaigns themselves. They no longer need to operate with the candidate or party. As a result, they have created shadow campaigns. This is extremely detrimental for democracy because it rejects the very foundation that democracy functions on political accountability. Without being held accountable by the people, third party advocacy organizations suffer much fewer consequences if they engage in illegal or unfavorable actions. This occurrence has resulted in an increase of voter suppression tactics that are funded and carried out by third party organizations, with donations most often contributed by anonymous donors.

Chapter Three: Voter Suppression in Wisconsin

In 2011 and 2012, following a wave of Republican takeovers of state legislatures and statehouse in the 2010 elections, state across the country saw an extraordinary assault on American citizens' voting rights- the worst in geographic scope in generations (Wang 1).

Republican Scott Walker defeated Tom Barrett in 2010 to become the Governor of Wisconsin. Only two years prior Wisconsin had voted for Obama with a 14-point lead over McCain. Just two years later the state shifted drastically to the right, and elected Walker, a staunch conservative. Wisconsin shifted farther to the right than any other state in the nation. Once in office Walker enacted drastic and draconian legislation that stunned the people of Wisconsin. Walker essentially called for the removal of over a half-century of collective bargaining rights for public employees. Walker's Wisconsin Budget Repair Bill drastically cut public spending: including teachers, health workers, social services, and environmental protections (Buhle 17). That was just the beginning; the bill went on to eliminate and cut state funded services in all sectors. It became the most draconian bill proposed in any state regarding social cuts, and soon Wisconsin became the shining example of the Republican Party. Republicans all over the country praised Walker for his bill and for his courage to step up to the unions.

Walker initially claimed that the public funding cuts were a financial necessity. However, a videotape was leaked which captured Walker in a meeting with Wisconsin billionaire Diane Hendricks. In the tape, Hendricks and Walker

are shown meeting before an economic development session at the company Hendricks owns, ABC Supply Inc. In the video Hendricks asks Walker: “Any chance we’ll ever get to be a completely red state and work on these unions?” to which Walker replies “Oh yeah... Well, we’re going to start in a couple weeks with our budget adjustment bill. The first step we’re going to deal with is collective bargaining for all public employee unions, because you use divide and conquer”(Nichols). This candid moment between Walker and Hendricks proves that the public spending cuts were not done in their entirety for financial reasons. Clearly there is ideology behind the cutting of public funds. Hendricks like many other millionaires who support Walker have an invested interest in seeing his Budget Repair Bill go into effect. A decrease in state spending for unions means a decrease in necessary state revenues and consequently taxes. The Koch brothers have also come out as staunch supporters of Walker, as they adamantly defend limited government and lower taxes.

In 2009, the Koch brothers saw potential for Wisconsin to turn Republican in the upcoming 2010 mid-term election. In order to garner support the brothers established Americans for Prosperity- Wisconsin, a registered 501(c)4. After witnessing the devastating loss in 2008 to Obama, they decided to intensify their ground game. Many factors were involved in the 2010 mid-term elections, however the Koch brother’s played an instrumental role in the election of Scott Walker. This is due to the ground operation the Koch brothers implemented in Wisconsin. The two hired “Tea Party organizers, invested heavily in front groups (like the MacIver Institute), ran constant advertising and

coordinated with employers to hold propaganda meetings with workers” (Fang). The Kochs have referred to their system of voter mobilization on the ground as *Themis*, named after the Greek goddess of divine order. *Themis* is a database system utilized by the Koch brothers, which collects and analyzes data on voters (Fang). Tim Philips, a Koch political deputy, told USA Today that the geo-targeting operation “looks at everything from voting data to Census data to consumer-purchasing information” (Schouten). The database has the ability to gain information about people’s magazine subscriptions and the websites people surf (Schouten). *Themis* allows strategists hired by Americans for Prosperity the ability to sort out likely voters and “bombard them in person, via the phone and internet with personalized messages”(Schouten). In essence the database can assess and analyze the entire population of Wisconsin and determine who is most likely to vote Democratic or Republican, and can attempt to either increase or decrease voter turnout. The Kochs believe in their system of mobilization so much that they have financed more than 200 organizations around the nation, all using the same system that was implemented in Wisconsin. The Koch brothers claim that their success is due to the low profile that Americans for Prosperity takes. The organization does not believe in the typical TV ads but rather using more discrete and specific tactics (Fang).

In September 2010, a series of leaked documents were released by One Wisconsin Now that uncovered a coordinated voter suppression plot between the Republican Party of Wisconsin, Americans for Prosperity, and the Tea Party group Grandson of Liberty. The plan targeted students and minority voters

through an illegal voter-caging attempt. The meeting took place June 16, 2010 and was attended and led by Tim Dake, head of the Grandsons of Liberty.

Grandsons of Liberty is a Tea Party organization that believes that the Constitution is the final law of the land and the government must stay within its Constitutional bounds (Wisconsin Grandsons of Liberty). Audio recording was taken during the meeting, in which Dake clearly lays out a detailed plan for a coordinated voter suppression effort. Dake outlines communication between himself, Rance Preibus, the Republican Party of Wisconsin Chair, and Mark Block, state director of Americans for Prosperity- Wisconsin. Dake begins by explaining how the Republican Party will provide its "Voter Vault", a statewide voter file to provide a proficient list of minority and student voters in certain Wisconsin districts. Dake states:

So, what we're hoping is that the various groups in the coalition plus Americans for Prosperity and Mark Block, who has been in on this... They have access to what they call Voter Vault; you know the records of voting. They can go in there and look for lapsed voters... So we're talking about Americans for Prosperity is willing to fund doing a mass mailing to registered voters on this about getting them involved with this, making sure that their information is current, because periodically we need to go back and check. One of the things we're going to do is take these addresses that people give and we want to send out a postcard that says, "you need to call and confirm this. And if you haven't called, well then it could get tossed out". We're also looking for when you send these cards out if they'll come back as an undeliverable address (One Wisconsin Now).

