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Blind Money: How Money Laundering Could Help Stem Campaign Finance Corruption

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NOTE

BLIND MONEY: HOW MONEY LAUNDERING COULD HELP STEM CAMPAIGN FINANCE CORRUPTION

I. INTRODUCTION

When everyday Americans want the government to act in their interest, they use the old-fashioned method of going to the voting booth.[1] Next, they cast a vote while hoping that fifty-one percent of Florida and Ohio think the same way that they do.[2] But when we consider a corporation with many more resources, the process is very different.[3] For these entities, the steps to influencing United States politics are much more convoluted, but much more effective.[4]

If a corporation wishes to have the government act in its interests, it may: first, make it publicly known that it is willing to spend up to one million dollars on the next presidential race.[5] Second, the corporation then donates a small amount to either side with the threat of more money on the horizon.[6] In response to the now credible threat of the corporation donating to their opponent's campaign,[7] both candidates will then fight with each other over who is the candidate that is most supportive of the relevant business sector.[8] Finally, after both major candidates have

1. *Overview of the Presidential Election Process*, USA.GOV, https://www.usa.gov/election (last updated Jan. 2, 2018).

2. Bobby Cervantes, *Barack Obama, Mitt Romney Best Al Smith Jokes*, POLITICO (Oct. 19, 2012, 9:28 AM), http://www.politico.com/news/stories/1012/82621.html.

3. *Senator Kerry Backs Amending the Constitution*, FREE SPEECH FOR PEOPLE.ORG (Feb. 3, 2010), https://freespeechforpeople.org/senator-kerry-backs-amending-the-constitution (noting on the *Citizens United* ruling: "[T]he system has now been tilted inexorably towards those who have the most money").

4. *Id.*

5. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 231-32 (2011).

6. *Id.* at 258-59.

7. *Id.*

8. Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 845-46 (1998) (describing "rent seeking" behavior by politicians).

voiced their support for policies that are favorable to the corporation's business, the corporation donates to both sides.[9] Under this model, it does not matter which candidate wins, the corporation will have the politician's ear either way.[10]

Such a model is disfavored[11] because it does not lead to a government that is truly representative of the people's interests.[12] Thus, money in politics becomes a backbone of numerous problems in this country, leading to policies that favor the few with the most resources.[13]

Since the 2000 election cycle, the amount of money spent on elections has more than doubled.[14] With each consecutive election cycle, there is another uptick in the amount of money being spent on campaigns across the nation, both in congressional and presidential races.[15] However, the mere fact that corporations can spend money on elections is not the overarching problem[16] because campaigns need money.[17] To assert that campaigns should not take outside money would likely never be upheld by the Supreme Court[18] and hinder the ability for smaller movements to access the media.[19] Donations are a beneficial way for candidates to reach a large audience and gain support nationwide.[20] Money's existence in the democratic process alone is not the problem.[21]

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9. Jason Cohen, *The Same Side of Two Coins: The Peculiar Phenomenon of Bet-Hedging in Campaign Finance*, 26 N. ILL. U. L. REV. 271, 316-19, 320-21 (2006).

10. Spencer MacColl, *Democrats and Republicans Sharing Big-Dollar Donors, DCCC's Million-Dollar Pay-Off and More in Capital Eye Opener: November 10*, OPENSECRETS.ORG (Nov. 10, 2010), https://www.opensecrets.org/news/2010/11/democrats-and-republicans-sharing-b.

11. Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era*, 40 FORDHAM URB. L.J. 723, 729 (2012).

12. *Id.*

13. *Id.* at 728-29.

14. *Cost of Election*, OPENSECRETS.ORG, https://www.opensecrets.org/overview/cost.php (last visited Nov. 10, 2018) (noting that the total cost of 2000 election was $3.08 billion and the total cost of 2016 election was $6.44 billion).

15. *Id.*

16. Jonathan Soros, *Soros: Big Money Can't Buy Elections—Influence is Something Else*, REUTERS (Feb. 10, 2015) http://blogs.reuters.com/great-debate/2015/02/09/soros-there-is-no-idyllic-pre-citizens-united-era-to-return-to; Zócalo Public Square, *Do We Really Need Campaign Finance Reform?*, TIME (Jan. 19, 2016), http://time.com/4182502/campaign-finance-reform.

