

# CORPORATE CONTROL OF ELECTIONS

## ***CITIZENS UNITED V. FEDERAL ELECTION COMMISSION (2010) and Related Decisions: History and Consequences***

(AN IN-DEPTH REFERENCE – as of September 2017)

Original sources, government reports and newspapers of record have been used where possible. When not available, I have used sources that seem most authoritative. The content of this paper represents my best effort to present accurate information on this problem. Any errors or inconsistencies are honest mistakes. I give permission to have this piece freely distributed and used for background research.

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## **INTRODUCTION AND SUMMARY**

*Issues such as a cleaner environment, better healthcare and better education, are like the branches of a tree; they cannot be solved until the root problem is solved: corporate control of elections, notes Lawrence Lessig of Harvard Law School.<sup>1</sup>*

In American elections, how do people decide who to vote for? Much of their knowledge comes from political advertisements. Until recently, laws limited the amount of money that any one person could spend on such ads, so that voters representing a spread of political viewpoints could afford to have their opinions heard. However, the Supreme Court's 2010 decision *Citizens United* (and related decisions) allowed corporations, unions and individuals<sup>2</sup> to spend unlimited sums on political ads in election campaigns. Corporations (many of which are multinational) and the super-rich (most of whom are corporate leaders) control the message.

**The average person's voice (whether Tea Party, Democrat, Republican or Libertarian) has little chance of being heard because “the people” lack the financial resources to compete. Unions and small businesses have also been hurt by the decision.**

The goal of corporations is to make profits, and their incentive in politics is to control government in order to maximize those profits. They have no interest in promoting the good or welfare of the people.

Not only did *Citizens United* allow corporations to spend unlimited amounts of money on political ads, but it also narrowed the legal definition of “corruption” to mean only outright bribery. Therefore, in court, reformers must show hard evidence that a specific amount of

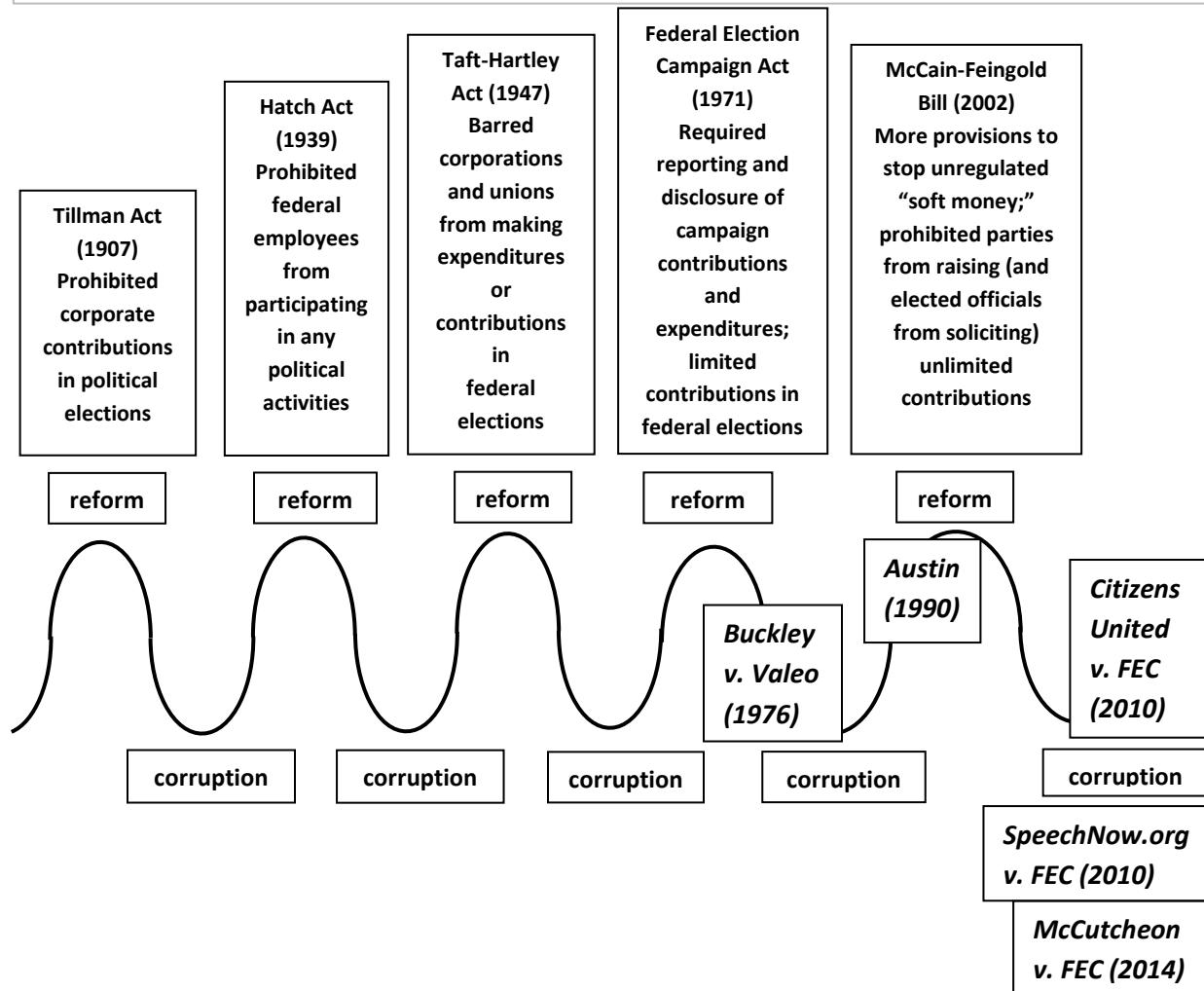
money was paid by a specific person to a specific candidate for a particular vote. It has become almost impossible to win court cases intended to stop what the average person would call corruption. The 2016 conservative victory at all levels of government has further dimmed prospects for reform in the near future.

**Historically, in response to public outrage, Congress and the states had the authority until 2010 to pass or amend laws limiting Big-Money's spending in elections. Though not a perfect system, it did provide an avenue for reform. *Citizens United* was decided in a way that stripped Congress and the states of this power.**

**Even regulators have been unable or unwilling to protect the interests of the American people, so that now corporations can legally keep their political activities secret, even from shareholders.**

While *Citizens United* prevented Congress from limiting corporate spending in elections, Congress still has several rights. It can require disclosure of the identity of donors; prevent

**THE GENERAL CYCLICAL PATTERN OF CAMPAIGN FINANCE CORRUPTION AND REFORM  
IN THE HISTORY OF UNITED STATES ELECTIONS**



foreign interference in elections; regulate campaign finance activity on the Internet; stop corporations from forcing employees to contribute to company or union SSF PACs; mold the Federal Election Commission into an effective regulator, and encourage public funding of elections. Congress can even initiate a constitutional amendment to overturn *Citizens United*. However, it has been unable to pass reform legislation on any of these issues.

As a consequence of *Citizens United*, members of Congress have to spend many hours soliciting contributions from corporations and the super-rich; some studies suggest that it takes 30-50% of their time. They are bought well before elections so they no longer represent their “natural-person” (human) constituents; they represent the corporations that support their campaigns.

Corruption now works both ways between corporations and Congress. Peter Schweizer, of Stanford’s conservative Hoover Institution, in his book “Extortion,” documents that some leaders in Congress delay votes on corporate-friendly bills until after the interested corporations or wealthy donors contribute a significant amount on behalf of the members’ campaigns.<sup>3</sup>

**More than half the state legislatures bar politicians from receiving contributions while they are in session. There are no such controls over Congress.**

**The only way to permanently prohibit corporations from participating in elections, and to require limits on all contributions in campaign finance, is to pass a constitutional amendment. This would not end all corruption, but it would stop the worst of it. If instead of an amendment, a future Supreme Court were merely to overturn *Citizens United*, such a decision would not permanently protect democracy from abuse by a later Supreme Court.**

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

##### Provisions

**1) *Citizens United* required that corporations (both for-profit and nonprofit) and unions be allowed to spend unlimited amounts of money from their general treasuries (ongoing revenue streams used for ordinary business expenses) on political election ads.**

Although *Citizens United* applied to **unions**, the relevant laws and types of resources available to unions make them significantly weaker than corporations when it comes to influencing elections. For example, federal law prohibits unions from using general funds to pay for political activities unless their employees (union members) agree to it.<sup>4</sup> According to the Center for Responsive Politics, corporations outspent labor unions by about 15 to 1 leading up to the 2016 elections.<sup>5</sup> Although the Supreme Court decision covered all businesses, **small businesses**, like individual citizens, have been hurt by the political activities of large corporations.<sup>6</sup> This report focuses primarily on the power of large corporations and the super-rich in American elections.

**2) *Citizens United* narrowed the definition of corruption to include only bribery (known as *quid pro quo* corruption). Before 2010, legal definitions included “the corrosive and distorting effects of immense aggregations of wealth” in election campaigns.<sup>7</sup> The Court argued in *Citizens United* that allowing corporations to spend freely on election ads would “not give rise to corruption or to the appearance of corruption.” The Court’s confidence was justified, given its narrowed definition of the term.**

The Court stated that corruption would be prevented a) because it assumed that the identity of donors would be disclosed, and b) because the decision prohibited corporations from

coordinating their expenditures directly with candidates or with political parties. However, these safeguards have not worked.

**3) The Supreme Court in an 8-1 vote held that disclaimer and disclosure requirements are constitutional, but the Court did not require the disclosure of the identity of donors.** It assumed that Congress and the Federal Election Commission (FEC) would enact relevant laws and regulations. (The FEC implements and enforces federal campaign finance law.)

**Neither Congress nor the FEC has acted on this; in fact, they have both blocked requiring disclosure.** Disclosure alone, however, would not stop large corporate funding of elections.

**4) In *Citizens United*, the Court agreed with earlier decisions prohibiting corporate contributions directly to candidates, to political parties or to traditional political action committees (PACs).** (PACs were created in 1944 to fund candidates' campaigns. There are legal limits on contributions to PACs, and also on contributions from PACs to candidates, to other PACs or to political parties. For details, see Appendix.)

#### Logic for the *Citizens United* decision

**1) In *Citizens United*, the Court under Chief Justice John Roberts assumed that corporations have First Amendment rights as "persons" (based on *First National Bank of Boston v. Bellotti* (1978)). The Court then placed heavy emphasis on the precedent that the First Amendment protects the public's right to receive information from any source, and concluded that one type of source (humans) cannot be favored over another (corporations).** The Court reasoned that government cannot suppress political speech on the basis of a speaker's identity. Thus, if the speech of humans ("natural persons") cannot be restricted, then neither can the political speech of for-profit or nonprofit corporations.

**2) The Court argued further that the more money spent on distributing political information, the better informed the electorate will be. Money, no matter the source, enables more speech, so like speech, money cannot be limited (sometimes shortened to money=speech).**

**3) Regarding corruption, the Roberts Court interpreted the controversial definition in the 1976 *Buckley v. Valeo* decision to mean only *quid pro quo* corruption.**

**Because *Citizens United* was decided on constitutional grounds rather than on statutory grounds, it can be overturned or amended only by a constitutional amendment or by the Supreme Court itself.** In 1803, the Supreme Court in *Marbury v. Madison* assumed the right to overturn congressional laws that it judged unconstitutional. The Roberts Court used this power to strip Congress – and later the states – of their right to keep Big Money out of politics.

#### Dissenting Opinion to *Citizens United*

**Justice John Paul Stevens argued in the dissenting opinion that, while corporations have First Amendment rights, this should not automatically give them all the rights of "natural persons."** He gave as examples such groups as the military, prisoners, students and foreign nationals, who have routinely been given different consideration under the Constitution.

He warned that unlimited funding is more likely to foster corruption when power is concentrated in the hands of just a few corporate leaders and the super-rich.

He argued that financial control of elections by just a few corporations and the super-rich would skew the message available to the public, and that it would become very difficult for average citizens to accumulate the necessary resources to air their own positions.

The dissent also warned that *Citizens United* would open the way for foreign interests to manipulate American elections.

*SpeechNow.org v. FEC (2010)*, decided by the D.C. Circuit Court of Appeals, immediately followed *Citizens United*. It reasoned that since groups making independent expenditures (political ads) can spend unlimited amounts on political ads, they should also be allowed to solicit unlimited contributions from others for such ads.

Implementation of *Citizens United* and *SpeechNow.org*

In response to *Citizens United* and *SpeechNow.org*, the FEC issued two Advisory Opinions (AOs) in 2010, creating “independent expenditures-only committees,” commonly known as Super PACs. AOs are advisory, and do not have the force of regulations (rules). The FEC, composed of six members – three nominated by the Republicans and three by the Democrats – deadlocks on critical issues. In 2014, the FEC finally passed rules to carry out *Citizens United* and related decisions, but they only reiterated the earlier AOs, failing to address a host of controversial issues, such as disclosure, and the protection of elections from foreign interference. Therefore, these issues are, by default, governed by inadequate regulations that were created for the 2002 Bipartisan Campaign Reform Act (BCRA, or the McCain-Feingold Bill).

- 1) According to the AOs, Super PACs, like corporations, are allowed to spend unlimited amounts of money on political ads, and to solicit unlimited amounts from corporations, unions and individuals to support those ads. (For details on Super PACs, see Appendix.)
- 2) The AOs required Super PACs to report periodically to the FEC, disclosing limited information about receipts and expenditures. However, a) the reporting schedule allows Super PACs to avoid disclosing their donors until after elections;<sup>8</sup> b) only the identity of the donors who specify that their contributions be used for particular ads (called “earmarking”) have to be disclosed; and c) if Super PACs receive money from nonprofit 501(c)s (discussed later), the Super PACs can report just the names of the nonprofits as their contributors, instead of the original donors. According to R. S. Garrett in a Congressional Research Service report, 501(c)s played a central role leading up to the 2016 elections.<sup>9</sup>
- 3) The AOs prohibited Super PACs from coordinating their expenditures for ads directly with political parties, candidates, or with candidates’ authorized committees (committees that accept and spend money on behalf of the candidates). It is legal for candidates to discuss any issue with Super PAC staff except actual expenditures that the Super PAC intends to make. They can, for example, collaborate on fundraising strategies. Since the term “coordination” has no “bright-line” definition, circumvention of the ban is rampant.
- 4) The AOs also prohibited Super PACs from contributing directly to candidates.

A third Advisory Opinion (2011) compromised the definition of “coordination” by making it legal for candidates to attend, speak and be featured guests at Super PAC fundraising events, as

long as the candidates themselves do not solicit unlimited funds. They can speak, and then step aside to allow Super PAC members to collect the money.

#### Consequences and corruption

**The wealth invested in this new campaign finance system is now fueling court challenges by corporations, designed to further increase their power in elections, particularly at the state and local levels and in elections for judges.** In the wake of *Citizens United* and *SpeechNow.org*, states with conflicting laws were told to reverse them.

While acknowledging that public funding is constitutional, the Supreme Court struck down the part of **Arizona's Clean Elections Act** that provided candidates with public funds to match the amount given other candidates by rich donors or corporations. The Court considered it a violation of the privately-funded candidates' First Amendment rights.

In 2012, the U.S. Court of Appeals for the Eighth Circuit overturned **Minnesota's disclosure law** as being "most likely unconstitutional" and too burdensome for corporations and political organizations, despite the Supreme Court's recognition that disclosure is constitutional.

When the **Montana** Supreme Court refused to overturn its hundred-year-old **Corrupt Practices Act** prohibiting any corporate spending in elections there, the U.S. Supreme Court summarily reversed it. The Court held that *Citizens United* takes precedence over state law.

**Corporate interests are targeting judges in some 38 states where they are elected, with the intention of electing those who will rubber-stamp their agenda.<sup>10</sup>**

**Large corporations are very active in federal campaigns across state borders.** The fact that some candidates supported by Big Money lose elections seems only to energize the backers to change strategies.

**As a consequence of *Citizens United* and *SpeechNow.org*, the delicate system of checks and balances in government (legislature, executive, judiciary), established by the Founding Fathers to protect democracy from tyranny, has become tilted heavily in favor of the Supreme Court, and of a few super-rich individuals and non-voting corporations.**

**The money spent by corporations in elections is a waste of national resources. Who ultimately pays for the hundreds of millions of dollars of corporate political activity? The American people do.** Every dollar that corporations spend from their treasuries on elections is a dollar they have cut from their employees' pay and benefits, added to the price of their products, or cut from R&D or product quality.

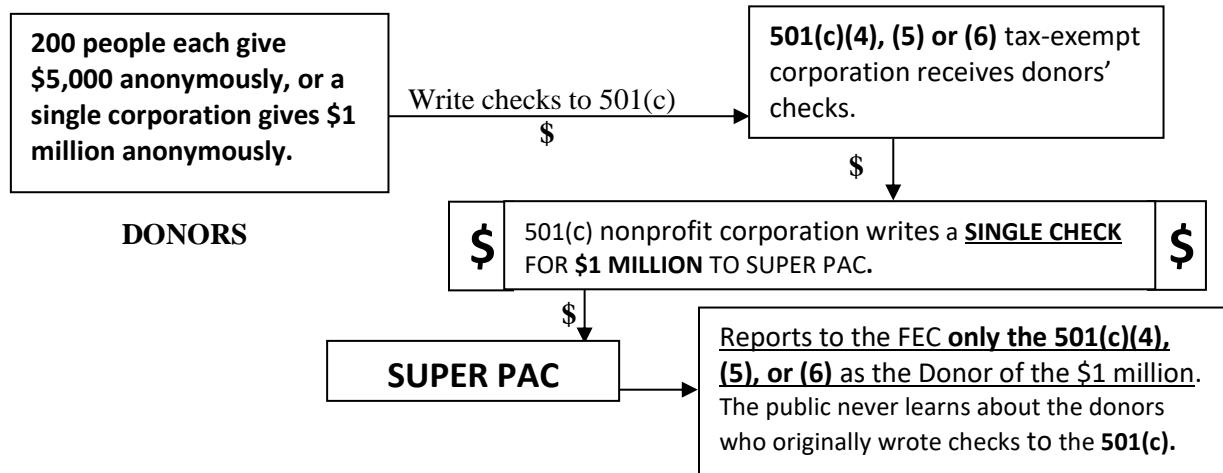
**Large corporations have an unfair advantage over voters because of their corporate form –** for example, because of their limited liability, their ability to build up immense amounts of cash, and their potentially infinite lifespan.

**There are avenues besides Super PACs through which corporations legally channel their political activities. Both tax-exempt 501(c) nonprofits, and unregulated shell companies allow corporations to hide their political activities from public scrutiny.<sup>11</sup>**

**501(c)(4)s, (5)s and (6)s are regulated by the IRS, not the FEC.** They can be established by (and accept donations from) individuals, corporations, trade and professional associations, and from unions; and they can use up to 49% of their expenditures and volunteer time for political campaign intervention. 501(c)s are not required to disclose the identity of their original donors.

They can bundle donations into a few or a single check before either spending the money themselves on political ads (which they are increasingly doing), or else passing funds along to Super PACs which do the ad-buying. In either case, only the 501(c) is reported as the donor. (For details on 501(c)s, see Appendix.) Though 501(c)s are required to report political ad-buys to the FEC, they must provide very limited information on revenues and expenditures. Original donors report separately to the IRS, but the IRS does not publish their identities. This kind of secret political spending is known as “dark money.”

### **ONE WAY TO CONCEAL THE IDENTITY OF POLITICAL DONORS**



501(c)4s, 5s, and 6s have been making **electioneering communications** (ECs) for many years. These are ads that clearly identify a candidate, but cannot instruct people to vote for or against that candidate. They address issues, and can only be aired close to primaries or elections. For example, “Candidate X has voted against important healthcare legislation; call X.”

Because *Citizens United* applied to both for-profit and nonprofit corporations, nonprofit 501(c)s gained the right for the first time to make independent expenditures (IEs), as well as ECs.