Americans for Prosperity will use the list to identify lapsed voters, and mail letters to these voters explaining that they must call and confirm their registration information. If voters fail to respond they will be removed from the voting list. If mail is returned as undeliverable, then it will be assumed they no

longer live at that address and therefore can no longer be registered to vote at that address. Tea Party organizations will then recruit individuals to work as poll workers to challenge voters on Election Day in different municipalities all over Wisconsin.

This plan is problematic on many levels. To start voter caging is illegal under federal law. Under the National Voter Registration Act of 1993, Congress ruled that a voter may not be removed or challenged from the voter role due to undeliverable mail (42 U.S.C. §1973gg). A voter may only be removed from the voter role if a change of address is supplied by the post office or the state itself has investigated voter confirmation. A voter cannot be challenged by a third party organization, and cannot be removed from voter roles by not returning mail to a third party organization. In addition, voter caging is highly ineffective. A voter may have moved to a different house but remain in the same district and therefore an eligible voter. Returned mail is plagued with errors and mistakes and is not a valid source of information to remove an individual from a voter roll. In addition, voter rolls themselves suffer from clerical errors. The actual mail may be incorrectly delivered, or the voter may be away from their permanent residence (Wang 44). There are many inaccuracies in voter caging and as a result it most often removes eligible voters from the voting roll. Therefore, it is classified illegal and a blatant attempt to suppress the vote of voters. Consequently, it is not an acceptable tool to use by campaigns or candidates. For that reason, Americans for Prosperity was responsible for all the funding and public aspects of the plan. All mailings to the public will have Americans for

Prosperity name on it. It is illegal for a nonprofit to coordinate with a campaign, thus actions taken by Americans for Prosperity cannot be traced back to the Republican Party. In the mind of the people the only party involved would be Americans for Prosperity. Thus, if these documents had never been leaked the voters of Wisconsin would assume that Scott Walker's campaign had nothing to do with this illegal voter suppression plot.

In 2011, one year after One Wisconsin Now released documents revealing the voter suppression attempt, Americans for Prosperity was surrounded by allegations regarding another voter suppression plot in the recall elections of Wisconsin State Senators. Americans for Prosperity sent absentee ballots to Democrats in at least two Wisconsin state Senate recall districts with instructions to return the paperwork after the election date. The fliers instructed voters to return ballots for the August 9 election to the city clerk before August 11. Clearly two days after the election was supposed to take place, which would discount all the voters who turned in the absentee ballots late. The fliers were distributed all weekend in District 2 and District 10. Both of which are predominantly democratic districts. Charles Shultz was one of the voters who received one of the incorrect absentee ballot applications. He filed an official complaint to the State of Wisconsin Government Accountability Board (G.A.B) in which Shultz states:

I received an absentee ballot request form from Americans for Prosperity. It intentionally listed to return up to Aug 11. The date of the election is Aug 9. If I followed their instruction my ballot would not be legal. I think they purposely intended to discount my vote (Government Accountability Board State of Wisconsin Complaint Form)

Multiple complaints like that of Charles Shultz flooded into the Wisconsin Government Accountability Board, which prompted Kevin Kennedy, Wisconsin's chief election official to release an immediate statement. Kennedy starts by stating that the Board has received numerous complaints about incorrect absentee ballot forms and that while it is technically legal for third party organizations to send out absentee ballot forms, it is not smart for voters to rely on them. Kennedy is quoted as saying that "there has been some confusion- intentional or unintentional- between recall elections on August 9" (Government Accountability Board, "What Voters Need to Know About Registration"). Consequently, Kennedy recommends that if you want your vote to count it is best to contact your municipal clerk directly and receive a ballot.

The same absentee ballot that was sent out by Americans for Prosperity not only had an incorrect return date, but also instructed voters to return the ballot applications to the "Absentee Ballot Application Processing Center", which isn't an official government body but a P.O box in Madison owned by the Wisconsin Family Action PAC. Americans for Prosperity and Wisconsin Family Action PAC are not the only right leaning organization to use the P.O Box number. Wisconsin Right to Life also uses the address (Dailykos). This is problematic as it is unknown who receives the applications and if they actually make it to the appropriate municipal clerk. Kevin Kennedy addresses this in the Government Accountability Board's statement release. Kennedy acknowledges that the Board has received complaints that voters are receiving telephone calls in addition to absentee ballots that have the incorrect addresses. Kennedy

further states, “If the address on the absentee ballot application mailer or envelope is incorrect, it could go to the wrong place... If you rely on an incorrect date on the mailer, you may be too late to vote”(Government Accountability Board, “What Voters Need to Know About Registration”). Elections Division Administrator Nat Robinson states that an incorrect return mailing address for a municipal clerk means “the request being misdirected or delayed or worse, the ballot not being counted”(Government Accountability Board, “What Voters Need to Know About Registration”). In addition, absentee ballot and voter registration mailings from third party organizations are often confused by voters as being official G.A.B or municipal clerk documents. However, the G.A.B and municipal clerks are nonpartisan organizations and could never contain political messages like most absentee mailers do. Consequently, voters are convinced they are filling out a government issued absentee ballot when in fact they are not. On top of that they are mailing it to a P.O. Box in Madison. This prompted Kennedy to suggest in the press release that if voters need to register they should only do so through “MyVote.WI.gov” and never trust mailers received in the mail, or they risk the chance of having their votes not counted.