17. Soros, *supra* note 16.

18. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) ("As a 'restriction on the amount of money a person or group can spend on political communication during a campaign,' that statute 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'").

19. *See* Ayres & Bulow, *supra* note 8, at 876; Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1084 (1996).

20. *Id.* at 877.

21. Zócalo Public Square, *supra* note 16.

The problem is that our current system allows for politicians to scratch the back of their donors after they are elected.[22] The United States currently has a system of quid pro quo politics: where wealthy donors give money to campaigns so that they can reap the benefits in the form of favorable policy in government.[23] Candidates and their donors can engage in this system in two different ways.[24] First, the candidate can "perform" to push businesses to act, expecting the donors to return the favor.[25] Second, donors could put money in the pockets of the candidates as a way to influence their decisions before a legislative decision is made.[26]

To mitigate this issue, the United States has a system whereby certain Political Action Committees ("PACs") must disclose their donors for each election cycle[27] and advertisements must display disclosure statements about the financing for the advertisement.[28] In the past, it has been argued that mandatory disclosure of donors is a way to better inform the public while not restricting freedom of speech.[29] After the stringent disclosure requirements in the Bipartisan Campaign Reform Act of 2002 ("BCRA") were passed[30] and upheld,[31] politicians continue to pass legislation that benefits donors.[32] For this reason, an ample solution to the issue at hand cannot focus on disclosure.[33] Instead, this Note offers a solution that limits the ability of donors to get favorable legislation passed, without simply arming a powerless electorate with knowledge of the money at stake.[34] When voters are faced with candidate options that have both been "bought" by the same companies,[35] disclosure does not help their decision-making.[36]

22. Ayres & Bulow, *supra* note 8, at 845.

23. *Id.*

24. *Id.* at 845-46 (describing "rent seeking" and "rent extraction" behavior).

25. Ayres & Bulow, *supra* note 8, at 845.

26. *Id.* at 846.

27. *What Super Pacs, Non-Profits, and Other Groups Spending Outside Money Must Disclose About the Source and Use of Their Funds*, OPENSECRETS.ORG, https://www.opensecrets.org/outside spending/rules.php (last visited Nov. 10, 2018).

28. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 368 (2010).

29. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003); *Citizens United*, 558 U.S. at 371 ("We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.").

30. Bipartisan Campaign Reform Act, 2 U.S.C. § 434(f)(1)-(f)(2) (2002).

31. *Citizens United*, 558 U.S. at 371.

32. *See Big Pharma's ObamaCare Reward*, WALL ST. J. (Feb. 5, 2015, 7:01 PM), https://www.wsj.com/articles/big-pharmas-obamacare-reward-1423180690.

33. Ayres & Bulow, *supra* note 8, at 844.

34. *See infra* Part IV.

35. MacColl, *supra* note 10.

36. Ayres & Bulow, *supra* note 8, at 844.

Experts in the area, including Bruce Ackerman, Ian Ayres, and Jeremy Bulow, have long since advocated for a system where campaign contributions are completely anonymous.[37] In this system, the candidates and their campaign teams would not know which corporations have donated.[38] This way, candidates will not know with whom they should engage in quid pro quo politics.[39] This Note will not only discuss the benefits of the anonymous system, but will also propose a new way to employ this system that better helps maintain anonymity.[40] In their article, Ayres and Bulow devised a system where each candidate has her own trust that donors can put money into anonymously.[41] Although a system that allows candidates and donors to have access to the same trust[42] would not be properly equipped to truly ensure anonymity, a two trust setup in a money laundering-type system would make it more difficult for the candidate to determine *who* donated *how much*.[43]

Part II discusses the history of campaign finance and the formation of the current system resulting from a long line of Supreme Court cases.[44] Part II also discusses the different rationales and reasons used to uphold limits on campaign contributions as well as reasons to eliminate limits on campaign contributions.[45] Part III discusses the current landscape of campaign finance law and its shortcomings.[46] Part III elaborates on the point that the issue is beyond the mere fact that money exists in our political system.[47] Part IV proposes a solution of anonymity that will deter politicians and corporations from engaging in quid pro quo politics and creates a system that lacks the appearance of corruption.[48]

II. HISTORY OF CAMPAIGN FINANCE

The history of campaign finance is not a linear saga that culminates in corporations being considered people in the 2010 *Citizens United*

37. *See id.* at 845; *see also* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 93 (2002); Bruce Ackerman & Ian Ayres, *The New Paradigm Revisited*, 91 CAL. L. REV. 743, 759 (2003).