**Independent expenditures** (IEs) are ads appearing on Internet, radio and TV, in mailings, on billboards, etc., explicitly telling voters to “vote for A,” or “vote against B;” and there are no restrictions on when such ads can be aired. Close interrelations have developed among corporations, Super PACs and 501(c)s. Those establishing 501(c)s can also establish Super PACs.

**While donors can legally keep their identities secret from the public, nothing prevents a multinational oil giant from telling its preferred candidate, but not the voters, about its contributions to a 501(c) supporting that candidate.**

**Corporations also channel secret political activities through shell companies (limited liability companies, or LLCs), which are not regulated by either the FEC or IRS.** Shell companies are incorporated by states as for-profit businesses. And though most of them are legitimate businesses, others serve as conduits for hidden political contributions. LLCs can disappear soon after incorporation, and ownership can be untraceable.

**Shadow parties** played an increased role in campaign finance during the 2016 elections. Usually led by former political party staff members, according to the Brennan Center for Justice Research, they are “outside groups with close ties to the parties that take unlimited contributions and sometimes keep their donors secret.”<sup>12</sup> Included among the ways that both political parties circumvent the law is the use of secret codes in social media to coordinate with outside groups.<sup>13</sup>

To carry out their political activities, corporations establish patriotic-sounding organizations (like “America Wants Cleaner Energy”) that can create highly-professional political ads designed to deceive and manipulate. They are intended to lead citizens to unwittingly vote for candidates who support, not the public interest (be it health care reform, better education or a cleaner environment), but the interests of the candidates’ silent corporate backers – whether banks, agribusiness, investors in fracking, or insurance interests (that might be out-of-state or foreign entities). Only after elections, if ever, might voters become aware of the source of the ads’ funding, because the FEC has established business-friendly reporting schedules.

**Government agencies that are supposed to regulate corporate political activities in order to protect the public interest – the FEC, the IRS (in its minor role), the Securities and Exchange Commission (SEC), and also Congress as law-maker – have been disabled or have become corporate puppets.** Even President Barack Obama was unable or unwilling to act to protect the “natural person” voter. President Trump supports broad deregulation.

A provision in the budget passed by Congress in January 2014, and again in the 2016 Appropriations Act, prohibited requiring disclosure of the political activities of applicants for government contracts.<sup>14</sup> Though the 2016 Appropriations Act increased funding for the IRS for the first time since 2009, it discouraged rulemaking on disclosure of corporate political activity. It also prohibited the SEC from using budget money for such rulemaking.<sup>15</sup> In any event, the SEC has shown no interest in the issue of transparency.

### **Foreign Interests**

Justice Stevens writes in the *Citizens United* dissent that the decision appears to give the same protection to multinational corporations controlled by foreign interests as it does to individual Americans. When does a multinational corporation become foreign? Congress has not yet come up with an answer. **The fact that corporations operating in the U.S. are not required by law to reveal the identity of their owners exacerbates the problems surrounding interference by foreign interests in elections.**<sup>16</sup>

Dangers of foreign interference will only grow as companies become increasingly multinational and campaign finance regulation becomes more lax. In fact, efforts by foreign interests to interfere in elections are well documented; for instance, foreign interests hacked into state voter-registration data during the 2016 presidential campaign.<sup>17</sup>

**Because the Supreme Court did not address the issue of foreign interference in elections, Congress has the power to undo parts of the damage from the decision.** Some experts believed that Congress, ever sensitive to national security, would enact protective legislation. However, it has not, leaving open opportunities for foreign interests to channel political activities through, for example, 501(c)s, the Internet and shell companies. U.S. subsidiaries of wholly-owned foreign companies have the same First Amendment rights as American companies in U.S. elections. Should American companies that reincorporate abroad in order to avoid US taxes continue to have full rights to participate in election campaigns?

The Internet, through which candidates solicit funds, is beamed world-wide. Anyone seeking information on a candidate is usually automatically asked for a donation – another entry for foreigner interests.

In September 2016, the Republican FEC commissioners blocked the passage of two rules that would have limited foreign contributions in U.S. political campaigns; they even blocked discussion of the issues.<sup>18</sup>

**Out-of-state and foreign involvement in state elections** reduces the power of voters' influence over their own local issues. The fact that there is less news coverage of state and local political contests gives corporations more power to control their outcome.<sup>19</sup> However, state and local governments set the rules for their own elections; and while they cannot block the inordinate influence of wealthy donors, they can make rules on fringe issues such as foreign interference, disclosure, and public funding of campaigns.

Simply enacting laws requiring disclosure of all donors (including donors to 501(c)s) would not stem the corrupting and enormously complex flow of money into elections from the super-rich and from domestic and foreign corporations.

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

Individuals, unlike corporations and Super PACs, have historically been allowed to give limited donations directly to candidates, political parties and PACs. (See details on PACs in Appendix.)

In order to prevent *quid pro quo* corruption, the FEC established both annual and biennial limits on donations. Annual base limits prevented corruption in a single election, and biennial limits prevented individuals from circumventing the base limits. Here is a simple example: If the annual limit on contributions to a single PAC is \$1 and the biennial limit is \$5, then in a two-year election cycle, an individual can give the maximum of \$1 to each of 5 PACs. Without biennial limits, an individual could create an infinite number of PACs all giving to the same candidate. The Supreme Court, in *McCutcheon*, decided that the biennial limits were unconstitutional, despite Justice Stephen Breyer's strong dissenting arguments.

**1) The *McCutcheon* decision allowed individuals to give legally-limited donations to an unlimited number of candidates, political parties and PACs. Disclosure of such contributions is required.**

**2) The decision also allowed individuals to create an unlimited number of PACs, all supporting the same candidate.**

**3) Historically, joint fund-raising committees (JFCs) could be set up by two or more candidates to raise money. While JFCs were not affected by *Citizens United*, the *McCutcheon* decision allowed JFCs, for the first time, to solicit money from individuals for all the candidates they represent. Political parties can set up a Super JFC to represent hundreds of candidates. Given the legal limits on individual gifts directly to candidates, an eager donor can write a single large check covering many candidates, knowing that the committee supports his or her views. The committee divides contributions among its candidates according to agreed-on ratios.**

**4) The Supreme Court further narrowed the definition of “corruption.” Regarding possible *quid pro quo* corruption, the Court held that protection of First-Amendment speech rights requires the courts to err on the side of calling an infraction “influence or access to elected officials” (which the Court said is legal) rather than calling it “bribery.”<sup>20</sup>**

***McCutcheon continues, “No matter how desirable it may seem, it is not an acceptable government objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.”***<sup>21</sup> (Emphasis added.)

5) Supporters of *McCutcheon* argue that it will lead to a better-balanced system than was created by *Citizens United*, which reduced the power of candidates and political parties, relative to that of corporations and the super-rich. They overlook the fact that *Citizens United* and *McCutcheon* together have left little power or voice to the voting American people in election campaigns.

McCutcheon supporters ignore the historical lesson from the 1990s, during which a significant amount of “soft money” going to political parties created the corruption that led to the reforming McCain-Feingold Bill; they can ignore it because Congress can no longer pass laws to stop such corruption.

**Other pending cases are challenging limits on direct contributions to state and local political parties, and are also challenging limits on what individuals can give directly to candidates.**

#### *How did corporations amass so much power?*

The Founding Fathers so deeply distrusted corporations that they were not mentioned in the Constitution. It was left to the states to issue charters of incorporation, on the assumption that the local level could keep a closer watch over corporate activity. At first this worked, as corporations, which were then temporary, built roads and canals.

However, corporations gradually became politically stronger. Thomas Jefferson wrote in 1816 (as Justice Stevens quotes in his dissent), “I hope we shall...crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government ...and bid defiance to the laws of our country.”<sup>22</sup>

During the industrial revolution, corporate leaders became involved in writing the Fourteenth Amendment (1868), so that the final document left open an opportunity for corporations to insinuate that they too were “persons” under the amendment.<sup>23</sup>

Then, in *Santa Clara County v. Southern Pacific Railroad Co.* (Supreme Court, 1886), the Court reporter (former president of the Newburgh & NY Railroad Co.) stated in his notes that in the Court’s opinion, corporations had rights as “persons” under the Fourteenth Amendment. While it was not part of the case or opinion, it was accepted by Chief Justice Morrison Waite.<sup>24</sup>

This was accepted as a basis for corporate rights to protection under not only the Fourteenth Amendment, but also the First and Fifth Amendments. Most important, corporations were thereafter assumed to have the right to freedom of speech under the First Amendment.

**In 1947, corporate “personhood” was written into law in “Rules of Construction.”**<sup>25</sup> From then on, corporations gained or lost some measure of control over government, largely depending on the political leanings of the sitting members of the U.S. Supreme Court and Congress at the time.

As previously mentioned, for a hundred years before *Citizens United*, in cycles, corporate corruption in campaigns would lead to public outrage, which would lead to congressional campaign finance reform. Now, without the possibility of congressional reform, public outrage has no means of redress. But corporations still continue to test for weaknesses in the remaining laws and regulations that were established to protect the American people and democracy.

The complexity of the new system could not have been better-designed to confuse and frustrate the electorate. As an example of the reaches of a single wealthy family, see the 2016 graphics of the Koch brothers' network, at Common Peoples Source for News.<sup>26</sup> Jane Mayer's 2016 book, "Dark Money," is an in-depth analysis of the extraordinary extent of the Koch brothers' power.

### ***Public reaction***

**Historically, both Republicans and Democrats in Congress have at times tried to undermine the integrity of campaign finance.** Recent public polls show that now a majority of both Republicans as Democrats want to stop the flow of unlimited contributions into the electoral system, and believe that corporations should not have the status of "personhood."

A push-back on many public fronts – at the federal, state and local levels – is growing among both liberals and conservatives.

Many cities and states are acting to regain some control over their own elections through legislation and public initiatives. As of September 2017, nineteen states had called on Congress to initiate a constitutional amendment to prevent corporations from participating in elections, and five states had called for an amendment convention to overturn *Citizens United*. More than 700 cities, towns and counties have also called for an amendment.

**Amendments have been introduced into Congress every year since the decision, but none of the bills has yet passed. (All amendments that have been introduced protect freedom of speech for the press.)** They differ in their solutions, but all intend to end corporate control of elections. They include various combinations of provisions: that corporations are not "persons," that money is not speech, that corporations have no constitutional rights, that Congress and the states may prohibit corporate participation in elections, that Congress and the states can regulate how money is raised and spent in elections, or that congressional elections can be financed with public money. Find details and analyses of the proposals in The Amendment Gazette: <http://www.amendmentgazette.com/analysis-2/> (Click on "amendments.")

The conservatives on the Supreme Court appear to assume that there is no alternative to either corporate control of elections or government tyranny. Overlooked is the middle ground – the basic intention of the Constitution: control of American elections and thus of government by the "natural people," the voters. President Lincoln's 1863 Gettysburg Address closed with, "...and that government, of the people, by the people, for the people, shall not perish from the earth."

This paper is intended to pull together scattered relevant pieces of information.

For other sources, see: Sheldon Whitehouse, "Captured: the Corporate Infiltration of American Democracy" (The New Press, New York, 2017); Democracy 21 at <http://www.democracy21.org/>; Campaign Legal Center at <http://www.campaignlegalcenter.org/>; Open Secrets.org, Center for Responsive Politics at <http://www.opensecrets.org/>; Sunlight Foundation at <http://sunlightfoundation.com/>; The Brennan Center for Justice at <http://www.brennancenter.org/>; Public Citizen at <http://www.democracyisforpeople.org/>; ProPublica tracks the sources of Super PAC funding at <http://projects.propublica.org/pactrack/#contributions=all>; We the People at <http://www.wethepeople.org/>; Move to Amend at <https://movetoamend.org/>; [democracymatters.org](http://democracymatters.org); Free Speech for People at <http://www.freespeechforpeople.org/>; follow

Bill Moyers at <http://billmoyers.com/>; <http://united4thepeople.org/> gives details on pending congressional bills to initiate constitutional amendments; People for the American Way at <http://www.pfaw.org/>; Lawrence Lessig, “Republic Lost” (Barnes and Noble, 2011); Jeffrey Clements, “Corporations Are Not People” (Berrett-Koehler, 2<sup>nd</sup> ed., 2014); Peter Schweizer, “Extortion” (Boston: Houghton Mifflin Harcourt, 2013); Jane Mayer, “Dark Money” (Doubleday Books, 2016); “Corruption in America,” by Zephyr Teachout (Harvard U. Press, 2016).

## CRITICAL EVENTS IN THE GROWTH OF CORPORATE POWER IN ELECTIONS

### I. Some Relevant Pre-*Citizens United* Laws and Court Decisions

In *Marbury v. Madison* (1803), the Supreme Court gave itself the power to reverse any law made by Congress or the states that it deemed unconstitutional. Therefore, in the 2010 *Citizens United* case, five conservative justices were able to overturn a number of congressional laws, parts of laws and previous Supreme Court decisions that they considered unconstitutional.

The **Tillman Act (1907)**, responding to Republican President Theodore Roosevelt’s reform efforts, barred corporate contributions in elections. The **Hatch Act (1939)** restricted participation by federal employees in political activities.

**On July 30, 1947, the corporate status of “personhood” was affirmed by Congress in “Rules of Construction,”** which reads as follows:

“In determining the meaning of any Act of Congress, unless the context indicates otherwise... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals....”<sup>27</sup>

The **Taft-Hartley Act (1947)** barred both corporations and unions from making expenditures or contributions in federal elections.

In 1971, the **Federal Election Campaign Act (FECA)** was passed to govern financial campaign activities in federal elections. It required the reporting and disclosure of campaign contributions and expenditures; it established limits on contributions for political ads, and allowed for public funding. Although the FECA prohibited contributions directly to candidates from corporations and unions, it allowed them to use their general treasuries to establish and administer SSF PACs, to which their employees, shareholders and PAC members could give limited amounts. (See: PACs in Appendix.) The FECA prohibited candidates from funding their own campaigns and prohibited contributions from foreign nationals.

***Buckley v. Valeo* (Supreme Court, 1976)<sup>28</sup>**

- 1) ***Buckley's* narrowed definition of corruption was so vague that its interpretation has led to disputes in the courts and among scholars. The Supreme Court in *Citizens United* interpreted *Buckley's* definition as including only bribery or *quid pro quo* corruption – payment for favors.<sup>29</sup>**
- 2) **The *Buckley v. Valeo* decision permitted candidates themselves to spend unlimited personal funds on their own campaigns, arguing that it could not possibly trigger *quid pro quo* corruption.**
- 3) **The Court allowed individuals to spend unlimited amounts on IEs – campaign ads.** It argued that limits would restrict the **quantity** of campaign speech, thus violating First Amendment rights of free speech.<sup>30</sup> It reasoned that the more political speech there is, the better-informed voters will be; and since money expands the amount of an individual's speech, money spent in elections cannot be limited. Some shorten this to "money=speech."
- 4) **The Court required the disclosure of information on donors and their expenditures.<sup>31</sup>**
- 5) **Limits were upheld on contributions by individuals and political committees made directly to candidates and political parties.** *Buckley's* support of these limits was affirmed in every subsequent decision until it was challenged in the recent *McCutcheon et al. v. FEC* (2014) Supreme Court case (to be discussed later).<sup>32</sup>
- 6) *Buckley*, in a footnote, coined the phrase "magic words" to suggest a way to distinguish between "express advocacy" (independent expenditures (IEs) – political ads) and other forms of campaign financing such as electioneering communications. IEs contain magic words such as "vote for," "elect," "vote against X," "reject" and "defeat."<sup>33</sup>

Corporations were not the subject of the *Buckley* case, but the logic of the decision was later applied in *Citizens United* (2010) to give corporations, as "persons," the right to spend unlimited amounts of money on election ads.

***Austin v. Michigan Chamber of Commerce* (Supreme Court, 1990)<sup>34</sup>**

- 1) **The Supreme Court in *Austin* upheld a broad definition of "corruption;" 2) it upheld the constitutionality of a Michigan statute prohibiting corporations from using their general treasury funds to finance campaign speech; 3) it upheld Michigan's right to limit donations in its elections; and 4) it upheld the right to limit out-of-state entities from influencing the outcome of local elections.**

*Austin* held that restricting corporate political expenditures is constitutional, and that the government's interest is to prevent corruption and to protect shareholders' interests.<sup>35</sup> The precedent for this went back to the 1830s.

**According to *Austin*, the government has a compelling interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public support for the corporation's political ideas.... Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions"<sup>36</sup> (emphasis added). The *Citizens United* (2010) majority opinion referred to this as the "anti-distortion rationale," and overruled it.<sup>37</sup>**

## **The 2002 McCain-Feingold Bill (Bipartisan Campaign Reform Act – BCRA)**

In the early 1990s, according to former Senator Russ Feingold, writing in the Stanford Law Review, “Democratic lawyers and strategists exploited a loophole created by the FEC in the late 1970s. They created ‘soft money’ … [money raised outside the control of the Federal Election Campaign Act] – a system that allowed the solicitation of unlimited contributions to the political parties from corporations, labor unions, and individuals. This system was corrupting.... By the peak of the 2002 cycle, combined soft money, raised from both Republican and Democratic committees, reached nearly \$500,000,000.”<sup>38</sup> To close this loophole, the McCain-Feingold Bill was enacted. It limited contributions to candidates and political parties. However, Feingold points out that immediately following the reform, corporations began dismantling provisions. Both *Citizens United* and *McCutcheon* further chipped away at the BCRA. Feingold warned that *Citizens United* would leave average people feeling that their participation in political campaigns was “irrelevant,” and that even their votes had no weight in elections.

## **II. Recent court decisions that have led to the deregulation of corporate political activities**

**A. The Supreme Court case *Citizens United v. Federal Elections Commission (2010)***<sup>39</sup> was brought by Citizens United (CU), a right-wing 501(c)(4) corporation that produces political documentaries. CU challenged the regulations on election communications.

Prior to *Citizens United v. FEC*, although CU itself was not a PAC, it did have a PAC. When it was reminded in court that it could run its political ads from its own PAC, the corporation argued that because its PAC was not allowed to accept corporate money and, instead, had to raise money from humans, the organization’s rights of free speech were being infringed upon. CU won this part of the case. According to a reliable source, CU did not want to use its PAC to pay for “Hillary The Movie” and its related promotional materials because it wanted to bring this eventually-successful test case.

Justice Stevens, in his dissent to *Citizens United*, wrote: “Five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”<sup>40</sup>

### **1) Court Logic**

**In the *Citizens United* decision, the Court emphasized that the First Amendment protects the right of people to receive information from any source, and it argued that the government cannot suppress political speech based on the identity of the speaker (human or corporate).**

The Court applied the logic of *First National Bank of Boston v. Bellotti (1978)*<sup>41</sup> that “Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” The *Citizens United* majority opinion stated: “The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”<sup>42</sup>

***Citizens United* applied the ruling from *Buckley (1976)* that setting limits on money spent for political ads restricts the quantity of campaign speech.**<sup>43</sup> It reasoned that the more speech the better; and since money expands the amount of speech, contributions for the purpose of making both IEs and ECs cannot be limited.

The Court continued: “distinguishing wealthy individuals from corporations based on the latter’s special advantages of [corporate form], e.g., [their] limited liability, does not suffice to allow laws prohibiting speech”<sup>44</sup> or prohibiting unlimited corporate financial participation in elections.

The Supreme Court rejected Citizens United’s argument that disclosure of the donors’ identities would subject them to retaliation from those disagreeing with the particular chosen expenditures. It stated that there was no evidence for such a claim. “Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.”<sup>45</sup>

Regarding corruption, the *Citizens United* Supreme Court overruled all of *Austin* (1990) and also parts of the Supreme Court decision *McConnell v. FEC* (2003),<sup>46</sup> which had applied *Austin*’s relatively broad definition of “corruption.”