Just one year later in 2012 Wisconsin found itself in another set of elections. Scott Walker was recalled on Tuesday June 5th. Much like the recall elections in 2011, it was plagued with voter suppression attempts. Wisconsin State Senator Lena Taylor hand delivered a letter to Kevin Kennedy on June 5th citing two examples of voter suppression. Lena writes “One group is informing citizens, who in the exercise of their constitutional rights signed a recall petition,

that they need not vote today as they have already accomplished their work” and a second group is telling voters “that the recall election is on Wednesday” (Taylor). Both of these attempts were done by anonymous robo calls made to people’s homes. Barrett for Wisconsin finance director Mary Urbina-McCarthy wrote, “Reports coming into our call center have confirmed that Walker’s allies just launched a massive wave of voter suppression calls to recall petition signers”(Eidelson). Walker’s campaign denied any part in the robo calls and released a statement stating, “any accusation that our campaign is making those calls is categorically false and unfounded”(Weinger). Taylor in her letter to the G.A.B calls for Kennedy to seriously investigate these elections and find which organizations are behind these voter suppression tactics.

In the 2012 Presidential election roughly five months later, billboards were put up in mostly minority neighborhoods that stated, “Voter Fraud is a Felony” and showed a picture of two white women and a black man behind bars. The billboards depict one of the women saying, “We voted illegally” and below is a caption that states the penalty as being three years and a \$10,000 fine. These billboards originally surfaced in Milwaukee, Wisconsin in 2010. However, they were removed after voting rights advocates protested the boards. When looked into who purchased the billboards the voting rights advocates only found that it was funded by a private family foundation. Two years later in 2012 the same billboards reappeared right before the presidential election. More than 85 were purchased in the Milwaukee area. When advocates asked Clear Channel Outdoor Advertising about who had purchased the billboards, Clear Channel refused to

disclose the purchasers' information. However, after consistent investigation Clear Channel agreed to remove the boards. One Wisconsin Now and theGrio revealed:

The name of the family foundation that purchased the voter fraud Wisconsin billboards in 2010 and 2012... [they] discovered that a little known nonprofit, the Einhorn Family Foundation, based in Milwaukee, was behind the billboard campaigns (Reid).

The Einhorn Family Foundation is run by Steven Einhorn, who is a staunch supporter of the Koch brothers and other Tea Party organizations. Steven Einhorn has remained relatively well out of the spotlight and media's attention.

After it was discovered that the Einhorn Family Foundation was responsible for the billboards it was reported that the Harry Bradley Family Foundation funded the billboards (Fischer). According to the Milwaukee Journal Sentinel Scott Walker and his wife met privately with Lynde and Harry Bradley a week after the 2010 election. The president and CEO of the Bradley Foundation is Michele Grebe, who served as Walker's campaign chairman. Grebe also chaired Walker's 2010 campaign, headed Walker's gubernatorial team, and chaired the recall election of Walker in 2012 (Fischer). The Bradley Foundation has spent more than \$350 million dollars in grants, \$234 million of that has been given to conservative infrastructure since 2001 (Bice, Daniel, Bill Glauber, and Ben Poston). The Foundation has over \$600 million in assets, which has allowed the Foundation to be a major player in Wisconsin. State Rep. Kelda Helen Roys, a democrat from Madison said:

I think its emblematic of the very cozy relationship between the Walker administration and very powerful corporate interests and ultra-

conservative groups whose issues Walker has championed and pushed (Bice, Daniel, Bill Glauber, and Ben Poston).

The Foundation has traditionally been relatively mainstream and usually backs initiatives towards the privatization of schools. However, Grebe told Milwaukee Journal-Sentinel's Dan Bice that the organization is looking "for more ways to affect the popular culture with these ideas so that we're not appealing just to the elites, but we're also attempting to appeal to a broader population"(Bice, Daniel, Bill Glauber, and Ben Poston). So far it appears that the group is more invested in funding organizations that will help with the re-election of Republican politicians, specifically Scott Walker. Brendan Fischer from The Center for Media and Democracy's Pr Watch wrote:

The Bradley Foundation is increasingly moving away from funding traditional conservative causes that advance legitimate public policy options, and towards funding controversial groups that specialize in political hijinks and smears (Fischer).

One Wisconsin Now's Scot Ross told MSNBC "A lot of people think that the most destructive elements coming out of Wisconsin might be Governor Scott Walker's agenda... But it turns out it is this little building that houses the Bradley Foundation"(Reid). Billboards that are supposedly aimed at eliminating voter fraud are really a means of voter intimidation. The placement of these billboards in neighborhoods with predominantly black, Hispanic, and university voters is extremely telling of the motive. These demographics overwhelmingly vote democratic. The intentions are not to protect against voter fraud but scare voters away on Election Day. (Fessler)

The Bradley Foundation and subsequent voter suppression tactics have not made national news nearly as much as voter suppression attempts through voter ID laws. Wisconsin is no exception. On May 25, 2011 the Wisconsin Act 23 was passed and signed into law by Governor Scott Walker. The law excluded many popular forms of ID such as Veteran and college IDs. The ACLU in conjunction with the National Law Center on Homelessness & Poverty filed a federal lawsuit charging the Wisconsin voter ID law as unconstitutional. The law would deny citizens the basic right to vote, since it inflicts an undue burden on eligible voters to provide acceptable forms of ID. This is in violation of the Equal Protection Clause of the 14th Amendment and the 24th Amendment, as it imposes an unconstitutional poll tax. An increased burden is placed specifically on veterans, minority voters, seniors, and college students (ACLU). The right to vote is a basic right that is crucial to preserving democracy, as it allows an individual to take part and impact the political process. Our democracy depends on legitimate voting practices. Fortunately, the courts agreed and in March of 2012 two judges ruled Act 23 unconstitutional, which prevented the Government Accountability Board from enforcing photo ID requirements (Barnes).