38. Ayres & Bulow, *supra* note 8, at 877.

39. *Id.*

40. *See infra* Part IV.

41. Ayres & Bulow, *supra* note 8, at 854.

42. *Id.*

43. *See infra* Part IV.

44. *See infra* Part II.

45. *See infra* Part II.

46. *See infra* Part III.

47. *See infra* Part III.

48. *See infra* Part IV.

case.[49] Rather, campaign finance history has a long and cyclical history full of ebbs and flows.[50] This Part begins with a discussion of the Federal Election Campaign Act of 1971 ("FECA 1971")[51] and its amendments in 1974 ("FECA 1974")[52] in Subpart A.[53] Subpart B of this Part discusses *Buckley v. Valeo* and its First Amendment rationale.[54] Subpart B also examines *Bellotti* and its bearing on corporate speech.[55] Subpart C explains a shift in the jurisprudence, starting with a discussion of *Austin v. Michigan Chamber of Commerce* and its rationales to uphold limits on campaign contributions.[56] Subpart C reviews BCRA[57] and its limits in PACs.[58] Subpart C also discusses *McConnell v. Federal Election Commission* and the Court's decision to uphold BCRA.[59] Subpart D analyzes the *Citizens United v. Federal Election Commission* decision and its shift back to rationales used in *Buckley*.[60] Subpart D also lays out the current landscape of contribution limits.[61]

A. Reigning in Corruption with FECA

After the 1968 Presidential election was steeped in campaign misconduct, a Justice Department spokesman announced in 1970 that violators of existing campaign finance law would not be prosecuted.[62] This led to FECA 1971,[63] which had stronger disclosure requirements

49. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978) (holding that corporations are people in the sense that they get afforded First Amendment protections); *Campaign Finance Reform Legislation: Hearing Before the Comm. on H. Oversight H.R.*, 104th Cong. 173 (1995) [hereinafter *Hearing Before the Comm. on H. Oversight H.R.*] (statement of Hon. William M. Thomas, Chairman of the Committee).

50. *Hearing Before the Comm. on H. Oversight H.R., supra* note 49 ("Beginning in the early 1970s, with less than 1,000 PACs and peaking out at around 4,000 total PACs—there hasn't been a continuous growth of new PACs, they have been ebbing and flowing, but a continuation in number."); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 586 (2011).

51. Federal Election Campaign Act, 2 U.S.C. §§ 431-432 (1971).

52. Federal Election Campaign Act, 18 U.S.C. §§ 591-607 (1974).

53. *See infra* Part II.A.

54. *See infra* Part II.B.1.

55. *See infra* Part II.B.2.

56. *See infra* Part II.C.1.

57. Bipartisan Campaign Reform Act, 2 U.S.C. §§ 431-456 (2002).

58. *See infra* Part II.C.2.

59. *See infra* Part II.C.3.

60. *See infra* Part II.D.1.

61. *See infra* Part II.D.2.

62. ROBERT E. MUTCH, BUYING THE VOTE 130 (2014) ("House Clerk W. Pat Jennings sent Attorney General John Mitchell a list of twenty Nixon fundraising committees that failed to a single report for the 1968 campaign, and the names of 107 congressional candidates who had also violated disclosure requirements.").

63. *Id.*

than the Federal Corrupt Practices Act of 1925.[64] Even though FECA 1971 had stronger disclosure requirements, Congress weakened the contribution and expenditure limits.[65] This was done by circumventing the Taft-Hartley Act of 1947.[66] The Taft-Hartley Act of 1947 banned direct contributions to elections by corporations,[67] whereas FECA 1971 allowed corporations to use treasury funds to establish PACs that accept donations and spend them on elections.[68] The weakened contribution and expenditure limits were a result of the advent of PACs.[69] Another problem with FECA 1971 was that it did not set up an independent body to police these disclosure requirements.[70] After further revelations of Nixon campaign misconduct during the 1972 election cycle, Congress amended FECA in 1974.[71] The amendments strengthened and added "teeth" to the previous bill by including the creation of the Federal Election Commission ("FEC"), a separate agency tasked with enforcing these new laws.[72]