The Court relied instead on the two older decisions, *Buckley* and *Bellotti*. **The Roberts Court interpreted Buckley’s vague definition of corruption to mean only *quid pro quo* (get for giving).** As a result, Congress can regulate corruption only if a campaign contributor exchanges money for official favors from a candidate.<sup>47</sup> The Court assumed that corruption would be prevented because 1) transactions would be transparent, and 2) the decision prohibited corporations from coordinating their expenditures with candidates and political parties.

The Supreme Court majority argued: “The fact that speakers [including corporations] may have influence over or access to elected officials does not mean that these officials are corrupt.... The appearance of influence or access [to elected officials], furthermore, will not cause the electorate to lose faith in this democracy.”<sup>48</sup>

Justice Anthony Kennedy cited his own dissent to *McConnell v. FEC*: “Favoritism and influence are not...avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. **It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.**”<sup>49</sup> (Emphasis added.) But responsiveness to the interests of the super-rich and corporations? Or to the interests of the American people?

*Citizens United* barred contributions by for-profit and nonprofit corporations directly to candidates because such transactions could easily become bribery, but it allowed them to spend freely on independent political ads. The majority opinion reasoned that: “...independent expenditures do not lead to, or create the appearance of *quid pro quo* corruption. **In fact there is only scant evidence that independent expenditures even ingratiate.**”<sup>50</sup> (Emphasis added.)

Adam Liptak in *The New York Times* (May 3, 2010) explains the absurdity of this concept: “Contributions [directly] to politicians can give rise to corruption or its appearance, the Court said, but independent spending is free speech. A \$2,500 contribution directly to a politician is illegal; a \$25 million independent ad campaign to elect the same politician is not.”<sup>51</sup>

In a 5-4 decision, the *Citizens United* Supreme Court found unconstitutional some provisions of the Federal Election Campaign Act and also part of the McCain-Feingold Bill.

## 2) Provisions of *Citizens United* (2010), and Consequential Issues

### a. Corporations (both for-profit and nonprofit) and unions are permitted to spend unlimited sums of money from their general treasuries for political advertisements, known

as independent expenditures (IEs) – ads that expressly advocate for or against the election of clearly identified candidates. There are no restrictions on when an IE can be made. Such ad-spending cannot be made in cooperation (coordination), consultation or in concert with, or at the request or suggestion of, any candidate, candidate's authorized committee, or any political party.<sup>52</sup> (An authorized committee is not a PAC; it works directly with a candidate, accepting and spending money on the candidate's behalf.)

To put a fine point on this, so long as the corporation does not discuss its ad-buy with a candidate/office-holder, the corporation's CEO can still request a meeting with the candidate/office-holder to discuss a pending piece of legislation. Doing so would be lobbying by the CEO, not coordination of a specific expenditure.

**b. Corporations and unions can also spend unlimited funds from their general treasuries on broadcast, cable, and satellite electioneering communications (ECs),** created in 2007 after the decision *Wisconsin Right to Life*. These ads – about issues – can mention specific candidates,<sup>53</sup> but, unlike IEs, they may not say “vote for A” or “against B” or “defeat X.” ECs are aired within 30 days before a primary or 60 days before a general election for federal office.<sup>54</sup> Issue ads made outside this time-frame need not be reported to the FEC.<sup>55</sup> ECs cannot be coordinated with candidates, candidates' authorized committees or with political parties.

**c. Corporations and unions may not contribute directly to candidates, political parties or to PACs.**

**d. The Court in *Citizens United* applied the *Buckley* position requiring limits on contributions by individuals directly to candidates, their authorized committees and political parties – a preventative measure to “ensure against the reality or appearance of corruption.”** (*McCutcheon* (2014) established ways to circumvent these limits.<sup>56</sup>)

**e. Although the Court did not require the disclosure of the identity of donors to political ads, it agreed in an 8-1 decision that requiring disclosure and disclaimers is constitutional.** According to the majority opinion written by Justice Kennedy, “A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today.... With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions.... The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>57</sup>

The Court assumed that Congress or the FEC would provide relevant legislation or rules on disclosure, but neither Congress nor the FEC has acted on this. **Congressional bills requiring disclosure have not yet passed, but legislation blocking disclosure has passed.**<sup>58</sup>

The FEC is composed of six members, three nominated by Republicans, and three by Democrats; because four votes are needed to pass regulations, the commission deadlocks on important issues. Failing to agree on rules to implement the disclosure recommended by *Citizens United* (2010), the FEC is by default relying on regulations applicable to the BCRA (2002).

**The three Republican FEC commissioners have refused to update controversial parts of the 2002 regulations,<sup>59</sup> so, for instance, if donors do not ask that their money be used for a**

**specific ad (known as “earmarking”), their identity can legally be kept secret.**<sup>60</sup> Actually, earmarking money for a particular IE or EC ad is unusual, because campaign ads may be created long after contributions are collected.

**To avoid having to report donors, organizations making political ads become incorporated and accept only “non-earmarked” contributions. This gives them money to use freely and secretly in their political planning; the selected ads may not be in the donors’ interest.**

While two Democratic FEC commissioners responded with counter-arguments to the Republicans’ interpretation of the rules, the damage had already been done.<sup>61</sup>

Rep. Chris Van Hollen (D-MD) (now Senator) unsuccessfully challenged these regulations in a petition to the FEC and in the courts (discussed later).<sup>62</sup>

**f. *Citizens United* automatically invalidated many federal, state and local laws (see below).**

**g. Regarding foreign political activity in American elections**, the majority opinion of the Court stated: “We need not reach [means “consider”] the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”<sup>63</sup> The Court noted relevant laws that already addressed this issue, but how effective are they? In 2016, a wealthy Mexican was convicted of interfering in U.S. elections.<sup>64</sup> The Russians were implicated in efforts to manipulate the outcome of the 2016 presidential election. How much of this kind of interference goes undetected?

### **3) Dissenting Opinion of *Citizens United***

Justice John Paul Stevens wrote the **dissent** to *Citizen United* (joined by Justices Ruth Ginsburg, Stephen Breyer and Sonia Sotomayor).

**According to the dissent, “The Court’s ruling threatens to undermine the integrity of elected institutions across the Nation.”**<sup>65</sup>

“The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case.”<sup>66</sup> Justice Stevens asks, ““who’ is speaking when a business corporation places an advertisement that endorses or attacks a particular candidate.... Take away the ability to use general treasury funds for some of those ads, and no one’s autonomy, dignity, or political equality has been impinged upon in the least.”<sup>67</sup>

**He argues that the Court can limit constitutional rights of speakers, and it routinely does so, giving different groups (for example, students, prisoners, the military, foreigners and the Court’s own employees) different levels of rights under the First Amendment.**<sup>68</sup> The Court can, and should, limit the constitutional rights of corporations.

Justice Stevens argues that the decision appears to give the same protection to multinational corporations controlled by foreign interests as it does to individual Americans.

**He argues that the “unparalleled resources, professional lobbyists, and single-minded focus [of business corporations] ...make *quid pro quo* corruption and its appearance inherently more likely when they...spend unrestricted sums on elections.”**<sup>69</sup>

**He argues that “natural people” cannot compete with corporations:** “When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult

for them to coordinate resources on behalf of their position,”<sup>70</sup> whereas corporations have immense resources.

The dissent ends with, “...the Court’s opinion is...a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”<sup>71</sup>

#### **4) *Citizens United* and State and Local Elections**

Following the decision, not only federal laws, but state laws too, have been challenged in the courts. Laws in more than half the states were in conflict with *Citizens United*.

**Arizona’s Clean Elections Act** (1998) was the first state law to be challenged in the U.S. Supreme Court after *Citizens United* – in June 2011.<sup>72</sup> The **Arizona** law had given candidates for state office public funds to match the amount given other candidates by private financing and by independent groups. While the Supreme Court held that public funding is constitutional, it stipulated that the state’s use of matching funds unconstitutionally burdened privately funded candidates’ free speech and did not meet a compelling state interest. Reformers are now exploring various legal options for public funding in state and local elections.

Despite recognition that disclosure is constitutional, **Minnesota’s disclosure law** was overturned by the U.S. Court of Appeals for the Eighth Circuit in 2012. The court asserted that the law was “most likely unconstitutional” because the system for reporting and disclosure was too complex, making it too burdensome for companies and organizations.<sup>73</sup>

In December 2011, the Montana Supreme Court (*American Tradition Partnership v. Bullock*) upheld **Montana’s Corrupt Practices Act of 1912, which banned corporate political spending in elections. It had been passed in order to protect democracy from destruction by the “copper kings.”** The case was appealed to the Supreme Court, which in February 2012 summarily overturned the hundred-year-old law.<sup>74</sup> While the **Montana** case gave the justices a chance to reverse *Citizens United*, they instead reaffirmed it. The Court argued that *Citizens United* takes precedence over state campaign finance law.

Corporations are now becoming more aggressive in trying to influence state and local races.<sup>75</sup> Because elections of non-federal officials receive little news coverage, they are particularly vulnerable to secret political activity by large corporations (including out-of-state, multinational and foreign entities) pursuing their own agendas.<sup>76</sup> Such intrusion in state and local elections diminishes the speech of voters on their own local issues. However, states are beginning to fight back.<sup>77</sup> Among local responses to Big Money in elections was the 2014 defeat of candidates supported by the Chevron Corporation in Richmond, CA.

#### **5) Election of Judges**

**Moneyed interests are now working to control elections of judges.** In this regard, the dissent noted, “The majority of the States select their judges through popular elections. At a time when

concerns about the conduct of judicial elections have reached a fever pitch...the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”<sup>78</sup>

#### **6) 501(c)4s (“dark money”) in politics, after *Citizens United***

Cory G. Kalanick in the Minnesota Law Review<sup>79</sup> discusses 501(c)(4)s in the post-*Citizens United* political environment. Among the consequences he notes are the following:

- a. *Citizens United* allows rich political donors to circumvent the traditional contribution limits. Not only is this “antithetical to the purpose of social welfare nonprofits,” but a single very rich donor running attack ads just before elections requires the opposition to find scores of donors to “give the maximum just to adequately respond.”
- b. While anonymity “is likely the chief draw of donors to social welfare nonprofits[,]... this lack of disclosure leaves citizens in the dark as to the funding sources of advertisements – as well as their motivations.”
- c. Those who control secret outside money, having nobody to answer to, tend to create extremely “ugly” attack ads.
- d. “The use of nonprofits [in politics] can and does result in **coordination** with political parties and candidates, or at least the appearance of coordination.”
- e. “The use of nonprofits can and does result in **corruption**, or at least the appearance of corruption. Wealthy donors ... contribute large sums of money to buy access to elected officials, and anonymous donors hope to ‘purchase the votes that will make them richer.’”

**B. *SpeechNow.org v. Federal Election Commission*** is a second relevant, recent court decision (D.C. Circuit Court of Appeals, 2010 (599 F.3d 686)).<sup>80</sup> SpeechNow, a nonprofit unincorporated association,<sup>81</sup> argued that **if groups making independent expenditures (political ads) can spend unlimited amounts on political ads, then they should also be allowed to solicit unlimited contributions**. They argued that limits violate the First Amendment.<sup>82</sup>

#### **1) Court Logic**

In *SpeechNow.org*, as Adam Liptak in The New York Times reported, “**the Supreme Court ... identified only one government interest sufficient to overcome the First Amendment protections afforded to contributions for political speech: preventing corruption or the appearance of corruption.”**<sup>83</sup> Applying the logic from *Citizens United*, the D.C. Circuit Court of Appeals argued that **if groups paying for political ads cannot corrupt candidates, then contributions to those groups also cannot corrupt candidates**.

#### **2) Relevant Provisions**

- a. It is unconstitutional to set limits on the amount of campaign contributions to groups that use funds for independent expenditures.<sup>84</sup>
- b. Super PACs can solicit unlimited contributions from for-profit and nonprofit corporations, unions and individuals.<sup>85</sup>
- c. The court concluded that disclosure is constitutional, but did not require it.<sup>86</sup>

### **Implementation of *Citizens United* (2010) and *SpeechNow.org***

The FEC issued several Advisory Opinions (AOs) to implement the decisions – the first two in July 2010.<sup>87</sup> AOs are advisory only, and do not have the force of regulations.

1) AO (2010-09) responded to a request by a 501(c)(4) nonprofit corporation – the conservative Club for Growth, Inc. **The AO permitted the 501(c) to establish and administer a separate Super PAC in order to solicit unlimited funds from individuals in the general public and to spend unlimited amounts on political ads.**<sup>88</sup> (For details on Super PACs, see Appendix.)

2) AO (2010-11) allowed Super PACs to solicit unlimited contributions from individuals, political committees, corporations, and unions for the purpose of making IEs.<sup>89</sup>

**Super PACs must disclose their donors to the FEC. During election years, they can choose between reporting on a monthly or quarterly basis, and in non-election years reports are due monthly or semi-annually.**<sup>90</sup> **In these reports a 501(c) can be listed as the donor, concealing where the money originally came from.** Independent expenditures cannot be coordinated with a candidate, political party or a candidate's authorized committee.

Corporations can use their general treasuries to buy political ads, or they can contribute to one of several types of organizations, such as Super PACs or 501(c)s, which make the ads for them.

3) In a third AO (2011-12), the FEC kept FECA's \$5,000 limit on what each candidate, political official or party leader can raise for Super PACs. However, the AO allows them to appear at Super PAC fundraisers as long as they do not participate in soliciting unlimited funds for IEs.<sup>91</sup>

In 2014 the FEC replaced the AOs with regulations to implement the two Court decisions, but they failed to consider any of the controversial issues, for example: 1) disclosure of the identity of original donors, 2) the coercion of employees by corporations and unions into contributing to company or union SSF PACs, 3) foreign interference in elections, and 4) coordination of the expenditures of Super PACS and other groups with candidates. Complaints by two of the FEC commissioners in a 2015 letter to the FEC General Counsel highlighting these problems failed to ignite any FEC action.<sup>92</sup>

Taylor Lincoln, of Public Citizen's Congress Watch Division, argued that groups making independent expenditures are in fact not spending independently of candidates and political parties, because 1) AO 2011-12 allows candidates to appear at functions by such groups, and 2) independent-expenditure-groups tend to support just one candidate and so are not independent.<sup>93</sup>

The Court decisions and FEC advisory opinions gave corporations, including multinational corporations – but not candidates or political parties – the legal right to create complex structures through which to channel unlimited contributions into the American electoral system. Much of it is hidden from public view.

The 2013 CPA-Zicklin Index of Corporate Political Accountability and Disclosure<sup>94</sup> reported that “Corporations have [voluntarily] increased their disclosure of payments to non-profit 501(c)(4) groups. [However, 501(c)4] groups, often labeled ‘dark money’ conduits when they make independent expenditures without disclosing donors, have increased significantly in number and magnitude.”

Why do Super PACs exist at all if such a large proportion of campaign funding is channeled through 501(c) organizations where the money can be hidden? For some major contributors, political giving is an opportunity for publicity, in which case they are likely to give to PACs or to Super PACs. Many fundraisers ask donors if they wish to have their contributions remain anonymous. If they do, then 501(c) organizations serve that purpose.

**Thus, this system provides ways in which a corporation can give a publicized small amount through a Super PAC for an ad supporting a candidate whom its customers, shareholders and employees prefer, but can simultaneously give a very large secret contribution through a 501(c) or a shell company for ads that support a candidate disliked by these groups.**

Super PACs use all contributions for political purposes. Since they must disclose the donors that earmark their contributions for a particular ad, Super PACs have formed close ties with other kinds of organizations in the political arena. For example, Crossroads GPS is the 501(c)(4) for the Super PAC American Crossroads. Super PACs and 501(c)(4)s can be set up and run by the same people out of the same office, targeting the same electoral races. Many Super PACs and 501(c)s are organized to help a single candidate.

The National Rifle Association of America Political Victory Fund (NRA) is registered with the FEC as an SSF PAC and also as a Lobbyist Registrant PAC. The NRA Institute for Legislative Action (the lobbying arm of the NRA) is a 501(c)4, as are the NRA Media Outreach and the NRA General Fund. The NRA also has a number of 501(c)3s.

**C.** A third case that resulted in more deregulation, *Rear Admiral (Ret.) James J. Carey et al. v. FEC*,<sup>95</sup> was decided by the U.S. District Court of D.C. in August 2011. It allowed nonconnected PACs (PACs not connected to corporations, unions or business leagues) to establish a separate bank account called a hybrid PAC (which acts like a Super PAC) to receive unlimited contributions from individuals, corporations and unions in order to make political ads. (For details on types of PACs, see Appendix.)

**D. McCutcheon and the Republican National Committee v. FEC (Supreme Court, 2014)**<sup>96</sup> is a perfect example of how Big Money is dismantling all government controls over election funding – step by step.

Only individuals can contribute directly to candidates, PACs or to political parties. Until 2014 the courts upheld both annual and biennial limits<sup>97</sup> on these contributions because, as the courts argued, direct contributions invite *quid pro quo* corruption (bribery) and should thus be regulated. The biennial limits on donations to PACs, as explained in the introduction, prevented individuals from creating any number of PACs, each giving to the same candidate.

Corporate CEO Shaun McCutcheon and the RNC wanted to eliminate the biennial limits (but not the annual base limits) on contributions. The U.S. District Court for the District of Columbia had dismissed the lawsuit, affirming that the aggregate biennial limits did not violate the First Amendment and were at a reasonable level.<sup>98</sup> On appeal, the Supreme Court decided in favor of the plaintiffs. The Roberts Court, in *McCutcheon*, decided that biennial limits do violate the First Amendment speech rights of citizens, and therefore are unconstitutional. This win in the Supreme Court allows individuals to circumvent all the limits on direct contributions.

Before the *McCutcheon* decision, the FEC had established a maximum limit of \$2,600 on what an individual could contribute to each candidate in a single year. \$48,600 was the biennial limit

on what an individual could give to all candidates over a two-year election cycle. This meant that individuals could give the maximum to only 18 candidates over a two-year period.

In the same way, maximum annual and biennial limits were established on what individuals could give to PACs, national political parties, and to state, district and local parties:

Annual limits: \$5,000 to political committees (PACs) per year; \$32,400 to a national political party per year; \$10,000 (combined limit) to state, district and local parties per year.

Biennial limits: \$74,600 to all PACs and parties over a two-year period. The maximum total amount allowed for all contributions in elections for a two-year period was \$123,000.<sup>99</sup> (Since *McCutcheon*, Congress has raised the legal base limits on individual contributions; disclosure is still required.<sup>100</sup>)

As a consequence of *McCutcheon*, a wealthy individual can legally bypass all limits by creating hundreds of PACs, knowing that they will all give the money to a single candidate. This benefits only a few of the wealthiest individuals in the U.S.

The *McCutcheon* case seemed contrived, since Mr. McCutcheon already could spend as much as he liked on political ads to influence elections.

### **Provisions of *McCutcheon***

- 1) It kept intact the annual base limits on what individuals can contribute directly to **each** congressional candidate, presidential candidate, political party or PAC. Disclosure is required.
- 2) It eliminated biennial limits. This allows individuals to give to as many candidates, political parties and PACs as they want to.
- 3) *McCutcheon* stipulated “...while preventing corruption or its appearance is a legitimate objective, Congress may target only... ‘*quid pro quo*’ corruption [bribery].”<sup>101</sup> The Court continues: “...because the Government’s interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access.”<sup>102</sup>

### **Consequences of *McCutcheon***

This decision produces winners and losers:

1) **Joint fund-raising committees (JFCs)** have existed for many years. While they were not affected by *Citizens United*, they have become powerful in the aftermath of *McCutcheon*. A JFC can be set up by two or more congressional candidates or by a political party to raise money.

Political parties’ Super JFCs can collect money for all the candidates they represent, and can distribute the money as they wish. A Super JFC can solicit the maximum legal base-limit (\$2,600) from each wealthy donor for each of its candidates. Thus, according to the FEC Press Office, if a Super JFC is collecting for 400 candidates, each individual donor can give \$2,600 x 400, or \$1,040,000.