Republican National Committee Chairman Reince Preibus alleged that he is deeply concerned about voter fraud in Wisconsin “Certainly in Milwaukee we have seen some of it, and I think it’s been documented. Any notion that’s not the case, it certainly is in Wisconsin”(PR Watch). Voter fraud is a narrative that has spread throughout the country. Countless states are drafting voter suppression

legislation through voter ID, registration, and early voting laws. According to the Brennan Center For Justice, since 2011, 25 laws and two executive actions have passed in 19 states, which could impact more than five million voters. In the past two years Florida, Iowa, Ohio, Pennsylvania, and Wisconsin which are all swing states, have passed new voting laws making it harder for the average American to vote. At least 34 states have passed voter ID laws. Seventeen states now require proof of citizenship. Sixteen states have introduced bills to limit registration, and nine have introduced bills to reduce early voting (Wendy Weiser, Lawrence Norden). Florida passed a bill that would end early voting. In support of the bill Florida State Sen. Mike Bennett said, "I don't have a problem making it harder. I want people in Florida to want to vote as bad as that person in Africa who walks 200 miles across the desert. This should not be easy" (Wang 3). The narrative of voter fraud has erupted in the United States over the past two years even though America does not have a voter fraud problem. In fact, "you have a better chance of being hit by lightning than discovering an incident of polling place fraud" (Zalan and Wang). The myth of voter fraud has been perpetuated by political leaders for partisan goals and often results in the suppression of eligible voters.

Legislative attempts to suppress votes has in actuality not been very successful most have been overturned or at least postponed by the courts. The majority of these laws have been initiated in battleground states, and almost all have been stopped. In Ohio the United States of Appeals for the Sixth Circuit invalidated the ban on early voting and reinitiated the usual three-day early

voting (Hagler). In August 2012 a federal judge stopped newly passed legislation that restricted voter registration drives in Florida. Similarly judges in Texas ruled that their new voter ID law violated civil rights protections. U. S Circuit Judge David Tatel ruled the Texas voter ID law “imposes strict unforgiving burdens on the poor and racial minorities in Texas”(Hagler). Pennsylvania courts blocked new legislation that required photo identification. Pennsylvania Judge Simpson ruled that he was not certain voter disenfranchisement would not occur if a photo ID was required to vote, and as a result he nullified Pennsylvania’s photo ID requirement. There have been eleven laws passed by Republicans since 2010 and all have been stopped by state or federal courts (Berman). Wendy Weiser, the director of the Democracy program at the Brennan Center, said “It is a remarkable development that courts across the country have almost uniformly rejected every single law passed making it harder for eligible citizens to vote”(Berman). Almost every voter suppression law has either been put on hold or invalidated by the Courts.

In addition to the Courts, voter suppression bills have been very unpopular among the people. The organization ALEC is a non-profit, non-partisan organization that drafts “model bills” to be adopted by state legislatures. ALEC is funded almost entirely by corporations in the hopes of funding legislation beneficial to the business world. The goal of ALEC is to bring together the private sphere and the public sphere. Today ALEC claims that every year “close to 1,000 bills, based at least in part on ALEC Model Legislation, are introduced in the states...of these, an average of 20 percent become law”(“ALEC

History”). ALEC created the model legislation upon which all voter ID laws are based. ALEC was also responsible for the Stand Your Ground bill that allowed George Zimmerman to shoot Trayvon Martin in Florida, and be acquitted. Both these laws have received an increase in media attention and have become extremely unpopular with the American people. ALEC usually remains out of the media spotlight, but has lately been in the news and media more than ever before. More and more Americans are aware of the organization and the type of model legislation they create. The American people have expressed concern and anger over these bills. As a result, major corporations have ended their membership with ALEC. Coca Cola, Pepsi, and Kraft have all pulled their membership. Coca-Cola released a statement clarifying that its involvement “was focused on efforts to oppose discriminatory food and beverage taxes, not on issues that have no direct bearing on our business”(O’Toole). In a letter to Color of Change, a Pepsi vice-president wrote:

As we discussed, PepsiCo has been a member of the bipartisan group of state legislators ALEC, for the last decade, where we largely focused on issues raised by discriminatory taxes. We were not involved in the discussion on voter registration, nor do we serve on the Task Force, which reviewed the proposals. In addition, PepsiCo pays the minimal, standard membership fee to ALEC and thus does not have influence over issues in which we do not actively engage. ... Please note, at this point in time, PepsiCo is not a member of ALEC, as of 2012, as our membership expires each year”(Mock).

The same principle applies to corporations as it does to politicians. There is a standard of accountability to the people or customers. How the American people respond to your actions has a significant impact on policies.

There is a fundamental difference though between legislative attempts to suppress the vote and attempts made by private organizations. Voter suppression is not a popular political approach among Americans. Tova Andrea Wang in her book, *The Politics of Voter Suppression: Defending and Expanding Americans Right to Vote*, argues that the act of voting is critical for democracy. The ability to cast a vote engages in democracy and supports it. It is the only way that individuals can express themselves and hold their elected officials accountable. Wang argues, “the vast majority of American people, despite the politically organized discouragement, do believe that voting is meaningful” (Wang 11). The Pew Research Center reported that in 2012, 68% of Americans said that voting give them some say about how government runs things (Pew Research Center). Therefore, it is only logical that people would be upset over the wave of laws restricting voting. In addition, the Courts have found that most of these laws are illegal, and violate the Voting Rights Act. Voter suppression attempts that are channeled through public office and elected officials are detrimental, however there is a remedy. The people and the courts act as a check on the power of legislators. Thus, when legislators clearly over step their boundaries, the courts and the people can stop it. When voter suppression attempts happen outside the boundaries of public office, this is where the corruption occurs. *Citizens United* has allowed for private organizations to engage in the political process more so than ever before. Engaging in the political process as completely private actors without any formal connection to

public officials eliminates the checks and balances the people have on elections and campaigning.