B. Opening the Floodgates

1. *Buckley* (1976)

With the beefed-up limits and disclosure requirements as part of FECA 1974, the Act was almost immediately challenged by reform opponents in the Supreme Court.[73] The Supreme Court held in *Buckley v. Valeo*[74] that the direct contribution limit in FECA 1974[75] was constitutional because of the importance of fighting quid pro quo corruption.[76] The expenditure ban in FECA 1974 put limits on the amount of money a given person could spend in one election cycle.[77] Regarding the limit on expenditures, the Court held that it was unconstitutional because it was a limit on First Amendment rights.[78]

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64. *Id.*
65. *Id.*
66. FEDERAL ELECTION COMMISSION, THE FIRST 10 YEARS 2 (1985).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*; MUTCH, *supra* note 62, at 139.
72. MUTCH, *supra* note 62, at 139.
73. *Id.*
74. 424 U.S. 1 (1976).
75. Federal Election Campaign Act, 18 U.S.C. § 608 (1974).
76. *Buckley*, 424 U.S. at 28-29.
77. *Id.* at 19-20.
78. *Id.* at 21, 23.

Much of the reasoning in *Buckley v. Valeo* was used as a rationale for the holding in *Citizens United*.[79] This was the first time that the idea that First Amendment rights were more important than the appearance of quid pro quo corruption received the Supreme Court's attention.[80] This idea can first be traced to Ralph K. Winter, who laid out this position in an American Enterprise Institute publication in 1974.[81] Winter, a Yale Law School professor, argued that in the reformers' rush to stop future corruption scandals, FECA reforms would not actually stop this kind of corruption.[82] Instead, Winter argued that the reform would unconstitutionally limit First Amendment freedom of speech.[83] Winter went on to represent Senator James Buckley in his attack on FECA 1974 in front of the U.S. Supreme Court[84] and employ his First Amendment argument.[85]

Overall, the Court upheld disclosure statements and contribution limits because of a new "anticorruption rationale."[86] This was a novel exception to the First Amendment given that the Court could not cite a single case where campaign finance law was upheld to prevent quid pro quo politics.[87] However, the Court saw expenditure limits as crossing the line and therefore unconstitutional.[88]

2. *Bellotti* (1978)

In 1978, the U.S. Supreme Court decided *First National Bank of Boston v. Bellotti*.[89] At issue was a Massachusetts law that prohibited corporations from contributing to candidate and ballot-measure

79. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) ("As a 'restriction on the amount of money a person or group can spend on political communication during a campaign,' that statute necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" (citation omitted)).

80. MUTCH, *supra* note 62, at 141.

81. *Id.* at 140.

82. RALPH K. WINTER, JR., WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER 23-24 (1974).

83. WINTER, JR., *supra* note 82, at 27 ("There is no room for price controls in the marketplace of ideas."); Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 801 (2016) ("[Winter] also condemned contribution limits as 'an explicit restriction on political freedom' that 'establishes a dangerous precedent' of government regulation of freedom of speech and association.").

84. John R. Bolton, *The Struggle to Preserve a Free Political System*, AMERICAN ENTERPRISE INSTITUTE (Jan. 22, 2016, 12:00 PM), http://www.aei.org/publication/the-struggle-to-preserve-a-free-political-system.

85. *Id.*

86. Buckley v. Valeo, 424 U.S. 1, 24, 26, 68, 143 (1976).

87. MUTCH, *supra* note 62, at 144.

88. *Buckley*, 424 U.S. at 45.

89. 435 U.S. 765 (1978).

elections.[90] The ballot measure at issue was an amendment to the state tax code.[91] The First National Bank of Boston wanted to spend company treasury funds to oppose the law[92] and asserted that the Massachusetts law had violated its First Amendment rights.[93] Justice Powell, writing for the majority, stated that the question is not whether corporations have First Amendment rights, but whether the Massachusetts law in question abridges speech meant to be protected by the First Amendment.[94] This important framing helped the Court look at the speech itself without tackling the philosophical conundrum of whether corporations are people.[95] In doing so, the Court said of the speech: "[w]e thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."[96]

C. Stemming the Tide

1. *Austin* (1990)