2) A small number of the **richest people** will be winners. Most super-rich individuals are corporate leaders – for example, George Soros, the Koch brothers, Sheldon Adelson and Shaun McCutcheon. They represent industries, so *McCutcheon* is also a win for **corporations**.

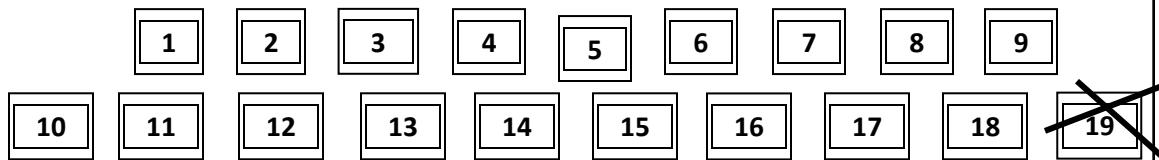
3) **In a sense, corruption is the biggest winner.** The Court rejected previous, broad definitions of corruption. It denied that immense amounts of money poured into elections can be corrupting,

unless it is specifically given to bribe an office-holder in his duties. **Further, the majority opinion states:** “...the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties” does not give rise to corruption.<sup>103</sup>

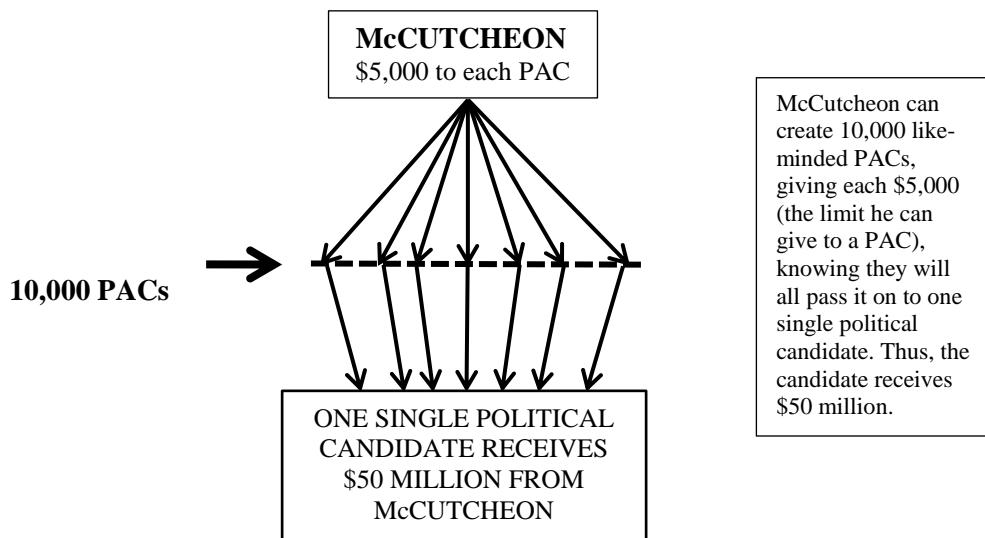
### **LIMITS ON INDIVIDUAL GIVING BEFORE McCUTCHEON V. FEC (2014)**

There were both Annual Limits and Biennial Limits for individual gifts. McCutcheon wanted to keep the Annual Limits, but eliminate the Biennial Limits.

An individual could give only \$2,600 to each candidate in an election, with a biennial AGGREGATE limit of \$48,000 for ALL candidates. McCutcheon argued that being able to give the maximum to only 18 candidates in an election cycle was unconstitutional, limiting speech; he argued that giving to a 19<sup>th</sup> candidate would not be corrupting, 18 being an arbitrary number.



### **CONSEQUENCES OF SUPREME COURT, McCUTCHEON V. FEC (2014)**



Based on: “It’s Not Citizens United,” by Charles Fried, New York Times, Opinion Pages, October 1, 2013: [http://www.nytimes.com/2013/10/02/opinion/its-not-citizens-united.html?\\_r=0](http://www.nytimes.com/2013/10/02/opinion/its-not-citizens-united.html?_r=0) .

The Court refines this: “The line between *quid pro quo* corruption and general influence may seem vague..., but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, ‘[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech....’”<sup>104</sup> (Emphasis added.) The Court’s decision makes it almost impossible for anyone to challenge misconduct by large donors, or for reformers to win cases in courts.

4) **Political parties will gain more power.** Supporters of the *McCutcheon* decision point out that *Citizens United* transferred power from political parties (which *McCutcheon* supporters consider more transparent and responsive to public opinion) and gave it to Super PACs. They see *McCutcheon* as correcting the imbalance.<sup>105</sup>

Supporters are ignoring the historical lesson from the 1990s, when the same kind of large “soft money” donations to political parties created the massive corruption that led to the reforming McCain-Feingold Bill. They can afford to ignore it because Congress is now limited in how it can control corruption.

5) Because disclosure of the names of individual donors to candidates and political parties is required under *McCutcheon*, the decision will probably not reduce the power of **501(c)s** or of the increasingly popular **shell companies**, which can hide donors’ identities.

6) **Voters** are losers here. Their interests will be overwhelmed by ever larger amounts of money flowing into the political system to support the super-rich and corporate interests.

Republican Senator John McCain, a strong supporter of campaign reform, wrote that *McCutcheon* is “the latest step in an effort by [the Supreme Court] to dismantle entirely the longstanding structure of campaign finance law erected to limit the undue influence of special interests on American politics.”<sup>106</sup>

Fred Wertheimer, president of Democracy 21, is quoted as saying, “If you knock out aggregate [biennial] contribution limits, you create a system of legalized bribery in this country.”<sup>107</sup>

### III. Some Relevant Since *McCCutcheon*

1) In ***Republican Party of Louisiana v. FEC* (2017)**, the Republican Party argued before the U.S. District Court for D.C. that existing limits on contributions to state political parties violate the First Amendment, and also that “restrictions are not justified by the government interest in preventing real and apparent *quid pro quo* corruption.”<sup>108</sup> The Court ruled that there is an anti-corruption interest in limiting such “soft money” contributions. The case was appealed to the U.S. Supreme Court, which in 2017 affirmed the lower court ruling.<sup>109</sup>

2) Ongoing is ***Holmes, et al. v. FEC***, before the D.C. Circuit Court of Appeals, which challenges limits on what individuals can give directly to candidates.<sup>110</sup> Holmes argues that limits violate First Amendment rights of individuals. As of September 2017, there was no final decision.

3) ***Thompson v. Hebdon*** (9<sup>th</sup> U.S. Circuit Court of Appeals) challenged limits on both in-state and out-of-state contributions to political parties in Alaska’s state and local elections. The limits are being defended on the basis of state’s rights rather than possible corruption.<sup>111</sup>

## CONFUSION OF OVERSIGHT

Given the sophisticated infrastructure that corporations have built for controlling elections, the government ought to have an equally sophisticated regulatory system. It does not. Corporations have either gained control over regulators, as with the FEC and SEC, or they have rendered them powerless, as they have the IRS. The Trump administration supports further deregulation.

### **I. The Federal Election Commission**

The FEC was established in 1975 to carry out and enforce campaign finance law.<sup>112</sup> According to Ann Ravel, a commissioner of the FEC, the agency was set up in a way that prevents action. The six commissioners are chosen by the president, but no more than three can be from the same political party, so nominations for the positions come from party leaders. Since four votes are needed for decisions, the FEC has difficulty acting on serious concerns; it issues advisory opinions when it should make rules. Its recent work has actually expanded corporate power over elections beyond the intentions of *Citizens United*.

Those making IEs or ECs above a specific dollar amount must report limited information on those transactions to the FEC. However, the FEC does not require the disclosure of the identity of donors unless contributions are “earmarked” for particular ads. In 2016, the FEC deadlocked on setting rules to ban participation in elections by U.S. subsidiaries of wholly-owned foreign companies, so that this continues to be an entry for foreign influence in our electoral system. The Republican FEC commissioners have also blocked efforts by other commissioners to make stronger rules on transparency and they have blocked investigations of spending violations.<sup>113</sup>

The inadequate FEC regulations on disclosure have been unsuccessfully challenged in petitions to the FEC, and in the courts.<sup>114</sup> The complaints claimed that regulations are inconsistent with the provisions of the law. “Complaints that have been filed with the F.E.C. about Super PACs are being ignored because the three Republicans...are opposed to campaign finance laws.”<sup>115</sup>

The FEC is under-funded. In 2013 the agency requested that Congress allow it to accept gifts of goods and services “that will help the agency carry out its functions.” According to the FEC, included among government entities already authorized to receive such gifts are both the Department of Justice and the Office of Government Ethics.<sup>116</sup> After refusal by Congress, the request was renewed in 2014 and again in 2015. As of September 2016, no action had been taken.

Besides this, the FEC has legal conflicts of authority with the IRS, including conflicts over the non-disclosure of donors to 501(c)s.<sup>117</sup> There is a law on the books, however, that states that the FEC and IRS “are directed to ‘consult and work together’ in making their rules ‘mutually consistent.’”<sup>118</sup>

### **II. The Internal Revenue Service<sup>119</sup>**

The IRS was established to collect taxes and to find and penalize evaders. In addition, 501(c)4, 5 and 6 tax-exempt nonprofit corporations are under the jurisdiction of the IRS, not the FEC. The IRS does not disclose the identity of donors.<sup>120</sup> Therefore, corporations create 501(c)s in order to hide their political activities. A 501(c) must report limited information to the FEC about the revenues and expenditures it makes on IEs and ECs; but it only has to report its own name as the donor. The original donors report separately to the IRS, which keeps their identities hidden even from the FEC. This creates conflict between the two agencies.

The U.S. Code (in the Tariff Act of 1913) states: “[501(c)4s are] not organized for profit but [are] operated **exclusively** for the promotion of social welfare.”<sup>121</sup> A **1959 IRS regulation**<sup>122</sup> significantly changed the meaning of the U.S. Code when it stipulated that “An organization is operated **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.” (Emphasis added.)

This immediately created a problem of definition: What does “primarily” mean? Under current law, as part of their primary purpose, nonprofit 501(c)s are allowed to spend unlimited amounts of money educating and lobbying on issues. However for their non-primary purpose political activities, they must limit their spending to 49% of their total expenditures.<sup>123</sup>

Since there is no clear boundary between “lobbying and educating” on the one hand, and the various forms of “political campaign activity” on the other, enforcement of regulations is difficult.<sup>124</sup>

The IRS approves applications from organizations for tax-exempt status, and determines if a nonprofit has spent too much on non-primary, non-exempt activities. However, since it is under-funded and under-staffed, the IRS has little incentive to spend time auditing 501(c)s, which produce no profit and incur no taxes.

The IRS was embroiled in controversy for several years over how it was treating applicants, with conservatives accusing it of intentionally favoring liberals. Given the large amounts of money from secret sources being funneled through 501(c)s in the aftermath of *Citizens United*, great pressure has been put on the IRS – on one side to enforce the rules more strictly, and on the other not to enforce them at all.<sup>125</sup>

In November 2013, the IRS proposed new rules intended to clarify the kinds of political activities that 501(c)4s are allowed to do, and to replace the current “fact-intensive inquiries” in enforcement by more definitive rules.<sup>126</sup>

Reactions to the proposed rules were intense; Republicans and 501(c)4s accused the IRS of taking away their freedom under the First Amendment and further discriminating against them. Some reformers accused the IRS of simply providing different loopholes for misbehavior; others believed the changes were a positive first step in improving the system. Under pressure, the IRS withdrew its proposal.<sup>127</sup>

Congress cut the IRS budget by about 20% between 2010 and 2015.<sup>128</sup> The 2016 budget increased funding by 3%, but stipulated that “None of the funds...may be used...to target citizens of the United States for exercising any right guaranteed under the First Amendment....” And, “None of the funds...may be used...to target groups for regulatory scrutiny based on their ideological beliefs.”<sup>129</sup>

According to Paul S. Ryan, the Campaign Legal Center’s Program Director for FEC Matters, and Associate Legal Counsel: “What we have seen in recent years is a proliferation of c4 political front groups that abuse their privileged tax exempt status to evade campaign finance disclosure laws. What was once a small trickle of abuse by these organizations is now a gusher.”<sup>130</sup>

Byron Tau and L. French, write: “Many political groups have branched into the for-profit realm, organizing themselves as limited liability corporations [LLCs, commonly known as shell companies], trust or other corporate designations.” The authors quote Kenneth Gross, former

associate general counsel for the FEC: “If 501(c)4s become an inconvenient vehicle...funders will find a different vessel and 501(c)6s and LLCs would be likely suspects.”<sup>131</sup>

### **III. Securities and Exchange Commission**

An SEC regulation (set prior to *Citizens United*) permits corporations to finance political activities out of their general treasury funds without informing their shareholders.

However, on March 25, 2011, at the request of a major Home Depot corporation shareholder, the SEC required that the company give more transparency regarding its political electioneering contribution policies to its shareholders and allow them to have an advisory say on that policy.<sup>132</sup> Many hoped it signaled a change in SEC policy.<sup>133</sup> It did not.

**Despite great pressure from shareholders, law professors and other interested groups, the SEC has shown no interest in changing its regulations on disclosure to shareholders.**<sup>134</sup>

Then, in its appropriations for 2016, Congress included a provision forbidding the SEC from using the funds to make rules to require additional disclosure of corporate political contributions and expenditures.<sup>135</sup>

### **IV. The President**

Despite pressure from reformers, President Obama did not address the deterioration of democracy in the wake of *Citizens United*. Although he had the power to issue an Executive Order requiring federal contractors to disclose contributions made to nonprofit organizations, trade associations and political organizations, he took no action.<sup>136</sup> President Trump has repeatedly voiced his opposition to regulations, in general.

### **V. Congress**<sup>137</sup>

Bills to initiate a constitutional amendment to overturn *Citizens United* have been introduced into Congress. None has passed. The Disclose Act<sup>138</sup> was introduced into Congress in 2010, and again in every year from 2012 to 2017. It has not passed. The Act would require transparency, require that shareholders be informed of political activities, and put controls on foreign interference in elections. On the other hand, Congress has passed bills to prevent disclosure.<sup>139</sup>

As reported by Russ Choma in [OpenSecrets Blog](#), the 2014 Congressional Budget included “language that would prohibit any of the funds approved in the budget from being used to require disclosure by those seeking government contracts, their officers, directors, or affiliates, to candidates or committees or for independent expenditures or electioneering communications.”<sup>140</sup> The 2016 appropriations act extended this prohibition, and also forbade the SEC from making rules on disclosure.<sup>141</sup>

While at this time in Congress, Republicans are undermining the integrity of campaign finance, in the past at times Democrats have taken the lead. Now polls show that among Americans, almost as many Republicans as Democrats want to stop Big Money from dominating elections.

Part of the reason Congress is dysfunctional regarding election reform is that it is a major player in the corruption. Recently, Peter Schweizer, author of the book “Extortion,” brought to light the flip-side of corporate corruption. He reports that some leaders of Congress are now extorting large amounts of money from corporations and wealthy donors while bills relevant to the donors’ interests are being considered. “At least 27 state legislatures have put restrictions on allowing state politicians to receive contributions while their legislatures are in session.” There are no such controls over Congress.<sup>142</sup>

## FOREIGN INFLUENCE IN AMERICAN ELECTIONS

**Foreign influence in American elections is the issue that some reformers believed would push Congress to act. It hasn't.** *Citizens United* and related decisions, and regulatory actions and inactions have made it easy for foreign interests to secretly channel money into American federal, state and local elections.

*Citizens United* held that “We need not reach [means “consider”] the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”<sup>143</sup> They noted laws already forbidding foreign intervention. **Justice Stevens in his dissent wonders why the Court feels unable to deliberate about foreign interests, given that they have routinely been treated differently under the Constitution. Further, the Court’s decision “would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans.”**<sup>144</sup>

Confusion arises in defining the percent of foreign ownership that should be allowed within multinational corporations active in election campaigns. According to a Congressional Research Service (CRS) report, “There does not appear to be any bright-line rule as to what percentage of foreign ownership suffices for categorizing a corporation as ‘foreign’ for statutory purposes.”<sup>145</sup>

The report includes a discussion of the failure of Congress thus far to grapple with the issues of foreign interference. “Preventing foreign influence [in] U.S. elections has apparently never been recognized as a legitimate state interest in the same way that national security was recognized.... However, it seems plausible that a court would treat it as such given that determining who can participate in the political process is arguably an inherent aspect of sovereignty....”<sup>146</sup>

In December 2015, a bill was introduced into the House entitled “Stop Foreign Donations Affecting Our Elections.”<sup>147</sup> No action has been taken on it.

In June 2016, the FEC hosted a public forum entitled “Corporate Political Spending and Foreign Influence.” It is an excellent overview of the issues by some top experts in the field, and the FEC published transcripts of their speeches.<sup>148</sup>

A proposal was then made by an FEC commission member for rulemaking to rescind the 2006 advisory opinion (AO 2006-15 TransCanada) that allows U.S. subsidiaries of wholly-owned foreign companies to have the same access to participate in American elections as U.S. corporations.<sup>149</sup> They can make political ads and contribute unlimited amounts to Super PACs and to 501(c)4s. The proposal to rescind was blocked by the Republican commissioners at the FEC meeting on September 15, 2016. They also blocked a proposal asking for rulemaking on how much foreign involvement in corporate ownership would disqualify a corporation from participating in U.S. elections.<sup>150</sup> Yet another proposal was made later in the month asking for rulemaking regarding the protection of elections from foreign interests.<sup>151</sup>

The problem of foreign influence in elections is complex. FECA regulations did not anticipate the **Internet or social media**. When a campaign asks for donations online, anyone in the world can respond. Also, anyone asking for information on campaign websites usually is automatically asked for a donation. Notes Schweizer, a fellow of the conservative Hoover Institution, in The Daily Beast:<sup>152</sup> “With millions of online campaign donations ricocheting through cyberspace, one might think the Federal Election Commission would have erected serious walls to guard federal elections from foreign or fraudulent Internet contributions.” It has not. Schweizer continues: “The FEC...has taken the position that this sort of passive Internet solicitation is not

illegal, because the campaigns, presumably, are not intentionally targeting foreign nationals with their online money pleas.” Republican commissioners on the FEC do not want to publicly address this issue and therefore have blocked relevant rulemaking.

**Soliciting campaign donations from foreign nationals is prohibited by the Federal Election Campaign Act (FECA).**<sup>153</sup> Without re-addressing *Citizens United*, in 2012 the Supreme Court dismissed the case *Bluman et al. v. FEC*,<sup>154</sup> which had sought to lift the ban preventing foreign nationals temporarily living in the U.S. from financially influencing elections. The FEC’s website quotes the Court in its Memorandum Opinion: “It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in...activities of democratic self-government.”<sup>155</sup>

However, given the ease with which **shell companies** can be established and dissolved in states like Florida and Delaware, what’s to stop hostile foreign interests from anonymously establishing such companies to interfere in U.S. elections? “Shell companies” are incorporated as corporations, limited liability companies (LLCs), partnerships, or under single ownership. Many do not appear to engage in any commerce. Such companies can be legally created by people using fake information and leaving no traceable identity. They can spend any amount of money in our elections, and disappear before being noticed.

In September 2016, a wealthy Mexican real estate developer, J. S. Azano, was convicted of illegally funneling more than \$500,000 into southern California local elections with the intention of getting support for his development of the San Diego waterfront. He used dark money channels and straw donors to support both Democrats and Republicans.<sup>156</sup> The Russians actively interfered with the 2016 election campaign through the Internet, social media and fake news stories. How many other intrusions by foreign interests have gone undetected?