Chapter Four: Redefining Corruption

Citizens United was not a drastic break from previous Supreme Court precedents. Since the *Buckley* decision in 1976, the Court has continued to frame campaign finance as a contribution versus expenditure binary. *Citizens United* was no exception, as it simply reiterated this ideological split created by the Supreme Court. Therefore, the outrage that *Citizens United* has ignited needs to be redirected at the *Buckley* decision. The Court created this ideological divide on the basis of what constitutes corruption. The Court reasoned that the government only has a legitimate state interest to regulate free speech if there is the possibility of quid pro quo corruption. Expenditures occur outside the political sphere and therefore cannot have coercive effects that could illicit a quid pro quo arrangement. However, this distinction is inherently problematic. It doesn't make sense to regulate one type of spending, but leave the other completely unchecked. This decision reveals an overly simplistic understanding of the political process. The idea that direct contributions are the only way that money can come to have a coercive effect on elections is entirely naïve. Both the left and the right accept and continue to use this framework. Critical responses of the decision often blame unregulated money as the root of the problem. Money buys influence and distorts the political process. Money may very well be a destructive presence in our political process, however this analysis neglects to analyze the political process itself. The contribution expenditure binary incorrectly assumes legitimacy about the nature of corruption. Corruption

becomes defined in terms of private actors entering into the public sphere. Expenditures never enter the public sphere and therefore fall outside the possibility of corruption. However, corruption doesn't just occur in government institutions but in institutions that are involved in the political process. The ideological commitment to a distinct public and private sphere mislabels corruption, and as a result campaign finance reforms are perpetually doomed to fail. If money cannot go directly to the candidate then it will empower unaccountable third party organizations that do not have to stand before the people. Since the *Buckley* decision, the conversation regarding campaign finance has effectively stopped. All campaign finance assumptions, laws, and history have essentially been forced into a binary that assumes legitimacy (Hohenstein).

The *Buckley* paradigm is a regulatory structure created by the Court that has defined the terms of campaign finance ever since. The *Buckley* Court found that actual corruption or even the appearance of corruption is the only factor that can justify limits on money in elections. In this understanding the Court uses quid pro quo arrangements as the basis for corruption. Essentially the Court believes that corruption occurs when government officials illicit tangible favors from their wealthy backers (Issacharoff). In *Buckley*, the Court argues that even the appearance of corruption is of equal concern:

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions (*Buckley*).

The goal is to limit actual or apparent contributions to public officials since large contributions raise concerns of misconduct. Even the appearance of financial

contributions poses potential danger to our fair and effective government. Large contributions to a candidate undermine the integrity of our system. It is only common sense that if an individual donates substantial amounts of money to a campaign they naturally expect something in return. Since the danger of corruption and the appearance of corruption are valid concerns to a legitimate democracy the state has justification to regulate it and intrude on free speech rights. However, the Courts interest in preventing corruption (appearance) does not translate to expenditures since they do not possess the concern of quid pro quo corruption. Since it is illegal to coordinate or prearrange an expenditure with a campaign expenditures in theory are completely separate political activity. Therefore, campaigns have no control over expenditure purchases, which eliminates any corrupting circumstance. Corruption becomes defined as the deal that bypasses political accountability (Issacharoff 123). In addition, it is our protected First Amendment right to purchase independent expenditures. Expenditures are viewed as a necessary means to express our political speech.

However, the Court has also acknowledged that another form of corruption can occur when excess wealth has distorting effects on the political process due to undue monetary influence. Most often the Court expresses this stance on corruption in dissenting opinions. In the case *First National Bank v. Bellotti*, the Court ruled that corporations have the protected right to free speech and can speak on public issues. Justice Powell wrote the opinion in which he declared:

There is no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in

Massachusetts, or that there has been any threat to the confidence of the citizenry in government (*First National Bank of Boston*).

The concern that corporate wealth will drown out the voices of ordinary citizens is simply not a concern for the Court. However, Justice White in the dissenting opinion argues for a critical understanding of corporate money and the unfair advantage that wealth provides in the political process. White's critical analysis of the corporate status questions the notion that the voice of corporations is no more influential than the ordinary citizen. White writes that the position of corporations allows them "to control vast amounts of economic power which may, if not regulated, dominate the very heart of our democracy, the electoral process" (*First National Bank of Boston*). Unregulated money allows corporations and the wealthy the ability to control the market place of ideas. As a result, the ordinary citizen cannot compete. White does not agree with Justice Powell's analysis because it rests on an assumption of equality. Regardless of the amount of money an individual or corporation has does not fundamentally change ones relationship to the political process. However as White argues, large sums of money do overshadow the voice of the people. Politics then caters to the large money and the very heart of democracy is threatened.