In *Austin v. Michigan Chamber of Commerce*,[97] the Court upheld a Michigan statute that prohibited corporations from donating money out of their general treasury funds to advocate for a candidate seeking election.[98] These are "independent expenditure" donations that do not go directly to the candidate but are spent on behalf of the candidate and fell out of the purview of the limits in *Buckley*.[99] *Buckley* upheld limits on "direct contributions" or "hard money" donations.[100]

Michigan's concern in enacting this statute was not merely to protect democracy from unequal speech whereby corporations could influence elections heavily,[101] but the act also sought to stop the distortive nature of corporate speech in elections.[102] The fact that

90. *Id.* at 767-68.
91. *Id.* at 769.
92. *Id.*
93. *Id.* at 770.
94. *Id.* at 776.
95. *Id.* at 777.
96. *Id.* at 784.
97. 494 U.S. 652 (1990).
98. *Id.* at 654, 660.
99. *Id.* at 659.
100. Buckley v. Valeo, 424 U.S. 1, 143 (1976).
101. *Austin*, 494 U.S. at 659-60 ("The act does not attempt 'to equalize the relative influence of speakers on elections.'").
102. *Id.* at 660 ("[T]he 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

corporations gained the wealth that they were spending on elections not through public support—but by the virtue of their economic enterprise—meant that their speech distorted public opinion.[103] The statute at issue "ensure[d] that expenditures reflect actual public support for the political ideas espoused by corporations."[104]

The formulation of *Austin* broke away from *Buckley* in a few ways: it rejected the rigid formula of weighing corruption against First Amendment Speech, it moved away from the divide between expenditure and contribution limits, and it let stand a direct ban on expenditures.[105] This antidistortion rationale is important because it gives a foothold to one side of the debate that corruption concerns can be weighed against First Amendment speech.[106] Although the "antidistortion rationale" is not well articulated in the decision, it broaches the possibility that corruption can be broader than just bribery-like conduct.[107]

2. BCRA's Contribution Limits

Signed by then President George W. Bush, BCRA [108] was the first major piece of campaign reform legislation since FECA.[109] In the meantime, between *Austin* and the passage of BCRA, both President George H.W. Bush and President Bill Clinton had proposed bills to reform campaign finance,[110] but both times Congress killed the proposed bills.[111]

BCRA prohibited corporations from paying for independent expenditures with their general treasury funds.[112] Corporations instead had to set up PACs to make this kind of independent expenditure.[113] Prior to BCRA, PACs and corporations could use independent expenditures to advocate for the election of a specific candidate as long as the group did not coordinate with the candidate.[114] If there was

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public's support for the corporation's political ideas.").

103. *Id.*

104. *Id.*

105. Jacob Eisler, *The Deep Patterns of Campaign Finance Law*, 49 CONN. L. REV. 55, 64-65 (2016).

106. Austin v. Mich. Chamber of Commerce, 494 U.S. 660 (1990).

107. Eisler, *supra* note 105, at 65.

108. Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections as People?*, 39 WASH. ST. U. L. REV. 203, 206 (2012).

109. MUTCH, *supra* note 62, at 162.

110. *Id.* at 163.

111. *Id.*

112. Imtanes, *supra* note 108, at 206.

113. *Id.*

114. *Id.*

coordination, then it would have been considered a direct contribution and therefore subject to direct contribution limits.[115] But BCRA changed this and made advocacy for or against the election of a candidate identical to coordination with a candidate.[116] This meant that independent expenditures, that were not coordinated with a candidate which previously enjoyed no limitations, were now subject to direct contribution limits.[117]

3. *McConnell* (2003)

The Court upheld the limits on "soft money" that were part of BCRA;[118] this is money donated, not to a specific candidate, but to a political party in order to fund the party's election activities in general.[119] First, the Court explained how the amount of soft money in elections had been skyrocketing.[120] The Court then referenced the ulterior motives used by some donors who engage in donating to both sides of the aisle.[121] Some donors were clearly using funds not to advance an ideology, but to gain access to federal candidates.[122] Faced with First Amendment protections, the Court acknowledged that there is a strong interest in the "integrity of our electoral process."[123] The majority opinion referenced corruption and the appearance of corruption, as well as the antidistortion rationale, as reasons to uphold contribution limits.[124] The evidence in the record, as well as common sense, showed that large soft-money donations had a corrupting influence in politics.[125] Included in the record was testimony about the subtlety of this corruption by Robert Rozen, a D.C. lobbyist, who stated that when it