In 2013, Brendan Fischer of the Center for Media and Democracy’s “Watch” wrote: “Super PACs ... must report all of their expenditures. But some donors sidestepped these transparency rules by forming ‘shell corporations.’ ... Of all Super PAC donations from business corporations [in 2012 elections], at least seventeen percent came from shell corporations that appear to have been formed for no reason other than to filter money into elections, and to keep the true sources of the funds secret.”<sup>157</sup> And by September 2016, according to Open Secrets data, \$62.7 million had been spent by undisclosed sources in the political cycle.<sup>158</sup>

## CORRUPTION<sup>159</sup>

Richard Briffault observes that from the 1830s to 2010 there were two government justifications recognized by the courts for restricting corporate participation in elections: 1) corporate aggregations of wealth that could threaten democracy, and 2) the need to protect shareholders from corporate use of funds not in their interest.<sup>160</sup> These were accepted as possible sources of corruption as recently as 1990 in *Austin*, which *Citizens United* overturned. *Citizens United* and related decisions narrowed the definition of corruption to *quid pro quo* bribery and dismissed the importance of shareholder protection.

The Court claimed that corruption would be prevented 1) by the disclosure of the identity of donors contributing money for political ads, and 2) by prohibiting those making political ads from coordinating their expenditures with candidates.

In *Citizens United*, the majority opinion concluded: “If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.”<sup>161</sup> On the other hand, they seemed confident that, “...independent expenditures do not lead to, or create the appearance of *quid pro quo* corruption. In fact there is only scant evidence that independent expenditures even ingratiate.”<sup>162</sup>

The majority opinion in *McCutcheon* asserted: “The line between *quid pro quo* corruption and general influence may seem vague..., but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, ‘[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech....’”<sup>163</sup> And: “...because the Government’s interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access.”<sup>164</sup> (Emphasis added.)

*Citizens United* and *McCutcheon* have led to the deregulation of campaign finance. Some of the remaining laws are not being enforced; law-breakers, according to public sources, go unpunished. The line between what is legal and what is not is deliberately being erased.

- 1) Government regulators (the FEC, IRS and SEC) responsible for implementing and enforcing the laws have been weakened, or are colluding with Big Money.
- 2) Many lawmakers benefit from the corrupt system, so they have little incentive to repair it. Not only do congressional candidates receive most of their funding from corporations and the super-rich, but many lawmakers bribe these groups, in return.
- 3) Corporations and the super-rich take advantage of regulatory inaction on disclosure in order to keep their political activities secret.

The Supreme Court in *Citizens United* failed to require the disclosure of the identity of donors, even though it held that disclosure would prevent corruption. It stipulated only that disclosure is constitutional and left it to Congress and the FEC make rules.

However, neither Congress nor the FEC (both now controlled by corporate interests) has carried out provisions for disclosure; instead they have blocked it. Therefore, earlier FEC regulations pertaining to donor disclosure, which had been issued in the wake of the 2002 McCain-Feingold Bill, still apply. In fact, the FEC did not even put the McCain-Feingold Bill, as written, into effect – providing loopholes for noncompliance.

FEC Commissioner Ann Ravel writes: “...I’ve quickly learned how paralyzed the F.E.C has become and how the courts have turned a blind eye to this paralysis....Money from anonymous donors will continue to pour into elections. And voters will again be barraged with political advertising from unknown sources, making it difficult for them to make informed decisions. If we continue on this path, we will be betraying the public and putting our democracy in jeopardy.”<sup>165</sup>

Taking advantage of the Republican FEC commissioners' refusal to strengthen disclosure rules,<sup>166</sup> many corporations choose to accept *only* "non-earmarked"<sup>167</sup> contributions, which do not require disclosure of the original donors (see "earmarking contributions" in the Glossary). Such contributions can then be used freely for purposes determined by the corporation, even though they may not be in the interest of the donors or of the affected local population.<sup>168</sup>

501(c)4s, 5s and 6s provide a primary avenue for secret funding for political ads. They report to and are regulated by the IRS, which does not disclose the identity of any donors.

"As a nonprofit organization, the [U.S. Chamber of Commerce, a 501(c)(6)] need not disclose its donors in its public tax filings, and because it says no donations are earmarked for specific ads aimed at a candidate, it does not invoke federal elections rules requiring disclosure."<sup>169</sup> The Chamber of Commerce compounds its secrecy by being both a 501(c)(6) and a recipient of only "non-earmarked" contributions, giving it the freedom to use other peoples' money for its own political ends.

Rep. Van Hollen (D-MD) (now Senator) petitioned the FEC in April 2011<sup>170</sup> to revise the rules and regulations relating to the disclosure of **independent expenditures (IEs)**. He argued that the regulations, as written, violate the Federal Election Campaign Act (FECA) and the McCain-Feingold Bill that the FEC is supposed to be putting into effect. Van Hollen pointed out the "wholesale and widespread absence of donor disclosure by groups making independent expenditures to influence the 2010 congressional elections...."<sup>171</sup> On December 15, 2011, the FEC "considered but did not approve" a "Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications."<sup>172</sup>

In another action in April 2011, Van Hollen (in the U.S. District Court, D.C.) challenged the lack of disclosure requirements regarding **electioneering communications (ECs)**. His case would have compelled the FEC to publicly disclose all donors and donations related to ECs, as stipulated in the McCain-Feingold Bill (2002).<sup>173</sup> The District Court decided in favor of Van Hollen.<sup>174</sup> However, opposing interested groups – not the FEC – appealed the decision. In January 2016, the U.S. District Court of Appeals reversed the lower court's decision and Van Hollen's case for disclosure was defeated.<sup>175</sup>

**Unregulated shell corporations (LLCs) serve as another legal channel for unlimited amounts of secret money flooding into American elections.** They can be created by anyone using fake identifying information, and they can appear and disappear quickly.

For example, a Super PAC supporting Mitt Romney -- Restore Our Future, established by three former Romney aids -- received a check for \$1 million from a shell company called W Spann LLC. The company was founded in March 2011, made the contribution to the Super PAC in April and dissolved in July 2011, according to MSNBC, "leaving no paper trail as to who its owners were -- or even where it was located."<sup>176</sup>

As reported by the Washington Post, the owner of W Spann LLC, who had retired from a company cofounded by Romney and who had an office in the same building, later came forward in order to head off an investigation.<sup>177</sup>

**In the wake of *Citizens United*, shadow parties and codes in social media have been used to mask coordination between parties and outside groups, and sometimes to hide funds.**

Corporations resist disclosure because they do not want their political activities revealed to employees, customers, shareholders and donors, who may not agree with their opinions.

**If disclosure of all donors and donations for political activities were required and enforced, would that be enough to protect the democratic process?** Perhaps not, because: a) The freedom for individuals and corporations to spend unlimited amounts of money in elections would still invite corruption or the appearance of corruption. b) The corporate form would still give corporations significant advantages over “natural persons.” c) The regulatory reporting rules allow corporations to postpone revealing information to the public about political activities until well after elections. There are also ways of confusing the reports themselves. It would be an overwhelming task for voters to figure out, after an election, who had paid for any of the hundreds of ads to which they were exposed.<sup>178</sup> d) Most Americans would not know, from the name of a corporate donor, its political intentions (for instance, Baker Hughes is a Texas-based fracking company).

**4) The prohibition against “coordination” of expenditures with candidates was intended to prevent corruption.** In light of the high degree of interaction between corporations and candidates still allowable under the law, the Court’s majority was either disingenuous or naïve in its belief that such modest constraint would prevent corruption, noted a reliable source.

Garrett writes in a CRS Report for Congress: “A … source of concern may be that legally separate organizations (e.g., 501(c) tax-exempt political organizations, which are generally not regulated by the FEC or federal election law) operate alongside some Super PACs....”<sup>179</sup> Garrett also notes “the reported migration of some candidate campaign staff members to Super PACS that have stated their support for these candidates.”<sup>180</sup>

Taylor Lincoln, of Public Citizen, stated that “nearly half of unregulated outside groups [including Super PACs and 501(c)s] that sought to influence the 2012 elections spent their money to aid just one candidate.... Many of these groups were operated by individuals with close ties to the candidate they assisted.”<sup>181</sup>

**5) The campaign finance system has become extremely intricate, making it difficult to “follow the money.”** As an example of the reaches of a single family, see the 2016 graphics of the Koch brothers’ network, at Common Peoples Source for News.<sup>182</sup>

**The campaign finance laws, regulations and court decisions, and their distortion in implementation, have muddied the boundary lines around the definitions of critical terms and concepts**, making it easy for corporations and the super-rich to circumvent legal restraints.

For example, where is the boundary between “corruption” and “influence over, or access to, elected political officials”? What is a “foreign” corporation? Where are the boundaries of “coordination”? Where are the boundaries in 501(c)s between “social welfare” functions and “intervention in political campaigns”? Where is the bright line between the oversight responsibilities of the FEC and the IRS? Debate becomes difficult when the definition of basic terms cannot be agreed upon. Why does Congress not intervene to stop easy secret access for foreign interference in U.S. elections? Why does Congress not stop the active participation of unregulated shell companies, or regulate campaign finance activity on the Internet? Why does Congress still allow its members to solicit contributions during sessions?

*McCutcheon* added another layer of complexity to the system by allowing rich individuals to legally circumvent the long-standing regulatory base limits on direct contributions to candidates.

As Evan Lehmann reports in *The New York Times*: “The conservative nonprofit Americans for Prosperity [AFP, a 501(c)4 organization] unleashed a volley of ads aimed at Democrats in [the 2010] midterm elections, but it later reported to the IRS that it was not active in political campaign activities.” On its tax form for the IRS, AFP reported no political activity, yet it reported to the FEC that it had spent \$1.3 million on radio and TV political ads, leaving the donor column blank on the FEC reporting form.<sup>183</sup>

The article continues, shedding light on the conflict between the IRS and the FEC’s disclosure and reporting rules, which allow corporations to ignore disclosure: “As long as political activity is not a 501(c)’s primary activity, the organization can “run political [ads] naming candidates, criticizing their positions and urging voters to elect or oust them.” By reporting to the IRS that it had not participated in political activity, AFP could allow its donors to remain anonymous, so that, except for the disclosure of the final disbursement amount, the transaction might never be tracked in any investigation.

**6) This ever-increasing complexity in campaign finance has left the public greatly confused.** The more the confusion, the easier it is for corporations to intensify their control, and the more difficult it is for an overworked and underfunded government to stand up to them.

Overturning *Citizens United* to end corporate control of elections may take years of work by many dedicated people, given that 1) President Donald Trump has chosen a politically conservative Supreme Court justice to replace Justice Antonin Scalia, 2) Republicans hold majorities in both the House and the Senate, 3) Republicans control a majority of state legislatures, 4) Republicans hold a majority of the state governorships, 5) conservatives have been funding corporate-friendly judges in state elections, and 6) voting districts have been gerrymandered to favor conservatives.

## WE THE PEOPLE – PUBLIC OPINION

Justice Stevens, in his *Citizens United* dissent, wrote: “[Corporations] are not themselves members of ‘We the people by whom and for whom our Constitution was established.’”<sup>184</sup> A large majority of Americans support the elimination of corporations from the election process.

Reformers try to save every existing law and regulation that protects democracy, fragile though many of those protections are. Many law professors, some Republican and Democratic officials and former officials, reform “watchdog” groups, and other Americans concerned about the survival of democracy are working to overturn *Citizens United* and related decisions. They approach the problem from different angles, but with the same purpose. Activist groups, such as The Campaign Legal Center, Democracy 21, Citizens for Responsibility and Ethics in Washington, and Free Speech for People are strongly pressuring the Supreme Court, the FEC, IRS, Department of Justice, SEC and Congress to end corporate control of elections.

As of September 2017, nineteen states had passed resolutions calling on Congress to pass a constitutional amendment to overturn *Citizens United*. A number of other states have pending resolutions.<sup>185</sup> As of September 2016, five states had called for an amendment convention to overturn *Citizens United*. More than 700 city, town and county councils have passed resolutions

asking Congress to overturn *Citizens United*. Moyers & Company reported that some states are taking action to minimize corporate control of their elections.<sup>186</sup>

In October 2017, the City Council of St. Petersburg, Florida voted to set limits on contributions in municipal election campaigns. It also voted to prohibit contributions from corporations that are more than 5% foreign owned, and to require disclosure of transactions.<sup>187</sup> This is the first such action at the local level.

Many bills proposing amendments to end corporate control of elections have been introduced into Congress, all preserving the free speech rights of the press. None has yet passed.

Senator Jon Tester (D-MT) introduced a 2015 joint resolution for an amendment stipulating that the rights in the Constitution are reserved for “natural persons,” that corporations are not persons, and that Congress and the states can regulate corporations.<sup>188</sup>

Senator Tom Udall (D-NM) introduced a Senate Joint Resolution (2013) for a constitutional amendment that would grant Congress and the states the right to regulate and set limits on contributions and spending in election campaigns (including activities by Super PACs and “dark money” organizations), and to distinguish between natural persons and corporations.<sup>189</sup> The bill came to a vote in 2014, but was defeated. Although the vote was 54 for it and 42 against, two-thirds support is necessary for passage. It was reintroduced in 2015.

Rep. Richard Nolan (D-MN) introduced a House Joint Resolution<sup>190</sup> (2015) stipulating that corporations are not “persons” for the purposes of the First Amendment, and that Congress and the states can regulate and limit contributions and expenditures in the political process.

## Polls

Greg Stohr, reporting on a 2015 Bloomberg News poll, (September 2015) wrote: “Although the [*Citizens United*] ruling was fashioned by the court’s conservative majority,” 80% of Republicans opposed it, as did 83% of Democrats and 71% of independents. “Among self-described liberals, conservatives, and moderates, 80 percent said the decision should be overturned.”<sup>191</sup>

A May 2015 CBS News/New York Times poll (conducted by SSRS of Media, PA) found that 84% of Americans across party lines think money has too much influence in political elections (80% Republicans, 90% Democrats and 84% Independents).<sup>192</sup>

A **bipartisan** poll of New York state voters, conducted by Global Strategy Group and Mercury Public Affairs (May 6, 2013), found that 97 % of voters believe that, “it is important for state leaders to address ‘reducing the influence of money in politics and ending corruption.’”<sup>193</sup>

In April 2012, the independent Opinion Research Corporation conducted a national poll for the Brennan Center for Justice (NYU Law School). It found that 69% (crossing party lines) of the public believe that Super PAC election activities result in corruption.<sup>194</sup>

In 2011, 79% of voters, surveyed by the Hart Research Associates, supported “passage of a constitutional amendment to overturn the Supreme Court’s decision in the *Citizens United* case [to] make [it] clear that corporations do not have the same rights as people.” Eighty-seven percent of Democrats, 82% of Independents and 68% of Republicans agreed.

Clearly, over time, the American people continue to support getting Big Money out of politics.

Small businesses are also suffering from the over-dominance of large corporations and the super-rich in elections. Three alliances of small-business-owners conducted a poll in January 2012 that found that **two-thirds of small businesses** “believe the *Citizens United* decision is bad for small businesses, compared to only 9 percent who think it’s good.”<sup>195</sup>

### **Constitutional Amendment**

Several factors make campaign finance reform difficult without a constitutional amendment.

- 1) *Citizens United* and *McCutcheon*’s very narrow definition of corruption – *quid pro quo* – is now the only legally accepted definition for purposes of campaign finance reform. This severely limits opportunities for reform through legislation or the courts.
- 2) *Citizens United* was decided on constitutional grounds, which closes historical avenues for reform. Lawyers point to a number of mistakes in the *Citizens United* decision, but there is no way to sue the Supreme Court. Even Congress cannot legally just reverse the *Citizens United* decision, even if it wanted to.
- 3) Reformers have an up-hill battle, due to the politicization of the Supreme Court.

Two possible ways to reverse *Citizens United* were laid out in a December 2011 letter from the Massachusetts Legislative Joint Committee on the Judiciary: 1) “Bring another case before the Supreme Court and hope that the Court decides to reverse itself, or 2) amend the Constitution.”<sup>196</sup>

### Constitutional Amendment – process

#### **The Constitution can be amended in two ways:**

- A.** Congress can propose a constitutional amendment by a two-thirds majority vote in both houses. The amendment must then be ratified by the legislatures or conventions of three-quarters of the states (38).
- B.** An “Article V Convention”<sup>197</sup> can be called for by two-thirds of the state legislatures to propose a constitutional amendment. The amendment must then be ratified by the legislatures or conventions of three-quarters of the states; Congress may set a reasonable time limit (for example, seven years) for such ratification. In many states a constitutional amendment can be brought before the state legislature by “ballot initiative,” but that process can be complex.

While no amendment has ever been passed by an amendment convention called for by state legislatures, the pressure of many state legislatures can push Congress into initiating an amendment. Therefore, it is worth putting effort into getting state legislatures involved.

John Nichols, in “America’s Most Dynamic (Yet Under-Covered) Movement,” writes, “**Just imagine if all Americans knew that calls for an amendment are coming not just from traditional progressive reformers but from Republican legislators and honest conservatives at the state and national levels.**”<sup>198</sup>

### APPENDIX

#### **PACs, SUPER PACs, 501(c)(4)s, (5)s and (6)s<sup>199</sup>**

Below are details on three major tools that corporations use to influence election campaigns.

**A.** The first **Political Action Committee (PAC)**, often referred to as a “political committee” was formed in 1944 by the CIO (an organization of unions). A PAC can be created by anyone wishing to collect money to give to a candidate or political party in the election process. The FEC limits the amount each donor can give to a PAC, and there are limits on what PACs can give to candidates, to other PACs or to political parties. The Supreme Court decision *McCutcheon (2014)* allows individuals to create and give the legal monetary limit to an unlimited number of PACs (which can all pass the money to the same candidate).

**Corporations, social welfare nonprofits (501(c)4s), trade associations such as unions (501(c)5s), and business leagues (501(c)6s) may not contribute to any PACs other than hybrid PAC bank accounts** (see below). But they can create and administer a kind of PAC called an SSF PAC to which their own employees, shareholders and PAC members can make limited contributions. There are two basic kinds of PACs:

1) **SSF PACs (separate segregated fund).** Corporations, unions, and business leagues can create and administer SSF PACs to which their own employees, shareholders and PAC members can voluntarily make limited contributions. While the parent corporate or union organizations themselves cannot give money to these PACs, no rules prevent corporations or unions from harassing employees into contributing.

2) **Nonconnected PACS** are those neither connected to, nor sponsored by, corporations, unions or business leagues, and they are usually ideological or represent a special interest, for example the National Rifle Association or the NC Conservation PAC. They can collect limited amounts of money from the general public and give limited amounts directly to political parties or to candidates for campaigns.

a. **Hybrid PACs.** As a result of the *James J. Carey v. FEC (2011)* decision (see Critical Events), any “nonconnected” PAC is permitted to establish an additional bank account, known as a “hybrid PAC,” which is completely separate from its other PAC accounts. It is in effect a Super PAC within the PAC, with the privileges and restrictions of a Super PAC (see Super PACs, below).

This separate account can accept unlimited contributions from individuals, political committees, corporations and unions to spend on independent expenditures (IEs), or on electioneering communications (ECs). Only this hybrid-PAC bank account can act like a Super PAC. In this way, the nonconnected PAC avoids the complexity of establishing a separate Super PAC.

b. **Leadership PACs** were created by the Honest Leadership and Open Government Act of 2007. These popular nonconnected PACs are established by a candidate to collect money to support *other* candidates. Thus, a network of allies and supporters can be built up. Leadership PACs have the same restrictions as other PACs, so they may not engage in unlimited fund-raising. To quote Schweizer in his book “Extortion,” “As Congressman Joe Hefley of Colorado put it, ‘my impression is that a lot of people use leadership PACs as a slush fund.’”<sup>200</sup>

Schweizer continues: “[F]ormer FEC chairman Bradley Smith...believes that leadership PACs have to go because of how they’re abused. Sometimes they are used to enhance a politician’s lifestyle, sometimes to bribe colleagues for votes.... [L]eadership PACs are not about benefits for districts; they are about benefits for members of Congress.”

*LAW:* PACs are IRS Code 527 organizations. Their only purpose is political activity.

**USE:** They use the contributions to influence elections, and unlike Super PACs, they can contribute limited amounts directly to candidates and to political parties in election campaigns.