Berg, Hahn, and Schmidhauser in their book *Corruption in the American Political System*, agree with Justice White's dissenting opinion that there is an unequal influence over votes. In theory every vote is weighted equally at the ballot box on Election Day. However, that presumes that each voter reaches his or her decision on an equal playing field. Therefore, the ability to influence votes makes votes weighted and inherently unequal. As a result, Berg, Hahn, and

Schmidhauser argue that votes can become weighted. If enough time and money are invested into political activism that can have distorting effects on votes, it creates a multiplier effect. The basic premise is that if an individual persuades another individual to vote for their candidate, that vote effectively doubles. Thus, if you persuade three people that vote triples and so on. An individual who “votes in an election and who contributes money to a favorite candidate obviously is in a position to have a greater effect upon the outcome than a person who merely votes but who makes no financial contribution”(Berg 44). Consequently, the more resources an individual has, the greater influence they wield in influencing the American public. Although it is difficult to assess the exact amount of money needed to actually influence voters it is evident “that the costly opportunities provided by the mass media have enhanced the value of money at the expense of other types of political activity”(Berg 46). Berg, Hahn, and Schmidhauser fundamentally believe that private money is the sole corrupting factor in American politics. The continued need for money to successfully run and win an election creates a systematic relationship between citizen and politician. This relationship of interdependence creates corruption. Quid pro quo relationships will rarely occur, what does is the ability to influence elections by purchasing votes.

In his book, *Selling Out*, Mark Green refers to this process as the Washington political money system. Since elections are so expensive, you’ll need to get money from somewhere. This in his opinion does not come from advocacy groups or the people, but rather candidates will turn to the wealthiest

1%. Green argues that direct bribery is unnecessary, “when everyone involved in the money chase knows implicitly that gifts will keep coming if a candidate keeps supporting the industry” (Green 149). Green, Berg, Hahn, and Schmidhauser are correct in their analysis that Washington is flooded with money and candidates will turn to the wealthiest Americans and corporations for financial help. Yet they want to classify the Washington political money system as entirely different from quid-pro-quo corruption when in fact it is simply a more complex form of bribery. The disproportionately favorable effects that money has in politics are simply a more nuanced understanding of quid-pro-quo corruption. Maybe there isn’t a direct ill give you x amount of money for y favor, but there is the transfer of money for favorable political policies. It is bribery channeled through a complex system that is Washington. It is irrelevant if the money is coming through a direct contribution because the effect is the same. Critics of the *Buckley* and *Citizens United* decision simply have a more expansive definition of what constitutes the “appearance” of corruption. Both sides of the political spectrum have a fundamental assumption that influence over elected officials is corruption. Whether this is through a direct bribe or through complex transfer of money. Therefore, the critical response to *Citizens United* is to ask for more regulation of money. However, all this does is reinforce the incorrect binary of contribution and expenditure. It assumes that money spent on independent expenditures are entering the public sphere and having corrupting effects on elected officials. Yet, what is not discussed is what

happens to money that is spent in the political process that never reaches the public sphere.

Corruption can occur in many different facets of society, however the kind specific to campaign finance is corruption that takes place in the political system. Michael Johnston describes a political system as “a regular and persistent pattern of action and institutions, rewards and sanctions, through which public policy is made”(18). Johnston wants to make it clear that it is not only government institutions that make up a political system but that key political decisions actually take place outside of the public sphere by outside interest groups. Johnston starts off by giving an example of a non-obvious form of political corruption. A man takes his car into his friend’s auto mechanic shop in order to get a state mandated annual inspection. The owner of the shop is a friend and certified that the car had passed examination after being passed a \$20 bill. Johnston uses this example of corruption because it exemplifies that corruption is not simply the action of a political or elected official. The owner of the shop is a private citizen who operates a private store without holding an elected position. However, he enters the public sphere when he is required to fulfill state mandated regulations. He is required to evaluate automobiles fairly and in accordance with state law, and he deliberately did not perform his public duties legally. As Johnston argues, “corruption does not always revolve around large sums of money and great issues: \$20 and an inspection sticker are hardly the stuff of grand intrigue”(11). What the driver wanted from the state, permission to drive his car, was harder to achieve going through the appropriate

means than it was to bribe the owner. Johnston argues that government is like a bottleneck. Since the government is able to offer certain benefits, the government acts as a bottleneck between what people want and what they get in return. The political process can be strenuous and slow and involves many standard procedures that can impede what people want. Johnston argues that corruption then becomes an influence that can breach the bottleneck.

Corruption is able to break through “standard official conduct, which stand as expensive, time consuming obstacles to those seeking the benefits of public policy” (23). Therefore, it is not corruption that occurs by elected officials, but by the very nature of government’s relationship to society. Corruption occurs by competing organizations to influence public policy and possible government actions. Just because corruption does not occur exclusively by elected officials does not mean that corruption occurs “outside” the political system.

Peter DeLeon uses and expands on Johnston’s definition of corruption in his book *Thinking About Political Corruption*. Similar to Johnston’s definition, DeLeon defines corruption as part of the political system. When corruption does occur it is not the act of one evil actor, but the result of institutionalized corruption. Corruption is an ongoing action of our political system, not specific events that occur by specific government actors. Our traditional understanding of corruption and the Supreme Court’s understanding attributes corruption to a moralistic action. Corrupt acts occur by corrupt individuals. Like Johnston, DeLeon attributes corruption to occur when outside actors breakthrough the “bottleneck”. The government is heavily imbedded in red tape. That means that

in order for the government to act it must follow the prescribed rules and regulations. Therefore, corruption occurs when these rules and regulations are bypassed. This form of corruption becomes systematic because at times it “encourages individuals and institutions to seize politically corrupt opportunities toward favored, highly vested ends”(31). Essentially the manner in which our government is structured encourages individuals to bypass the rules and regulations.

DeLeon in his clear definition of corruption distinctly leaves out political interest groups like pacs, nonprofits, and lobbyists. DeLeon firmly believes that campaigns and contributions are a fundamental aspect of campaigns and the political process:

Politicians and administrators should work with their constituents; similarly constituents should be free to express their support of their elected governmental representatives within legally defined limits and procedures (DeLeon).