115. *Id.*
116. *Id.*
117. *Id.*
118. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 139, 154 (2003).
119. Charles Davis, *Kavanaugh and Campaign Finance:* Republican National Committee v. Federal Election Commission, SCOTUSBLOG (July 13, 2018, 2:28 PM), http://www.scotusblog.com/2018/07/kavanaugh-and-campaign-finance-republican-national-committee-v-federal-election-commission.
120. *McConnell*, 540 U.S. at 124 ("Of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000.").
121. *Id.* at 124-25.
122. *Id.*
123. *Id.* at 136.
124. *Id.*; Imtanes, *supra* note 108, at 206-07 ("The Court in *McConnell* upheld most of BCRA, finding that corruption and its appearance was a compelling enough Government interest to impose these limits.").
125. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 145 (2003).

comes to quid pro quo contributions "words are rarely exchanged" and "people do have understandings."[126]

A factor that aided in the decision to uphold contributions limits was the fact that the majority used "closely drawn scrutiny" in deferring to Congress.[127] The Court stated that Congress should receive deference regarding its ability to weigh the interests of sanctity of the electoral process and free speech.[128] Justices Thomas and Kennedy had objected to the Court not using "strict scrutiny" in past decisions regarding campaign contributions.[129]

The Court reasoned that the contribution limits in BCRA have little impact on restricting the ability of contributors to engage in effective political speech.[130] In summarizing the case law on campaign finance reform, the majority stated that "[o]ur cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."[131] Corruption was not confined to "cash-for-votes exchanges"[132] but also extended to "the broader threat from politicians too compliant with the wishes of large contributors."[133] Included in the corruption rationale was the equally important "[g]overnment[] interest in combating the appearance or perception of corruption engendered by large campaign contributions."[134] The Court recognized that Congress had authority to legislate against large donors who made voters unwilling to participate in democratic governance.[135] In upholding contribution limits, the Court set a precedent for using a lower standard of review[136] in deferring to Congress and maintained three important arguments that, to them, outweighed First Amendment free speech: (1) antidistortion,[137] (2) corruption,[138] and (3) apparent corruption.[139]

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126. *See id.* at 147. Where a $2000 donation to an opponent's campaign may silently signal a credible threat of more expenditures to come that would benefit the opponent, no words need to be exchanged to exact influence. LESSIG, *supra* note 5, at 258-59.

127. *McConnell*, 540 U.S. at 137.

128. *Id.* at 137.

129. *Id.*

130. *Id.* at 138.

131. *Id.* at 143.

132. *Id.*

133. *Id.*; J. Robert Abraham, Note, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1088 (2010).

134. *McConnell*, 540 U.S. at 143 (2003); Buckley v. Valeo, 424 U.S. 1, 27 (1976).

135. *McConnell*, 540 U.S. at 143-44.

136. Ashna Zaheer, Note, *Judging Judges: Why Strict Scrutiny Resolves the Circuit Split Over Judicial Speech Restrictions*, 87 NOTRE DAME L. REV. 879, 901-02 (2011).

137. *McConnell*, 540 U.S. at 136.

138. *Id.*

139. *Id.*

D. Reopening the Floodgates

The Court was faced with two different lines of reasoning regarding campaign spending.[140] On one hand was *Austin* and *McConnell*, both reasoning that it was allowable to restrict spending because of an anticorruption interest.[141] On the other hand was pre-*Austin* reasoning, *Buckley* and *Bellotti*, that stated independent expenditures could not be restricted because First Amendment protection outweighed the threat of corruption.[142] The Court overturned *McConnell* and held that limitations on soft money were unconstitutional.[143] The Court upheld disclosure and disclaimer requirements for ads "on the ground[s] that they . . . help citizens 'make informed choices in the political marketplace.'"[144]

In reviewing the First Amendment implications of BCRA's Section 441b limit on independent expenditures, Justice Kennedy said "strict scrutiny" is the standard of review, or, more specifically, that a "narrowly tailored" statute that furthers a "compelling interest" is needed to uphold a restriction on free speech.[145] This would provide a higher threshold for the soft money ban to reach in order to be upheld as constitutional,[146] given that the *McConnell* Court used "closely drawn scrutiny," which only requires that the government provide a "sufficiently important interest."[147]

1. *Citizens United* (2010)

The Court starts its analysis of whether independent expenditures can be restricted by summarizing campaign finance law up until 2010.[148] The Court then evaluates the three arguments in the *Austin* decision that

140. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 348 (2010).

141. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 143-45, 154 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 660 (1990).

142. *Citizens United*, 558 U.S. at 346-47.

143. *Id.* at 365-66 ("The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin* and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled." (citations omitted)).

144. *Id.* at 367 (citation omitted).

145. *Id.* at 340 ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (citation omitted)).

146. Bob Bauer, *Contribution Limits and "Standards of Review"*, MORESOFTMONEYHARDLAW.COM (Mar. 3, 2017), http://www.moresoftmoneyhardlaw.com/2017/03/contribution-limits-standards-review.

147. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003).

148. *Citizens United*, 558 U.S. at 342-48.

were used to uphold contribution limits: (1) antidistortion, (2) corruption, and (3) apparent corruption.[149]

Antidistortion was first.[150] The antidistortion rationale was described as the government's interest in preventing corporations from "obtaining an 'unfair advantage in the political marketplace'" by virtue of their resources gained in the "economic marketplace."[151] As stated earlier, the government wanted to make sure that the political sphere reflected the views of the public instead of the few wealthiest donors who could use their massive wealth to distort the picture.[152] This argument was attacked first as being in violation of *Bellotti*[153] because this rationale meant that speech was being restricted by virtue of who is saying it.[154] The Court then said it is irrelevant to evaluate the correlation between corporate donations and the public's support for the corporation's ideas for purposes of First Amendment analysis.[155] On the contrary, the Court said that the First Amendment protects the "open marketplace" of ideas."[156] Overall, the antidistortion rationale did not persuade the majority and the Court held that potentially distorting public opinion was not enough to restrict the First Amendment.[157]

The next argument that the government offered to justify restricting independent expenditures was the corruption rationale.[158] Justice Kennedy started his analysis with the *Buckley* ruling.[159] *Buckley*'s rationale submitted that the interest of stopping corruption was valid to justify limits on "direct contributions," but this reasoning could not justify limits on "independent expenditures."[160] The Court then plainly states that preventing quid pro quo corruption is "not sufficient to

149. *Id.* at 348-49, 356.

150. *Id.* at 349.

151. *Id.* at 350.

152. Austin v. Mich. Chamber of Commerce, 494 U.S. 660 (1990).

153. *Citizens United*, 558 U.S. at 349-50.

154. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978).

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id.

155. *Citizens United*, 558 U.S. at 351.

156. *Id.* at 354 (quoting N.Y. St. Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

157. *Id.* at 356.

158. *Id.* at 356-57.

159. *Id.*

160. *Id.* at 356-57 ("The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.").

displace . . . speech."[161] Justice Kennedy goes a step further and states that independent expenditures do not give rise to corruption.[162] To explain this assertion, the Court reasoned that independent expenditures give speakers "influence" and "access," but that does not mean the politicians involved in such relationships are corrupt.[163]

Finally, in addressing the final government argument, the Court concluded that independent expenditures do not give rise to the appearance of corruption.[164] Justice Kennedy addressed the rationale behind the appearance of corruption argument and claimed that the appearance of influence does not cause the electorate to lose faith in the democratic process.[165] The dispelling of these three arguments led the Court to overturn *Austin* and *McConnell*,[166] swinging the Court's approach to campaign finance restrictions back to that of the *Buckley* and *Bellotti* Courts.[167]

2. Current Landscape and *Speechnow.org* (2010)

After *Citizens United*, the Court partly upheld and partly overturned BCRA.[168] We are left with a campaign finance system that yields an increase in spending with every successive election cycle[169] and transparency with regard to disclosure statements.[170] But the fact that money *exists* in elections is not the problem;[171] the problem is money's ability to *influence* and buy access.[172] The United States' current system does require disclosures from certain PACs, but some choose to disclose to the public anyway.[173] PACs are the independent organizations set up

161. *Id.* at 357.

162. *Id.* at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption."); Imtanes, *supra* note 108, at 208.

163. *Citizens United*, 558 U.S. at 359.

164. *Id.* at 360; Imtanes, *supra* note 108, at 208.

165. *Citizens United*, 558 U.S. at 360.