**DISCLOSURE:** The donors' names and their donations are reported to the FEC and are made public.

**TAXES:** Tax exempt. However, donations to PACs are not tax deductible for federal income tax purposes.

**CONTRIBUTIONS:** 1) PACs collect limited funds from individuals, political parties and other PACs. 2) Corporations, unions and Super PACs may not contribute to any PACs, except for hybrid PACs. 3) Those who are allowed to give to PACs are limited in how much they can give to each, but individuals can give to as many PACs as they wish. 4) A nonconnected PAC can accept unlimited contributions only to its special hybrid-PAC bank account for independent expenditures. This particular account acts like a Super PAC and can receive corporate contributions.

**REGISTRATION AND REPORTING:** With the FEC.

**B. Super PACs (Independent Expenditures-Only Committees)**<sup>201</sup> were first established in 2010 by the FEC to carry out the *Citizens United* decision. Super PACs are forbidden to contribute directly to candidates, candidates' authorized committees or to political parties; their political activity is not limited in any other way.

**Creation:** Anyone, including corporations and 501(c)s, can establish and administer Super PACs.

**LAW:** A 527 organization. Created by FEC Advisory Opinions 2010-09 and 2010-11 in response to *Citizens United*, Super PACs operate under the Federal Election Campaign Act and FEC rules.

**USE:** To **solicit** unlimited sums of money from people, corporations, labor unions, and 501(c)s, and to **spend** unlimited sums on IEs and ECs – political ads. ECs are rarely used now. However, if corporations find a use for ECs, they will reactivate them (for a definition, see Glossary).

**Independent expenditures** (IEs) are ads appearing on Internet, radio and TV, in mailings, on billboards, etc., explicitly telling voters to “vote for A,” or “vote against B.” The expenditures cannot be made in cooperation or consultation with, or at the suggestion of, a candidate or political party.<sup>202</sup> IEs can be made at any time in the election cycle.

A Super PAC can either make these IEs itself or pass the money on to other kinds of groups, such as 501(c)s, when it has particular reasons to do so. IEs are sometimes called “express advocacy communications.”

The press repeatedly and mistakenly reports that Super PACs have to be “independent of candidates,” but in fact they do not. They simply must refrain from making “coordinated expenditures” under regulations that define what constitutes “coordination.” However, the definition is not clear. For instance, Super PACs may discuss general strategy with candidates.

**DISCLOSURE:** Donors' names and donations of over \$200 are required to be reported to the FEC periodically, and **information is made public on contributors earmarking their donations for particular ads.** According to the FEC website, during election years Super PACs can choose between filing FEC reports monthly or quarterly. This means that the public may not know the origin of a political ad until well after the election. During non-election years they can choose between filing monthly or semi-annually. However, independent expenditures of \$10,000 or

more must be reported within 48 hours.<sup>203</sup> The disclosure requirement limits the usefulness of Super PACs because many donors wish to remain anonymous.

The FEC, because of its antiquated rules on disclosure, allows the identity of IE and EC donors to remain hidden if the donors do not “earmark” their contributions for a particular ad. The 2016 Appropriations Act prohibited the SEC from issuing rules on disclosure, and also forbade disclosure of the political activities of government contractors.

*TAXES:* Contributions to Super PACs are not deductible for federal income tax purposes.

*CONTRIBUTIONS:* Super PACs can solicit unlimited amounts of money from individuals, for-profit companies and unions, from 501(c) nonprofit corporations, from entities such as shell companies and from other Super PACs. There is no limit on what Super PACs can spend, but they may not donate directly to candidates, parties or to PACs. They can work together with 501(c)s.

*REGISTRATION AND REPORTING:* With the FEC.

**C. 501(c)(4), (5) and (6) tax exempt nonprofit corporations and associations**<sup>204</sup> were first established by the IRS Code in the early 1900s with the “exclusive” purpose of promoting the betterment and common good of the community. An amendment in 1959 changed the word “exclusive” to “primary,” creating a problem of definition. Today, non-partisan lobbying and public education on relevant issues are considered the primary tax-exempt purposes of these organizations. The non-primary activities can include political campaign intervention.

The following are the required primary tax-exempt purposes of politically active 501(c)s:

- (c)(4)s promote social welfare
- (c)(5)s improve labor and agricultural products and occupations
- (c)(6)s improve conditions for business leagues and chambers of commerce

In response to a 2013 scandal, the IRS proposed that organizations, in applying for 501(c) tax-exempt status, could self-certify that at least 60% of their expenditures would be used to promote the “social welfare,” and that no more than 40% would be used for “political campaign intervention activities.” But it noted that no regulations or cases had ever identified a “bright line” between the two kinds of activities.<sup>205</sup> Under pressure, the IRS scrapped its reform effort.

*Creation:* Anyone can establish a 501(c)4, 5 or 6 tax exempt, nonprofit corporation. A 501(c) can set up a Super PAC, and vice-versa. 501(c)s, and Super PACs maintain close relations. A 501(c)(4) can be organized as a corporation, a trust or an unincorporated association.

*Use:* Even before the *Citizens United* decision, 501(c)(4)s, (5)s and (6)s could make EC political ads. However, as a consequence of *Citizens United*, 501(c)s were allowed for the first time to make IEs (ads saying “vote for A” or “against B”). 501(c)s can make the ads themselves (as they are increasingly doing) or pay other groups to do the ad-buying for them.

501(c)s are forbidden to coordinate their expenditures on IEs and ECs with candidates, candidates’ authorized committees, or with political parties. Tax exemption is not the reason hundreds of millions of dollars have been pouring through 501(c)s; profits are not made. The real reason is to hide political activities.

**Currently, unlimited amounts of money can be spent by 501(c)s on their primary activities for the common good of the community, while only 49% of total expenditures and volunteer time can be invested in political activity.** Primary activities include voter

registration, get-out-the-vote campaigns, voter guides and candidate debates. 501(c)s can use “lobbying” and “education” to promote their primary activities. **However, no bright line separates these activities from “political campaign intervention activities.”**

*CONTRIBUTIONS, DISCLOSURE:*<sup>206</sup> 501(c)(4), (5) and (6) corporations can solicit unlimited amounts of money from the general public, for-profit and nonprofit corporations, trade and professional associations and unions. Up to 49% of their total expenditures and volunteer time can go into political campaign intervention, but they may not contribute directly to candidates, candidates’ authorized committees, or to political parties; nor can they coordinate their expenditures with these groups.

Although regulated by the IRS, when a 501(c) makes an independent expenditure or an electioneering communications ad, limited information on the transaction must be reported to the FEC as well as to the IRS. But the 501(c) does not have to reveal to the FEC the identity of the original donors, instead reporting only its own name as donor. This does not prevent contributors from revealing their identities to the candidate, so that the candidate, but not the voters, has this information.

The U.S. Chamber of Commerce (a 501(c)(6)) is a perfect organization through which to channel secret political contributions. It is large, has a complex structure, and performs many tasks in every state and abroad. Tracking the division between exempt and non-exempt activities in so complex an organization is difficult.

*TAXES:* Tax exempt. However, if a 501(c) spends more than 49% on non-primary political activities, it must pay taxes. Contributions to 501(c)s for political activities are not tax deductible.

*REGISTRATION AND REPORTING:* Registration and reporting are with the IRS. However, since limited information on all IEs and ECs made by 501(c)s must be reported to the FEC, there is confusion in the regulation and enforcement. 501(c)s can report themselves as the donors. The original donors report separately to the IRS, which does not disclose their identity.

## GLOSSARY

**A candidate’s authorized committee** (for example, Donald J. Trump for President, Inc.) is not a PAC or Super PAC. It works **directly** with a candidate, and can receive and spend money on behalf of the candidate. It makes coordinated communications – ads that are directly coordinated with the candidate and that must carry the statement that the candidate has authorized the message.

**Coordinated communication** (See Candidate’s authorized committee.)

**Dark Money** Money spent in elections that is unregulated, not transparent. The term usually refers to the activities of 501(c)s, but includes shell companies as well.

**Earmarking contributions** According to regulations for the 2002 Bipartisan Campaign Reform Act (which by default still apply), a donor’s identity must be disclosed to the public only if the donor requests that the money be spent on, or earmarked for, a specific IE or EC ad.

An **Electioneering communication (EC)** is any broadcast, cable or satellite communication that 1) refers to a clearly identified candidate, but does not call for the election or defeat of that candidate, 2) is made within 30 days of a primary and 60 days of a general election, 3) targets the relevant electorate. These ads discuss issues and mention candidates, but do not explicitly tell the public to vote for or against a particular candidate. Such **expenditures** cannot be coordinated with candidates, candidates' authorized committees or with political parties. Organizations making ECs do not have to report the ads to the FEC if they are made outside the above time-frame or if contributions are not "earmarked" for specific ads. Any "person" can make an EC.

**Express advocacy communications** (See Independent expenditures.)

**Independent expenditures** (IEs), also called "express advocacy communications," are political ads (e.g., TV, Internet or direct mail ads) that explicitly instruct voters how to vote ("vote for A" or "vote against B") in a federal election. IEs can be aired at any time. Such **expenditures** cannot be coordinated with candidates, candidates' authorized committees or with political parties. As interpreted by the FEC, public disclosure of original donors is required only if contributions are "earmarked" for a particular ad.

**Joint fund-raising committees** (JFCs) can be established by two or more political candidates to collect funds for campaign finance. A political party can set up a **Super JFC** to represent hundreds of candidates under the party umbrella. These committees can solicit the legal limit from individuals for each of their candidates.

**Magic words** are the key phrases (such as "vote for X," "reject Y" or "elect Z"), identified in *Buckley*, that are used in IEs and that distinguish them from other forms of political ads.

**Quid-pro-quo corruption** is money exchanged for official political actions or for votes.

**Shell corporations (LLCs)** are incorporated by states as for-profit companies. And though most of them are legitimate businesses, others do not engage in business and instead serve as conduits for hiding political contributions. Such companies can be legally created by people using fake names; they can spend large amounts of money in our elections, and disappear before being noticed. The formation requires no phone number, e-mail or location. Money can be moved through several LLCs to make donors completely untraceable.

**Soft Money** refers to contributions to election campaigns from sources not regulated by campaign finance law, such as 501(c)(4)s, (5)s and (6)s and shell companies. The identity of donors to these entities can be kept secret.

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<sup>1</sup> Lessig is Roy L. Furman Professor at Harvard Law; he is author of the book: “Republic Lost: How Money Corrupts Congress – and a Plan to Stop it” (Barnes and Noble, 2011).

<sup>2</sup> For individuals, see: *Buckley v. Valeo* (1976) and also 52 U.S. Code, Section 30104 (f); see also: 11 CFR 110.11.

<sup>3</sup> See: “Extortion, How Politicians Extract Your Money, Buy Votes, and Line their own Pockets,” by Peter Schweizer of the conservative Stanford U., Hoover Institute. (Boston: Houghton Mifflin Harcourt, 2013)

<sup>4</sup> For a clear discussion of these issues, see: “Unions, Corporations, and Political Opt-Out Rights After *Citizens United*,” by Benjamin I. Sachs, *Columbia Law Review*, Vol. 112:800-869, 2012. See particularly pp. 804-805: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924916](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924916) .

<sup>5</sup> See OpenSecrets.org, Center for Responsive Politics. “Business-Labor-Ideology Split in PAC and Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups,” 2016: <https://www.opensecrets.org/overview/blio.php> .

<sup>6</sup> See: “Citizens Divided by *Citizens United*: How the Recent Supreme Court Decision Affects Small Business in Politics,” by Mallory Mendrala, in *Ohio State Entrepreneurial Business Law Journal*, Vol. 7:1, p. 254:

[http://kb.osu.edu/dspace/bitstream/handle/1811/78422/OSBLJ\\_V7N1\\_253.pdf](http://kb.osu.edu/dspace/bitstream/handle/1811/78422/OSBLJ_V7N1_253.pdf) . See also: “Small Business United v. Citizens United”: [http://www.mainstreetalliance.org/small\\_business\\_united\\_v\\_citizens\\_united](http://www.mainstreetalliance.org/small_business_united_v_citizens_united) .

<sup>7</sup> See: p. 32 in: “Opinion of the Court” at: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>8</sup> See: “Super PACs in Federal Elections: Overview and Issues for Congress,” by R. Sam Garrett, September 16, 2016. [fas.org/sgp/crs/misc/R42042.pdf](http://fas.org/sgp/crs/misc/R42042.pdf) , p. 22.

<sup>9</sup> “Super PACs in Federal Elections: Overview and Issues for Congress,” by R. Sam Garrett, September 16, 2016. [fas.org/sgp/crs/misc/R42042.pdf](http://fas.org/sgp/crs/misc/R42042.pdf) , p. 14.

<sup>10</sup> See: “Rethinking Judicial Selection in State Courts,” by Alicia Bannon, June 2016, Brennan Center for Justice: <http://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts#Introduction> .

<sup>11</sup> See: “What Super PACs, Non-Profits, and other Groups Spending Outside Money Must Disclose about the Source and Use of their Funds,” OpenSecrets.org, Center for Responsive Politics, at: <https://www.opensecrets.org/outspending/rules.php> .

<sup>12</sup> See: “Election Spending 2016: Post-Election Update,” by Ian Vandewalker, November 23, 2016: <https://www.brennancenter.org/blog/election-spending-2016-post-election-update> .

<sup>13</sup> See: “Democrats and Republicans Attempt Twitter End-Run Around Campaign Finance Laws,” by Paul S. Ryan, November 25, 2014, The Brookings Institution at: <https://www.brookings.edu/blog/techtank/2014/11/25/democrats-and-republicans-attempt-twitter-end-run-around-campaign-finance-laws/> .

<sup>14</sup> See: Consolidated Appropriations Act, 2015 – budget for the year 2016. Div. E: “Financial Services and General Government Appropriations Act, 2016, Title VII, SEC. 735 (a). See also: Open Secrets, “Budget Deals a Blow to More Campaign Finance Transparency,” <http://www.opensecrets.org/news/2014/01/budget-deal-a-blow-to-more-campaign-finance-transparency.html> . See: CRS report, “The State of Campaign Finance Policy,” p.14, June 23, 2016 at: [fas.org/sgp/crs/misc/R41542.pdf](http://fas.org/sgp/crs/misc/R41542.pdf) .

<sup>15</sup> See, re the SEC: “Sen. Warren Calls on President to Immediately Designate New SEC Chair to Replace Mary Jo White” at: [http://www.warren.senate.gov/?p=press\\_release&id=1275](http://www.warren.senate.gov/?p=press_release&id=1275) . See also: “Menendez Leads Bicameral Letter Urging SEC Action on Corporate Political Spending Disclosure” at: <https://www.menendez.senate.gov/news-and-events/press/menendez-leads-bicameral-letter-urging-sec-action-on-corporate-political-spending-disclosure> .

<sup>16</sup> See the statement of John Coates, Harvard Law School, “Forum: Corporate Political Spending and Foreign Influence,” p. 2. June 23, 2016: <https://www.fec.gov/about/leadership-and-structure/ellen-l-weintraub/forum-corporate-political-spending-and-foreign-influence/> .

<sup>17</sup> See: “Russian Cyber Hacks on U.S. Electoral System Far Wider than Previously Known,” Michael Riley and J. Robertson. <https://www.bloomberg.com/news/articles/2017-06-13/russian-breach-of-39-states-threatens-future-u-s-elections> .

<sup>18</sup> See “FEC Stalemates on How to Deal with Foreign-owned Companies Spending in Elections,” by Ashley Balcerzak, September 25, 2016, Open Secrets.org at: <http://www.opensecrets.org/news/2016/09/fec-stalemates-on-how-to-deal-with-foreign-owned-companies-spending-in-elections/> . Also see the FEC’s Weekly Digest for September 12-16, 2016: “Rulemaking and Agency Procedures.”

<sup>19</sup> See: “Your State and Local Elections Are Now a Super PAC Playground,” by Paul Blumenthal, *Huffington Post*: [http://www.huffingtonpost.com/entry/2015-elections-super-pac\\_us\\_5633d165e4b0c66bae5c7bbb](http://www.huffingtonpost.com/entry/2015-elections-super-pac_us_5633d165e4b0c66bae5c7bbb) .

<sup>20</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), “Opinion of Roberts, C.J.,” p. 19, Section IV, A: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>21</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), “Opinion of Roberts, C.J.,” p. 18, Section IV, A: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>22</sup> See “Opinion of Stevens, J,” footnote 54 in: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>23</sup> See: “A Capitalist Joker,” by David H. Gans and D.T. Kendall, Constitutional Accountability Center at: <https://www.theusconstitution.org/sites/default/files/briefs/A%20Capitalist%20Joker.pdf> .

<sup>24</sup> See: “*Santa Clara County v. Southern Pacific Railroad* (1886)” at:

[http://reclaimdemocracy.org/personhood/santa\\_clara\\_vs\\_southern\\_pacific.html](http://reclaimdemocracy.org/personhood/santa_clara_vs_southern_pacific.html) . See also: “Santa Clara Blues: Corporate Personhood v. Democracy,” by William Meyers: <http://www.iipublishing.com/afd/santaclara.html> .

<sup>25</sup> See: US Code Title 1 – General Provisions, Chapter 1 – Rules of Construction, Section 1:

<https://www.gpo.gov/fdsys/pkg/USCODE-2012-title1/html/USCODE-2012-title1-chap1.htm> .

<sup>26</sup> See graphics on “Koch Brothers: Using the Power of Wealth Against ‘Free’ Elections,” Common Peoples Source for News, March 2014, updated October 2016 at: <http://www.cps-news.com/archives/koch-brothers-buying-fascism/> See also: “Who are the Koch Brothers and What Do They Want?” by Bernie Sanders, Huff Post, Politics, April 17, 2014. [http://www.huffingtonpost.com/rep-bernie-sanders/who-are-the-koch-brothers\\_b\\_5165995.html](http://www.huffingtonpost.com/rep-bernie-sanders/who-are-the-koch-brothers_b_5165995.html) .

<sup>27</sup> See: US Code Title 1 – General Provisions, Chapter 1 – Rules of Construction, Section 1 – “Words denoting number, gender, and so forth”: <https://www.gpo.gov/fdsys/pkg/USCODE-2012-title1/html/USCODE-2012-title1-chap1.htm> .

<sup>28</sup> See: *Buckley v. Valeo*, 424 U.S. 1 (1976): <http://www.fec.gov/law/litigation/Buckley.pdf> .

<sup>29</sup> See: “The Court’s Changing Conception of Corruption,” by Trevor Potter, May 7, 2015, Campaign Legal Center: <http://www.campaignlegalcenter.org/news/blog/court-s-changing-conception-corruption> ; see also “Corporations, Corruption, and Complexity: Campaign Finance after Citizens United,” by Richard Briffault, pp. 657-658: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1337&context=cjllp> ; see also “What John Roberts Doesn’t Get About Corruption,” by Zephyr Teachout, Political Magazine, April 14, 2014: <http://www.politico.com/magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683> .

<sup>30</sup> The Supreme Court reasoned that “A restriction on the amount of money a person or group can spend on political communication during a campaign...reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached...This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money....The expenditure limitations contained in the [Federal Election Campaign Act] represent substantial...restraints on the quantity and diversity of political speech.” See page 424 U.S. 1, 19 in: <https://supreme.justia.com/cases/federal/us/424/1/case.html>

<sup>31</sup> See: *Buckley v. Valeo*, p. 424 U.S. 1, 84 in: <https://supreme.justia.com/cases/federal/us/424/1/case.html> .

<sup>32</sup> Fred Wertheimer of Democracy 21 notes that *Buckley* reaffirmed “the distinction between limits on contributions, which are constitutional, and limits on expenditures, which are not,” in “From Buckley to McCutcheon: A brief History”: <http://www.democracy21.org/inside-the-courts/press-releases-inside-the-courts/from-buckley-to-mccutcheon-a-brief-history/> . See also: “Supreme Court Wades into Campaign Finance Law’s Sea of Complexity,” by Michael Doyle, *The Wichita Eagle*, October 8, 2013 “Spending by a candidate was deemed tantamount to political speech, and so received greater First Amendment protection [and therefore less regulation]. Campaign donations directly to the candidate were deemed potentially corrupting and hence subject to regulation.” <http://www.mcclatchydc.com/2013/10/08/204717/supreme-court-wades-into-campaign.html> .