Third party interest groups fall into the private sphere and therefore are not applicable to campaign corruption. DeLeon argues that it is only when the private and public directly meet and engage in a corrupt relationship that it becomes problematic. DeLeon and Johnston have a very nuanced perspective of the political process in that it is institutionalized corruption. Our political system is designed in such a manner that it becomes beneficial and easier to engage in corrupt acts than to follow the regulatory rules, specifically for actors who are not government officials. However, DeLeon and Johnston still hold on to a clear divide between public and private spheres of corruption. Corruption only occurs when it there is an interaction with the government or public institution.

The need to rely on a traditional understanding of the public and private split, whereby the government is the only actor that is able to advance public policy, misses the role that interest groups play in the political process.

Mark Nadel disagrees with the assumption that there is a clear divide between the public and private spheres. Nadel examines the role that corporate influence has over public policy. Nadel argues that we tend to study corporate influence on the government but ignore corporate influence on the public. We examine corporate power exclusively as its power through the government. There is an assumption that corporate influence is always channeled through government. This is in part because we consider corporations as private nongovernmental entities. Only when a corporation formally participates in the political process do we consider them public entities. In actuality corporations are political entities even when they are not operating through the government. Corporations are private governments themselves, as corporate actions have a direct impact on society and the people. Consequently, these actions must be viewed as public policies. Traditionally public policy is considered to derive exclusively from the government. But this does not acknowledge the actions taken by private organizations. As Nadel argues “there is no clear line between governmental (public) organizations and nongovernmental (private) organizations”(108). There has been a blurring between public and private organizations. As a result, it is difficult to know where public organizations end and private organizations begin. The focus of analysis has been placed on corporate power over government but very little on the content of that power.

The content of corporate and other private organizations power goes far beyond simply influencing the government.

Nadel's analysis of corporations as private governments can be applied to the rapid rise of Super PACs and nonprofits in the election process. Private advocacy organizations are not technically public entities but are engaging in public activities. Since the passage of *Citizens United* the rapid increase of money and the ability to spend unlimited money on expenditures has allowed these organizations significant increase of power and influence. However, similar to corporate influence, we tend to only look only when that influence acts through the government. In fact these private organizations are operating as secondary governments and no longer need to act through the government. The actions of these groups do not stay in the private sphere but enter into the public sphere. Simply because they are private institutions does not mean that they are separate from the political process and therefore corruption.

Advocacy organizations clearly have a desire to see their political desires implemented. If there is a candidate that will further your political needs than it only makes sense to campaign on their behalf. In addition, due to campaign finance regulations it can be more difficult to campaign with a candidate than to campaign separately. In order to avoid corruption the government enforces strict contribution regulations. However, strict campaign finance regulations encourage organizations to bypass the rules. *Citizens United* encourages organizations to not participate directly with campaigns by allowing them the ability to spend unlimitedly on expenditures. The contribution expenditure

binary encourages systematic corruption. By not limiting expenditures it perpetuates the presumption that direct contact with the government and campaigns is harder than to simply circumvent those regulations. What is unique about *Citizens United* and the campaign finance paradigm is that it allows actors to bypass government regulations without ever coming into contact with the government. It is politically more beneficial to campaign independently of the official campaign.

Third party advocacy organizations have the advantage of acting like independent governments or campaigns without having to worry about accountability. Political accountability is fundamental to democracy, as it ensures the behavior of elected officials is in line with the law or code of ethics. This act is crucial to preserving a democracy/government that will act in the interests of its people. Accountability is a mechanism for the people to either reward or punish those in office. It is one of the “only means of exercising effective control over the professionalized public services that play a major role in preparing and implementing policy” (Peters 17). Political accountability when used effectively requires government officials and public elites to act with a sense of shame and responsibility. It is not assumed that public officials will always act in an ethical manner. It is important to think of accountability as a performance based review performed by voters. It is this check on elected officials that ensures a functioning democracy.

There is no level of punishment a citizen can exert over a third party organization. Therefore, we do not necessarily need to limit the amount of

money these organizations can spend; we need to limit their ability to operate in the political process. The political process is much more complicated than the binaries we place it in. Expenditures may happen outside of public office, but expenditures have public consequences. When private organizations are allowed to spend and operate anonymously in the political process without any level of political accountability corruption occurs. Organizations can form and act as independent campaigns. They can campaign for a candidate without ever being worried about their electability. As a result, these groups can engage in unpopular campaign tactics like voter suppression. The ability to campaign for a candidate and suppress the vote of undesirable voters is highly corrupt and yet the people, the pillar of democracy, cannot do anything about it. The fear of unlimited expenditures is not solely limited to the flood of private money into politics, as many critics of the decision argue, but rather that unlimited expenditures encourage political activity outside of politics. It perpetuates societies corrupt relationship with the government. In order to achieve desired political outcomes it is easier to do so through corrupt acts rather than accessing the democratic process. It is more efficient on multiple levels. First you can bypass campaign finance regulations and second you can campaign without being held accountable. Expenditures allow organizations the ability to operate in the private sphere while achieving public outcomes. Corruption is not only the deal that occurs between an elected official and an outside actor, but rather the ability for an outside actor to influence the political process while remaining in the private sphere.

Conclusion: Neoliberalism and Privatization of Elections

Both the left and right have continually and incorrectly criticized the *Citizens United* decision. All along the political spectrum criticism has embraced the contribution expenditure binary. This commitment to an ideological split not only makes incorrect assumptions about the political process and corruption, but feeds into a larger narrative of neoliberalism. The ability to speak becomes inextricably linked with the ability to spend. Since *Buckley* the Court has continually ruled that independent expenditures are protected free speech. The worry that ordinary voices will be drowned out by the wealthy elite, is not a legitimate state interest to override our First Amendment right of free speech.