<sup>33</sup> See: Footnote 52 on p. 44, in *Buckley v. Valeo*, 424 US 1, 44 (1976):

<https://supreme.justia.com/cases/federal/us/424/1/case.html> .

<sup>34</sup> See: <http://caselaw.findlaw.com/us-supreme-court/494/652.html> .

<sup>35</sup> See: *Citizens United v. FEC* (2010), “Opinion of the Court,” Section, III, B: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>36</sup> See: *Austin v. Mich. Chamber of Comm.* - 494 U.S. (1990), at 660: <http://caselaw.findlaw.com/us-supreme-court/494/652.html> . See also discussion in *Citizens United*: “Opinion of the Court,” p. 31 in *CU* (2010) <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>37</sup> See: p. 32 in: “Opinion of the Court” at: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>38</sup> See: “Money Crisis; How Citizens United undermines Our Elections and the Supreme Court” by Russ Feingold, June 14, 2012, The *Stanford Law Review*, online: <http://www.stanfordlawreview.org/online/money-crisis> .

<sup>39</sup> See: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>40</sup> See: “Justices Turn Minor Movie Case Into a Blockbuster,” by Adam Liptak, *The New York Times*, January 22, 2010: <http://www.nytimes.com/2010/01/23/us/politics/23scotus.html?r=0> See: “Opinion of Stevens, J.,” p. 6: <http://www.law.cornell.edu/supct/pdf/08-205P.ZX> .

<sup>41</sup> *First National Bank of Boston v. Francis X. Bellotti* 435 U.S. (1978):

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=435&invol=765> .

<sup>42</sup> “Opinion of the Court” (CU 2010) III, A, 1, p. 26: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>43</sup> The Supreme Court reasoned that “A restriction on the amount of money a person or group can spend on political communication during a campaign...reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached...This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money....The expenditure limitations contained in the [Federal Election Campaign Act] represent substantial...restraints on the quantity and diversity of political speech.” see page 424 U.S. 1, 19 in: <http://www.fec.gov/law/litigation/Buckley.pdf>.

<sup>44</sup> *Citizens United (2010)* Syllabus [2(c)(1)], p. 5: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>45</sup> See: “Opinion of the Court,” p. 54-55: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>46</sup> See: “Opinion of the Court,” p. 50. <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>47</sup> See: “What John Roberts Doesn’t Get About Corruption,” by Zephyr Teachout, April 14, 2014:

<http://www.politico.com/magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683>.

<sup>48</sup> See *Citizens United (2010)* “Opinion of the Court,” III, B, 2 pp. 43-44

<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>49</sup> See *Citizens United (2010)* “Opinion of the Court,” III, B, 2, pp. 43-44. Originally from Justice Kennedy’s dissent in *McConnell*, 540 U.S., at 297: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>50</sup> See *Citizens United (2010)* “Opinion of the Court,” III, B, 2, p. 45.

<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>51</sup> See: “Free Speech Through the Foggy Lens of Election Law,” by Adam Liptak,

<http://www.nytimes.com/2010/05/04/us/politics/04bar.html>

<sup>52</sup> See: <http://www.fec.gov/pages/brochures/indexp.shtml#IE> See also: Congressional Research Service Report to Congress, February 1, 2010. “Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress,” p. 2, February 1, 2010 at:

[https://digital.library.unt.edu/ark:/67531/metadc505567/m1/1/high\\_res\\_d/R41054\\_2010Feb01.pdf](https://digital.library.unt.edu/ark:/67531/metadc505567/m1/1/high_res_d/R41054_2010Feb01.pdf). See also: “The State of Campaign Finance Policy,” by R. Sam Garrett, May 9, 2012 at:

<http://www.politicalmoneyline.com/pfds/misc/CRSR41542.pdf>.

<sup>53</sup> Defined by the FEC as any broadcast, cable or satellite communication, disbursed shortly before an election that clearly refers to a candidate for federal office, and targets the relevant electorate.

<sup>54</sup> See the FEC website: “Electioneering Communications,”

<http://www.fec.gov/finance/disclosure/electioneering.shtml#search=electioneering%20communications>.

<sup>55</sup> See: “Total cost of 2016 election could reach \$6.6 billion, CRP predicts,” October 25, 2016:

<https://www.opensecrets.org/news/2016/10/total-cost-of-2016-election-could-reach-6-6-billion-crp-predicts/>.

<sup>56</sup> See: “From Buckley to McCutcheon: A Brief History; A Brief History of the Supreme Court and Contribution Limits on Individuals,” by Fred Wertheimer <http://www.democracy21.org/inside-the-courts/press-releases-inside-the-courts/from-buckley-to-mccutcheon-a-brief-history/>.

<sup>57</sup> See p. 55 of the *Citizens United (2010)* “Opinion of the Court” [IV, B] at:

<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>58</sup> See: CRS report, “The State of Campaign Finance Policy,” p.14, by R. Sam Garrett, June 23, 2016 at: <fas.org/sgp/crs/misc/R41542.pdf>.

<sup>59</sup> See: “...we interpret 11 C.F.R. Section 104.20(c)(9) as requiring a corporation or labor union to disclose the persons who make donations . . . only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report [meaning a particular ad]. Otherwise, the corporation or union is under no obligation to disclose such information.” See FEC, related to the Matter of Freedom’s Watch, Inc. (MUR 6002) “Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn,” August 13, 2010, see particularly p. 5. It is marked “sensitive.” at:

<eqs.fec.gov/eqsdocsMUR/10044274536.pdf> or else, google: 10044274536.pdf. It was written about another case but is applicable here. See also: “Fading Disclosure,” Public Citizen, particularly p. 5:

<citizen.org/documents/Disclosure-report-final.pdf>.

<sup>60</sup> See: See: FEC Regulation CFR 11, Section 109.10(e)(1)(vi) “How do political committees and other persons report **independent expenditures**?” (e)(1) *“Contents of verified reports and statement.* If a signed report or statement is submitted, [it] shall include: (vi) “The identification of each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made *for the purpose of furthering the reported independent expenditure*” (author’s emphasis). at: <https://www.fec.gov/regulations/109-10/2017-annual-109#109-10-e-1-iii>. See also: Code of Federal Regulations, Title 11, Chapter I, Section 104.20(c)(9) “Reporting **electioneering communications**” (2 USC 434(f)) “Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information: If a disbursement were made by a

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corporation or labor organization pursuant to 11CFR 114.15, the name and address of each person who makes the donation aggregating \$1000 or more to the corporation or labor organization..., which was made *for the purpose of furthering electioneering communications.*" (author's emphasis) See 104.20(c)(9) at:

<https://www.gpo.gov/fdsys/pkg/CFR-2011-title11-vol1/xml/CFR-2011-title11-vol1-sec104-20.xml> .

<sup>61</sup> See: <http://www.fec.gov/members/weintraub/murs/mur6002sor.pdf> .

<sup>62</sup> See: *Christopher Van Hollen, Jr, Appellee v. FEC Appellees*, decided January 21, 2016, U.S. Court of Appeals for D.C. at: [http://www.fec.gov/law/litigation/van\\_hollen\\_ac155016\\_opinion.pdf](http://www.fec.gov/law/litigation/van_hollen_ac155016_opinion.pdf) .

<sup>63</sup> See: "Opinion of the Court," III, B, 4, p. 46-47: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>64</sup> See: "Jury finds Azano guilty on 36 counts in Foreign Money Case," The San Diego Union Tribune, September 9, 2016" at: <http://www.sandiegouniontribune.com/news/watchdog/sdut-azano-guilty-illegal-campaign-finance-2016sep09-story.html> .

<sup>65</sup> See: "Opinion of Stevens, J." I, p. 4: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>66</sup> See: "Opinion of Stevens, J." p. 2: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>67</sup> See in "Opinion of Stevens, J." p. 77: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>68</sup> See: "Opinion of Stevens, J." p. 29: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>69</sup> See p. 64 in "Opinion of Stevens, J": <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>70</sup> See p. 83 in "Opinion of Stevens, J": <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>71</sup> See p. 90 in "Opinion of Stevens, J": <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>72</sup> *McComish v. Bennett* (2011): <http://www.scotusblog.com/case-files/cases/mccomish-v-bennett/> . See also: <http://www.nytimes.com/2011/06/28/us/politics/28campaign.html> .

<sup>73</sup> See: *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692F 3D See 877, Decided Sept. 5, 2012 by U.S. Court of Appeals, Eighth Circuit: See: <http://harvardlawreview.org/2013/04/eighth-circuit-grants-injunction-against-minnesota-reporting-requirement-for-independent-corporate-political-expenditures-ae-minnesota-citizens-concerned-for-life-inc-v-swanson-692-f-3d/>

<sup>74</sup> For the two decisions, see: <http://caselaw.findlaw.com/mt-supreme-court/1595153.html> and <https://www.supremecourt.gov/opinions/11pdf/11-1179h9j3.pdf> .

<sup>75</sup> See: "A National Strategy Funds State Political Monopolies," The New York Times:

<http://www.nytimes.com/2014/01/12/us/politics/a-national-strategy-funds-state-political-monopolies.html> .

<sup>76</sup> See: "The Secret Power Behind Local Elections, by Chisun Lee and L. Norden, The New York Times, June 25, 2016: [http://www.nytimes.com/2016/06/26/opinion/sunday/the-secret-power-behind-local-elections.html?\\_r=0](http://www.nytimes.com/2016/06/26/opinion/sunday/the-secret-power-behind-local-elections.html?_r=0) .

<sup>77</sup> See: "How the States are Trying to Rein in Dark Money," Bill Moyers & Co.: <http://billmoyers.com/2014/03/21/how-the-states-are-trying-to-rein-in-dark-money/> .

<sup>78</sup> See: p. 70 of the "Opinion of Stevens, J," <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>79</sup> See: "Blowing up the Pipes: the Use of (c)(4)s to Dismantle Campaign Reform" by Cory G. Kalanick, Minnesota Law Review.org. [Vol. 95: 2254] pp. 2267-2268: [http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Kalanick\\_PDF.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Kalanick_PDF.pdf) .

<sup>80</sup> See: "Opinion of the Court": [http://www.fec.gov/law/litigation/speechnow\\_ac\\_opinion.pdf](http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf) . See FEC summary of the case in <http://www.fec.gov/law/litigation/speechnow.shtml#summary> .

<sup>81</sup> See: *SpeechNow.org, et al. v. FEC* (2010), p. 2: [http://www.fec.gov/law/litigation/speechnow\\_ac\\_opinion.pdf](http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf) .

<sup>82</sup> See: "Opinion of the Court," p. 16: [http://www.fec.gov/law/litigation/speechnow\\_ac\\_opinion.pdf](http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf) .

<sup>83</sup> See: "Courts Take on Campaign Finance Decision," by Adam Liptak, The New York Times, March 26, 2010: [http://www.nytimes.com/2010/03/27/us/politics/27campaign.html?\\_r=0](http://www.nytimes.com/2010/03/27/us/politics/27campaign.html?_r=0) .

<sup>84</sup> See: "Opinion of the Court," p. 15-16: [http://www.fec.gov/law/litigation/speechnow\\_ac\\_opinion.pdf](http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf) .

<sup>85</sup> See: "Opinion of the Court," p. 16: [http://www.fec.gov/law/litigation/speechnow\\_ac\\_opinion.pdf](http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf) . See also: "The State of Campaign Finance Policy: Recent Developments and Issues for Congress, CRS report, by R. Sam Garrett, May 9, 2012: <http://www.politicalmoneyline.com/pfds/misc/CRSR41542.pdf> .

<sup>86</sup> See: "Opinion of the Court," p. 17-20: [http://www.fec.gov/law/litigation/speechnow\\_ac\\_opinion.pdf](http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf) .

<sup>87</sup> See: FEC AO 2010-09: <http://saos.fec.gov/aodocs/AO%202010-09.pdf> . See FEC AO 2010-11: <http://saos.fec.gov/aodocs/AO%202010-11.pdf> .

<sup>88</sup> See: <http://fec.gov/pdf/record/2010/aug10.pdf> .

<sup>89</sup> See:

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwj9rbKL5MXRAhVK5yYKhem0BroQFgghMAE&url=http%3A%2F%2Fsaos.fec.gov%2Faodocs%2FAO%25202010-11.pdf&usg=AFQjCNhtNGfTcNAA7Qja6wmuLnzQmxCP6A&cad=rja>

<sup>90</sup> See: "Super PACs in Federal Elections," (2016) CRS report, p. 10. <https://fas.org/sgp/crs/misc/R42042.pdf> .

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<sup>91</sup> See: <http://articles.latimes.com/print/2011/jul/23/opinion/la-ed-superpacs-20110723> .

<sup>92</sup> Google: Petition for Rulemaking, June 8, 2015. Letter from Ann Ravel and Ellen Weintraub to the FEC, Office of General Counsel. See: <https://fas.org/sgp/crs/misc/R42042.pdf> .

<sup>93</sup> See: Updated to March 2013, “Super Connected” <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf> .

<sup>94</sup> Wharton School, Univ. of Pennsylvania, Center for Political Responsibility, p.7 at: <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8047> .

<sup>95</sup> See: [http://www.fec.gov/law/litigation/carey\\_dc\\_order.pdf](http://www.fec.gov/law/litigation/carey_dc_order.pdf) .

<sup>96</sup> See: [http://www.fec.gov/law/litigation/mccutcheon\\_sc\\_opinion.pdf](http://www.fec.gov/law/litigation/mccutcheon_sc_opinion.pdf) .

<sup>97</sup> See: “Supreme Court Strikes Down Overall Political Donation Cap,” by Adam Liptak, [The New York Times](https://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html): <https://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html>

<sup>98</sup> See: “*McCutcheon, et al. v. FEC.*” [http://www.fec.gov/law/litigation/mccutcheon\\_sc\\_opinion.pdf](http://www.fec.gov/law/litigation/mccutcheon_sc_opinion.pdf) .

<sup>99</sup> FEC, “Contribution Limits 2013-2014.” <http://www.fec.gov/pages/brochures/contriblimits.shtml> .

<sup>100</sup> See: “The State of Campaign Finance Policy,” CRS report by R. Sam Garrett, June 23, 2016, p. 8: <fas.org/sgp/crs/misc/R41542.pdf> . See also: CRS Report R43825 “Increased Campaign Contribution limits in the FY2015 Omnibus Appropriations Law,” by R. Sam Garrett, March 17, 2015.

<sup>101</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), majority opinion: “Opinion of Roberts, C.J.,” p. 19, Section IV,A: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>102</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), majority opinion: “Opinion of Roberts, C.J.,” p. 19, Section IV,A: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>103</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), majority opinion: “Opinion of Roberts, C.J.,” p. 19, Section IV,A: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>104</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), majority opinion: “Opinion of Roberts, C.J.,” Section IV, A, p. 20: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>105</sup> “Party all The Time,” by David Brooks, [The New York Times](http://www.nytimes.com/2014/04/03/us/politics/supreme-court-s-decision-in-mccutcheon-v-fec), April 4, 2014, p. A23.

<sup>106</sup> See: <http://www.mccain.senate.gov/public/index.cfm/2014/4/statement-by-senator-john-mccain-on-supreme-court-s-decision-in-mccutcheon-v-fec> .

<sup>107</sup> See: [The New York Times](https://www.nytimes.com/2013/10/02/us/politics/justices-to-weigh-key-limit-on-political-donors.html?mtref=duckduckgo.com&gwh=F3E7EC2EB1880944723901DAFA96D7C7&gwt=pay), “Justices to weigh Key Limit on Donors,” by Adam Liptak, Oct. 2, 2013, p. 1. See: [http://www.nytimes.com/2013/10/02/us/politics/justices-to-weigh-key-limit-on-political-donors.html?mtref=duckduckgo.com&gwh=F3E7EC2EB1880944723901DAFA96D7C7&gwt=pay](https://www.nytimes.com/2013/10/02/us/politics/justices-to-weigh-key-limit-on-political-donors.html?mtref=duckduckgo.com&gwh=F3E7EC2EB1880944723901DAFA96D7C7&gwt=pay) .

<sup>108</sup> See: Brennan Center for Justice, “Republican Party of Louisiana v. FEC” (Amicus Brief) March 2016: <https://www.brennancenter.org/legal-work/republican-party-louisiana-v-fec-amicus-brief> .

<sup>109</sup> See: <https://www.fec.gov/updates/supreme-court-affirms-lower-court-decision-lagop-v-fec-2017/> .

<sup>110</sup> See: <http://www.fec.gov/law/litigation/Holmes.shtml#ac> .

<sup>111</sup> See: “This Lawsuit in Alaska Could Upend the Campaign Finance Landscape,” by Aaron Mak, Slatest at: [http://www.slate.com/blogs/the\\_slatest/2017/08/11/the\\_thompson\\_v\\_hebdon\\_lawsuit\\_challenges\\_alaska\\_s\\_limits\\_on\\_out\\_of\\_state.html](http://www.slate.com/blogs/the_slatest/2017/08/11/the_thompson_v_hebdon_lawsuit_challenges_alaska_s_limits_on_out_of_state.html) .

<sup>112</sup> See: <http://www.fec.gov/about.shtml> .

<sup>113</sup> see “How Not to Enforce Campaign Laws,” by Commissioner Ann Ravel, “Op-Ed,” April 2, 2014, [The New York Times](https://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?smid=tw-share): [http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?smid=tw-share](https://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?smid=tw-share)

<sup>114</sup> See Van Hollen’s case at: See: [http://www.fec.gov/pdf/nprm/citizensunited/van\\_hollen.pdf](http://www.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf) .

<sup>115</sup> See: “Campaign Jungle,” [The New York Times](https://www.nytimes.com/2011/11/13/opinion/sunday/the-campaign-jungle.html?r=1), editorial, Sunday Review, November 12, 2011 at: [http://www.nytimes.com/2011/11/13/opinion/sunday/the-campaign-jungle.html?r=1](https://www.nytimes.com/2011/11/13/opinion/sunday/the-campaign-jungle.html?r=1) . See also: [http://www.nytimes.com/2011/08/28/us/politics/28donate.html?r=1&pagewanted=print](https://www.nytimes.com/2011/08/28/us/politics/28donate.html?r=1&pagewanted=print) .

<sup>116</sup> See: “Legislative Recommendations of the FEC, 2013” to Congress, p. 6, Adopted December 17, 2013: <https://transition.fec.gov/law/legrec2013.pdf> .

<sup>117</sup> See: “The FEC Offers a Hand – Or – Two Hands to the IRS,” by Bob Bauer, February 28, 2014, MoreSoftMoneyHardLaw.com at: <http://www.moresoftmoneyhardlaw.com/2014/02/fec-offers-hand-two-hands-irs/> .

<sup>118</sup> See: “The FEC Offers a Hand – Or – Two Hands to the IRS,” by Bob Bauer, February 28, 2014, MoreSoftMoneyHardLaw.com at: <http://www.moresoftmoneyhardlaw.com/2014/02/fec-offers-hand-two-hands-irs/> .

<sup>119</sup> See: “Advocacy Resource,” Chapter 1. by B. Holly Schadler, Alliance for Justice, 2012: [http://www.bolderadvocacy.org/wp-content/uploads/2012/10/The\\_Connection\\_paywall.pdf](http://www.bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf) .

<sup>120</sup> See: “Dark money in the 2012 elections (so far),” by Lee Drutman, July 16, 2012 at: <http://sunlightfoundation.com/blog/2012/07/16/dark-money/> .

<sup>121</sup> U.S. Code, p. 1456, Title 26, Internal Revenue Code, section 501(c)4: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleA-chap1-subchapF-partI-sec501.pdf> .