Elena Kagan who would later be nominated to the Supreme Court by Barack Obama served as the Solicitor General for *Citizens United*. Defending the government Kagan made a cautious argument and attempted to stay as close to Supreme Court precedent as possible. Instead of advancing worries about possible corruption or distortion of the political process, Kagan put forth the argument that it is unfair to shareholders of corporations whose money may go towards political issues they do not support. The government has a legitimate state interest to protect the shareholders money from going to political agendas they do not support. The type of political distortion that takes place is “the distortion of the electoral process that occurs when corporations use their

shareholders' money who may or may not agree"(Kagan 47:6-9). Kagan does not push back against the premise of expenditures, and agrees that such political speech is constituted. Kagan does however address the unique position of not-for-profit advocacy organizations. Her concern is that nonprofit corporations need to be supervised for fear that they will "function as conduits for the for-profit corporation"(Kagan 42:12).

Kagan does not worry about nonprofits being able to spend in conjunction with elections, but that they will act as a middlemen to move money anonymously. This is a legitimate concern, as we have seen nonprofits do act as conduits for corporations and Super PACs. However, the presence of nonprofits is viewed as entirely permissible because the nonprofit acts as the adversary to the business corporation. There is complete deference to the nonprofit since it operates as mechanism for free speech. The nonprofit is an ideologically based organization; therefore it is assumed that any individual involvement or donation with the organization is an agreement with that ideology. Third party advocacy organizations are seen as critical for our current democracy. It is a tool for an individual to have their voice heard on a larger platform. This form of political speech however is done through a donation to an organization. An individual's political speech is nothing more than a check written to an outside organization. Political speech becomes synonymous with the ability to spend. Therefore, it is not necessarily so that we demand a right to express ourselves, but rather that we demand the right to express property rights. In a neoliberal society we have turned free speech in a commodity for purchase. The figurative

marketplace of ideas is now a literal marketplace where the highest bidder can purchase the largest political voice. Our commitment to view interest groups as a positive presence demonstrates our belief that political speech should and does have a price tag. Third party advocacy organizations operate as a marketplace where individuals can purchase political speech.

The American Left concedes that it is wrong to have the wealthiest few Americans be able to purchase more political voice than others. However, they continue to support structural neoliberal institutions that encourage the commoditization of political speech. Nonprofits and other advocacy organizations are seen as beneficial since they operate in the private sphere and provide a space for individuals to politically express themselves. Neoliberal ideology continually encourages and glorifies the privatization of American institutions. The expenditure and contribution ideological split perfectly demonstrates this. Expenditures are good because they happen in the private sphere. Contributions are bad because they occur in the public sphere where corruption occurs. The notion that corruption only occurs in the public sphere perpetuates a false narrative of the political process. It reinforces the incorrect ideology that private organizations are completely separate entities from public/government entities. However, the private community is deeply entrenched in the political process, and expenditures just become another example of their influence.

In theory, expenditures made by outside organizations are supporting the political speech of their donors. However, those who donate clearly are the

select few who have substantial sums of money to donate. Inequality of wealth and the consequences of that inequality on elections troubles critics of *Citizens United*. Yet, the ability to purchase political speech is not what troubles critics. What is troubling is how much money is being spent and by whom. Solutions to the problem rely on spending limits and stricter disclosure requirements. The association with political speech and money is so entrenched that even the solution to the problem is to simply create a different marketplace. Our attempt to resist the capitalistic privatization of the election process is to create a fairer marketplace.

There is a universal understanding that money whether we like it or not is a necessary aspect of elections. Candidates need money to campaign. Yet we see money that goes to the actual candidate as corrupt. We worry what an elected official would do with large sums of money coming from a select few individuals. However, expenditures operate exactly the same way. Expenditures allow the wealthy few the ability to operate in the public sphere without accountability. The very nature of expenditures is to influence political outcomes. To categorize expenditures as private entities and void of possible corruption is entirely naïve. In fact, expenditures are subject to higher possibilities of corruption due to the complete lack of accountability. Ironically, expenditures allow for the corruption that contribution regulations are supposed to avoid. Corruption is defined by the Court as the deal that bypasses the check of political accountability. Yet all expenditures bypass the check of political accountability.

Citizens United was responsible for lifting the final ban on spending limits on independent expenditures. The Court ruled that the ability to purchase an independent expenditure is a protected First Amendment right. However, intentionally or unintentionally the Court created an incentive for campaigns/candidates to outsource campaigning to private organizations. Unlimited free speech in the form of independent expenditures gives private organizations the ability to campaign themselves, and in so doing allows them to engage in illegal/unfavorable campaign tactics like voter suppression. Campaigns no longer need to do the dirty work because they can outsource it to outside organizations. The amount of power and influence that outside organizations have in the political process is tremendous. While it may take a while to fully understand the impact outside interest groups have on elections, it can be said that we have already seen a drastic increase of activity from them. We have already seen an increased presence in Wisconsin, and a rise in voter suppression complaints to the Government Accountability Board. The fact that outside organizations have the capacity to participate in the political process at all is inherently troubling and problematic. It goes against the very principle democracy was founded on. Our public officials/institutions serve the best interests of the people because we hold them accountable. Private outside organizations operate outside this accountability on the assumption that political speech is equivalent to dollars spent. Both sides of the political spectrum reinforce this idea, and in turn reinforce neoliberal ideology that privatization of our institutions is beneficial. In fact, all this has done is begin the

process of privatizing our election process. Thanks to *Citizens United*, campaigns can now contract out the very process of campaigning.

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