<sup>122</sup> Treas. Reg. Section 1.501(c)(4)-1(a)(2)(i) <http://www.ecfr.gov/cgi-bin/text-idx?SID=6423df226140d4d50bd6b6f526eb201e&node=26:7.0.1.1.0.1.4&rgn=div8> .

<sup>123</sup> See: “Advocacy Resource,” Chapter 1, p. 15, by B. Holly Schadler, Alliance for Justice, 2012: [http://www.bolderadvocacy.org/wp-content/uploads/2012/10/The\\_Connection\\_paywall.pdf](http://www.bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf)

<sup>124</sup> See: <http://www.irs.gov/pub/irs-pdf/p4221nc.pdf> . See also: “What is a 501(c) anyway?” by Sean Sullivan, *Washington Post*, May 13, 2013: <https://www.washingtonpost.com/news/the-fix/wp/2013/05/13/what-is-a-501c4-anyway/> .

<sup>125</sup> See Politics and Government Blog of *The New York Times*, “I.R.S. Handling of Donations Draws Ire of Both Parties,” by Stephanie Strom, August 7, 2011: <http://thecaucus.blogs.nytimes.com/2011/08/07/i-r-s-handling-of-donations-draws-ire-of-both-parties/?ref=campaignfinance> . See: “IRS grants nonprofit status to ‘dark money’ group founded by Karl Rove,” by Robert Faturechi and D. Willis, ProPublica, February 10, 2016: <http://bangordailynews.com/2016/02/10/politics/irs-grants-nonprofit-status-to-dark-money-group-founded-by-karl-rove/> . See: *The New York Times*, “I.R.S. Moves to Tax Gifts to Groups Active in Politics,” by Stephanie Strom, see: <http://www.nytimes.com/2011/05/13/business/13gift.html> ; See: “What is a 501(c) anyway?” by Sean Sullivan, *Washington Wire*, at: <https://www.washingtonpost.com/news/the-fix/wp/2013/05/13/what-is-a-501c4-anyway/> ; See: “IRS Suspends Probes of Gifts to Political Advocacy Groups,” by J.D. McKinnon and K. Peterson, *The Wall Street Journal*, July 7, 2011 at: <http://blogs.wsj.com/washwire/2011/07/07/irs-suspends-probes-of-gifts-to-political-advocacy-groups/> ; Both the Campaign Legal Center and Democracy 21 have challenged the IRS for not enforcing the tax laws: <http://www.democracy21.org/archives/whats-new/democracy-21-and-campaign-legal-center-challenge-tax-exempt-status-of-crossroads-gps-priorities-usa-american-action-network-and-americans-elect-urge-prompt-investigations-and-action-by-internal-rev/> , September 28, 2011.

<sup>126</sup> Press Release, “Treasury, IRS Will Issue Proposed Guidance for Tax-exempt Social Welfare Organizations,” November 26, 2013: <https://content.govdelivery.com/accounts/USIRS/bulletins/96d671> .

<sup>127</sup> See: “New IRS Rules on Dark Money Likely Won’t be Ready Before 2016 Election,” by Theodoric Meyer, *ProPublica*, January 2015 at: <https://www.propublica.org/article/new-irs-rules-on-dark-money-likely-wont-be-ready-before-2016-election> .

<sup>128</sup> See: “Poor IRS Service Reflects Congress’s Deep Funding Cuts,” by Brandon Debot and C. Marr, June 1, 2015, Center for Budget and Policy Priorities at: <http://www.cbpp.org/research/federal-tax/poor-irs-service-reflects-congresss-deep-funding-cuts> .

<sup>129</sup> See: Public Law 114-113-December 18, 2015, “Consolidated Appropriations Act, 2016,”

<https://www.congress.gov/bill/114th-congress/house-bill/2029/text?r=63> . In PDF version, see particularly Section 107 and 108 on p. 2430; find the IRS on p. 2428.

<sup>130</sup> See: Ryan is quoted in: “Democracy 21 and Campaign Legal Center Challenge Legality of IRS Regulations as Failing to Properly Limit Campaign Activity by 501(c)4 Organizations,” July 27, 2011 at:

<http://www.democracy21.org/archives/whats-new/democracy-21-and-campaign-legal-center-challenge-legality-of-irs-regulations-as-failing-to-properly-limit-campaign-activity-by-501c4-organizations/>

<sup>131</sup> See: “Obama rules won’t weaken secret money,” by Lauren French and Byron Tau, POLITICO, November 26, 2013: <http://www.politico.com/story/2013/11/barack-obama-administration-taxes-nonprofit-groups-new-rules-100416.html> .

<sup>132</sup> See: <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf> .

<sup>133</sup> See: “SEC Takes A Shot At Citizens United,” by Rick Hasen Election Law Blog, May 17, 2011 at: <http://electionlawblog.org/archives/019515.html> .

<sup>134</sup> For the petition and discussion, see “Law Professors Ask SEC to Require Disclosure of Campaign Donations,” by Danny Yadron and A. Ackerman at: <http://blogs.wsj.com/washwire/2011/08/05/law-professors-ask-sec-to-require-disclosure-of-campaign-donations/tab/print/> . See also: “Menendez Leads Bicameral Letter Urging SEC Action on Corporate Political Spending Disclosure” at: <https://www.menendez.senate.gov/news-and-events/press/menendez-leads-bicameral-letter-urging-sec-action-on-corporate-political-spending-disclosure> . See also: “Sen. Warren Calls on President to Immediately Designate New SEC Chair to Replace Mary Jo White” at: [http://www.warren.senate.gov/?p=press\\_release&id=1275](http://www.warren.senate.gov/?p=press_release&id=1275) .

<sup>135</sup> See: “The State of Campaign Finance Policy,” CRS report by R. Sam Garrett, June 23, 2016, p. 14 at: <fas.org/sgp/crs/misc/R41542.pdf> .

<sup>136</sup> See: “President Obama May Require Federal Contractors to list Campaign gifts,” by Julie H. Davis, January 19, 2016, *New York Times*: [http://www.nytimes.com/2016/01/20/us/president-obama-may-require-federal-contractors-to-list-campaign-gifts.html?\\_r=0](http://www.nytimes.com/2016/01/20/us/president-obama-may-require-federal-contractors-to-list-campaign-gifts.html?_r=0) ; See: “Another Massive Problem with U.S. Democracy”:

<http://www.theatlantic.com/politics/archive/2013/12/another-massive-problem-with-us-democracy-the-fec-is-broken/282404/>.

<sup>137</sup> See “Fixing Congress,” p. 6-9, by Rep. Jim Cooper: <http://bostonreview.net/cooper-fixing-congress> .

<sup>138</sup> See: New York University School of Law, Brennan Center for Justice: <http://www.brennancenter.org/legislation/disclose-2013-act> .

<sup>139</sup> See: CRS report, “The State of Campaign Finance Policy,” by R. Sam Garrett, p.14, June 23, 2016 at: [fas.org/sgp/crs/misc/R41542.pdf](http://fas.org/sgp/crs/misc/R41542.pdf).

<sup>140</sup> See: “Budget Deals a Blow to More Campaign Finance Transparency,” by Russ Choma, January 14, 2014: <http://www.opensecrets.org/news/2014/01/budget-deal-a-blow-to-more-campaign-finance-transparency.html> .

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<sup>142</sup> See “Politicians’ Extortion Racket,” by Peter Schweizer, *The New York Times*, Op Ed, October 21, 2013.

<sup>143</sup> See: “Opinion of the Court,” III, B, 4, p. 46-47: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>144</sup> For the dissenting opinion, see: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>145</sup> Congressional Research Service Report, March 8, 2010 “Legislative Options After *Citizens United v. FEC*: Constitutional and Legal Issues,” p. 11 at: <http://www.fas.org/sgp/crs/misc/R41096.pdf> .

<sup>146</sup> See: Congressional Research Service Report, March 8, 2010 “Legislative Options After *Citizens United v. FEC*: Constitutional and Legal Issues,” p. 11and p. 8-18. <http://www.fas.org/sgp/crs/misc/R41096.pdf> .

<sup>147</sup> See: <https://www.congress.gov/bill/114th-congress/house-bill/4177/actions> .

<sup>148</sup> See: “Forum: Corporate Political Spending and Foreign Influence,” June 23, 2016, particularly transcripts by John Coats, and Richard Briffault in particular at: <https://www.fec.gov/about/leadership-and-structure/ellen-l-weintraub/forum-corporate-political-spending-and-foreign-influence/> .

<sup>149</sup> See: The FEC Weekly Digest for the week of September 12-16, 2016, under the section “Proposal to Rescind Advisory Opinion 2006-15” (TransCanada): <https://www.fec.gov/updates/fec-approves-two-notices-availability-seek-public-comment/> . See Commissioner Ann Ravel’s August 16, 2016 letter re rescinding AO 2006-15 at: [fec.gov/agenda/2016/documents/mtgdoc\\_16-32-a.pdf](http://fec.gov/agenda/2016/documents/mtgdoc_16-32-a.pdf) .

<sup>150</sup> See: “FEC Commissioners Disagree on Whether to Limit Political Activities of Foreign-Owned U.S. Subsidiaries,” News and Insights Newsletters, September 2016: [http://www.wileyrein.com/newsroom-newsletters-item-FEC\\_Commissioners\\_Disagree\\_on\\_Whether\\_to\\_Limit\\_Political\\_Activities\\_of\\_Foreign-Owned\\_US\\_Subsidiaries.html](http://www.wileyrein.com/newsroom-newsletters-item-FEC_Commissioners_Disagree_on_Whether_to_Limit_Political_Activities_of_Foreign-Owned_US_Subsidiaries.html) . See also: “FEC Stalemates on How to deal with Foreign-owned Companies Spending in Elections,” by Ashley Balcerzak, September 25, 2016, Open Secrets.org at: <http://www.opensecrets.org/news/2016/09/fec-stalemates-on-how-to-deal-with-foreign-owned-companies-spending-in-elections/> .

<sup>151</sup> See: “Revised Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence”: [http://www.fec.gov/agenda/2016/documents/mtgdoc\\_16-49-a.pdf](http://www.fec.gov/agenda/2016/documents/mtgdoc_16-49-a.pdf) .

<sup>152</sup> See: The Daily Beast, “The Illegal Donor-Loophole” by Peter Schweizer: <http://www.thedailybeast.com/articles/2012/10/08/the-illegal-donor-loophole.html> .

<sup>153</sup> See: FEC site: <http://www.fec.gov/pages/brochures/contrib.shtml#top> . For law, see 11 CFR 110.20(b).

<sup>154</sup> See: <http://www.supremecourt.gov/orders/courtorders/010912zor.pdf> .

<sup>155</sup> See: <http://www.fec.gov/law/litigation/bluman.shtml> .

<sup>156</sup> See: “Jury finds Azano guilty on 36 counts in Foreign Money Case,” *The San Diego Union Tribune*, September 9, 2016” at: <http://www.sandiegouniontribune.com/news/watchdog/sdut-azano-guilty-illegal-campaign-finance-2016sep09-story.html> ; See also: “Mexican tycoon convicted for giving to US campaigns,” by Julie Watson, *The Washington Times*, September 9, 2016 at: <http://www.washingtontimes.com/news/2016/sep/9/mexican-tycoon-convicted-for-giving-to-us-campaign/> .

<sup>157</sup> See: “The Swiss Bank Account of the 2012 Elections,” by Brendan Fischer, January 21, 2013, CMD’s PR Watch, at: <http://www.prwatch.org/news/2013/01/11945/swiss-bank-accounts-2012-elections-how-secret-donors-are-corrupting-democracy> .

<sup>158</sup> See: “FEC stalemates on how to deal with foreign-owned companies spending in elections,” by Ashley Balcerzak, OpenSecrets.org, September 15, 2016 at: <http://www.opensecrets.org/news/2016/09/fec-stalemates-on-how-to-deal-with-foreign-owned-companies-spending-in-elections/> .

<sup>159</sup> See: “Corruption in America,” by Zephyr Teachout (Harvard U. Press, 2016); “Rethinking Campaign Finance: Toward a Pro-Democracy Jurisprudence,” Brennan Center for Justice, NYU School of Law; For a detailed discussion of “corruption” and *Citizens United* (2010) see: “On Political Corruption,” by Samuel Issacharoff: [http://www.udesa.edu.ar/files/UAHumanidades/Issacharoff/Material\\_Constitutional\\_Voids.pdf](http://www.udesa.edu.ar/files/UAHumanidades/Issacharoff/Material_Constitutional_Voids.pdf); Google: “Campaign Finance Reform and Disclosure,” Douglas Oosterhouse (2013) ; see: “From Buckley to McCutcheon, A Brief History,” by Fred Wertheimer: <http://www.democracy21.org/inside-the-courts/press-releases-inside-the-courts/from-buckley-to-mccutcheon-a-brief-history/> (2013); see: “Corporations Are Not People” by Jeffrey Clements (Koehler Publishers, Inc., 2012); “Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform,” Cory G. Kalanick [*Minnesota Law Review*, 95:2254]: [http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Kalanick\\_PDF.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Kalanick_PDF.pdf); See: “Election 2010: The Loophole Created by 11C.F.R. Section 104.20(c)(9) and *Citizens United* and the Ineffectiveness of the Campaign-Finance-Law Framework in Iowa,” Brian P. Flaherty, [*Iowa Law Review*, Vol. 97:239-274]; “The Appearance of Corruption: Super PACs in the Wake of the *Citizens United* Decision,” by Gary Miller: <http://womentheweb.wikispaces.com/file/view/Miller+Paper.pdf> ; “Guide to the Current Rules for Federal Elections,” Campaign Legal Center; The Congressional Research Service Reports referred to in this report discuss the problem of non-disclosure and possible corruption; For good definitions of terms, see: <http://www.opensecrets.org/resources/learn/glossary.php#1> .

<sup>160</sup> See “Statement of Richard Briffault” Columbia University, FEC “Forum: Corporate Political Spending and Foreign Influence,” June 23, 2016 at: <https://www.fec.gov/about/leadership-and-structure/ellen-l-weintraub/forum-corporate-political-spending-and-foreign-influence/> .

<sup>161</sup> See Justice Kennedy, majority opinion, 558U.S. \_\_2010, p. 45: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>162</sup> See *Citizens United* (2010) “Opinion of the Court,” III, B, 2, p. 45. <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> .

<sup>163</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), majority opinion: “Opinion of Roberts, C.J.,” Section IV, A, p. 20: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>164</sup> U.S. Supreme Court, *Shaun McCutcheon, et al., Appellants v. FEC* (2014), majority opinion: “Opinion of Roberts, C.J.,” p. 19, Section IV,A: [http://www.supremecourt.gov/opinions/13pdf/12-536\\_e1pf.pdf](http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf) .

<sup>165</sup> See: [The New York Times](http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html) Op Ed, “How Not to Enforce Campaign Laws”: <http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html> . See also the official statement (June 17, 2011) about disclosure by FEC Commissioner Ellen Weintraub, p.1 at: <http://www.fec.gov/members/weintraub/nprm/statement20110617.pdf> .

<sup>166</sup> See: “As Anti-Climate Group’s Activities Rise, So Do Questions About Its Secret Finances,” by Evan Lehmann, in: [The New York Times](http://www.nytimes.com/cwire/2011/10/12/12climatewire-as-anti-climate-groups-activities-rise-so-do-14988.html?partner=rss&emc=rss), October 12, 2011: <http://www.nytimes.com/cwire/2011/10/12/12climatewire-as-anti-climate-groups-activities-rise-so-do-14988.html?partner=rss&emc=rss> .

<sup>167</sup> See: FEC Regulation CFR 11, Section 109.10(e)(1)(vi) “How do political committees and other persons report **independent expenditures?**” (e)(1) “Contents of verified reports and statement. If a signed report or statement is submitted, [it] shall include: (vi) “The identification of each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made *for the purpose of furthering the reported independent expenditure*” (author’s emphasis). See: <https://www.fec.gov/regulations/109-10/2017-annual-109-10-e-1-iii> . See also: Code of Federal Regulations, Title 11, Chapter I, Section 104.20(c)(9) “Reporting **electioneering communications**” (2 USC 434(f)) “Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information: If a disbursement were made by a corporation or labor organization pursuant to 11CFR 114.15, the name and address of each person who makes the donation aggregating \$1000 or more to the corporation or labor organization..., which was made *for the purpose of furthering electioneering communications*” (author’s emphasis). See 104.20(c)(9) <https://www.gpo.gov/fdsys/pkg/CFR-2011-title11-vol1/xml/CFR-2011-title11-vol1-sec104-20.xml> .

<sup>168</sup> See <https://www.fec.gov/updates/van-hollen-v-fec-appeals-court/> . See also: Code of Federal Regulations, Title 11, Chapter I, Section 104.20(c)(9) “Reporting electioneering communications” (2 USC 434(f)) “Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information: If a disbursement were made by a corporation or labor organization pursuant to 11CFR 114.15, the name and address of each person who makes the donation aggregating \$1000 or more to the corporation or labor organization..., *which was made for the purpose of furthering electioneering communications*” (author’s italics).

<sup>169</sup> See: re U.S. Chamber of Commerce: <http://www.nytimes.com/2010/10/22/us/politics/22chamber.html> .

<sup>170</sup> See “Petition for Rulemaking”: [http://www.fec.gov/pdf/nprm/citizensunited/van\\_hollen.pdf](http://www.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf) .

<sup>171</sup> See p. 5 in “Petition for Rulemaking”: [https://www.fec.gov/resources/legal-resources/rulemakings/nprm/citizensunited/van\\_hollen.pdf](https://www.fec.gov/resources/legal-resources/rulemakings/nprm/citizensunited/van_hollen.pdf) . See also: Commissioner Weintraub: <http://www.fec.gov/members/weintraub/statements/ELW CU Statement 12-16-11.pdf> .

<sup>172</sup> The FEC in 2011 wrote a “Draft Notice of Rule Making on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations: Draft A,” but did not make the proposed rules. [http://www.fec.gov/agenda/2011/mtgdoc\\_1102.pdf](http://www.fec.gov/agenda/2011/mtgdoc_1102.pdf) .

<sup>173</sup> See: “Court Cases; Van Hollen v. FEC”: <http://www.fec.gov/pdf/record/2011/jun11.pdf> . Senator Van Hollen has also sued the IRS over disclosure. See: [http://www.huffingtonpost.com/2013/08/21/chris-van-hollen-irs-lawsuit\\_n\\_3790606.html](http://www.huffingtonpost.com/2013/08/21/chris-van-hollen-irs-lawsuit_n_3790606.html) .

<sup>174</sup> See: <http://www.nytimes.com/2012/04/03/opinion/a-judge-turns-on-the-light-on-campaign-finance.html> . See also: “Ruling on Donor Disclosure by Social-Welfare Groups Reversed,” September 19, 2012 <http://philanthropy.com/blogs/philanthropytoday/ruling-on-donor-disclosure-by-social-welfare-groups-reversed/53958> .

<sup>175</sup> See: For the decision, see: [http://www.fec.gov/law/litigation/van\\_hollen\\_ac155016\\_opinion.pdf](http://www.fec.gov/law/litigation/van_hollen_ac155016_opinion.pdf) .

<sup>176</sup> See: “Mystery million-dollar Romney donor revealed,” NBC News.com at: <http://www.msnbc.msn.com/id/44046063/ns/politics/t/mystery-million-dollar-romney-donor-revealed/> .

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<sup>178</sup> See: Congressional Research Service, “The State of Campaign Finance Policy: Recent Developments and Issues for Congress,” R. Sam Garrett, July 18, 2011, pp. 18-19. <https://www.scribd.com/document/61644005/The-State-of-Campaign-Finance-Policy-Recent-Developments-and-Issues-for-Congress> .

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<sup>189</sup> <http://beta.congress.gov/bill/113th-congress/senate-joint-resolution/19> .

<sup>190</sup> H.J.Res.48 – “Proposing an amendment to the Constitution of the United States providing that the rights extended by the Constitution are the rights of natural persons only” (2015): <https://www.govtrack.us/congress/bills/114/hjres48/details> .

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