166. *Id.* at 363, 365-66.

167. *Id.* at 365.

168. *Id.* at 365 ("*Austin* is overruled, . . . 'effectively invalidat[ing] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy.'"); *id.* at 371 ("For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand.").

169. *Cost of Election*, OPENSECRETS.ORG, https://www.opensecrets.org/overview/cost.php (last visited Nov. 10, 2018) (noting that the total cost of 2000 election was $3.08 billion and total cost of the 2016 election was $6.44 billion).

170. *Citizens United*, 558 U.S. at 371.

171. Zócalo Public Square, *supra* note 16.

172. Ayres & Bulow, *supra* note 8, at 848-49; Benson, *supra* note 11, at 740.

173. *Political Nonprofits (Dark Money)*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Nov. 10, 2018).

to spend money as independent expenditures.[174] They are usually setup as 527s or 501(c)s.[175] But 501(c)(4) and 501(c)(6) nonprofit corporations do not need to disclose their donors to the IRS.[176] Disclosure and disclaimer requirements have been upheld because they help voters make informed choices, while political advertisements hide behind dubious and misleading names.[177] With disclosure and disclaimer statements, voters are better informed about the person or group who is speaking.[178] Armed with such information, the electorate can then better hold politicians accountable for their positions and corporate supporters.[179] Finally, the Court qualified its position of upholding these requirements by stating that disclosure and disclaimer statements do not chill free speech.[180] The argument was made by *Citizens United* that some donors would be dissuaded from speaking because of potential retaliation.[181] The Court said that if those contentions were valid then that would be a legitimate concern;[182] however, the Court found that those concerns were unfounded.[183]

To overcome *Citizens United*, if the Supreme Court were to hear this issue again, the opposition would have to deal with the precedent that, under strict scrutiny, corruption, appearance of corruption, and distortion are not enough of a reason to restrict the First Amendment.[184] The issue has come up in the courts since the *Citizens United* ruling with little change in the landscape of campaign finance law.[185]

SpeechNow.org v. Federal Election Commission can be viewed as going even further than *Citizens United*[186] because the D.C. Circuit

174. MUTCH, *supra* note 62, at 177.

175. *See id.* Political organizations governed under the Internal Revenue Code Section 527 are referred to by the Section number for simplicity's sake. *See 527 Basics*, OPENSECRETS.ORG, https://www.opensecrets.org/527s/basics.php (last visited Nov. 10, 2018). These organizations are generally created for the purpose of influencing a political issue or election, and generally can raise an unlimited amount of funds from their donors. *Id.* A nonprofit, tax-exempt group, which can engage in some type of political activity, can be created under the Internal Revenue Code Section 501(c). *See Types of Advocacy Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/527s/types.php (last visited Nov. 10, 2018). The groups range in purpose, from religious charities under 501(c)(3), to labor and agricultural groups under 501(c)(5). *Id.*

176. *Political Nonprofits (Dark Money)*, *supra* note 173.

177. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 367 (2010).

178. *Id.* at 368.

179. *Id.* at 370.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 370.

184. *Id.* 357, 365-66.

185. *See* SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 696-98 (D.C. Cir. 2010).

186. Jeff Patch, *March of Freedom Continues in* SpeechNow.org v. FEC, CENTER FOR

Court stated that, as a matter of law, independent expenditures do not pose a danger to corrupt or espouse the appearance of corruption.[187] *SpeechNow.org* also extended the ban on restrictions on independent expenditures to groups whose only purpose is making independent expenditures.[188]

III. PROBLEMS OF OUR CURRENT SYSTEM

> "As a fund-raising senator once jokingly said to me, 'Warren, contribute $10 million and you can get the colors of the American flag changed.'"
> —Warren E. Buffett[189]

This Part will outline the different types of corruption that are present in the current United States election system and how they affect democracy.[190] Several types of corruption have been put forth as reasons for reforming our campaign finance system in cases such as *Austin* (corruption, appearance of corruption, and antidistortion),[191] *McConnell* (corruption and appearance of corruption),[192] and *Citizens United* (antidistortion, corruption, and appearance of corruption).[193] Corruption can be classified as either quid pro quo corruption or influence/access corruption.[194]

COMPETITIVE POLITICS (Mar. 26, 2010), http://www.campaignfreedom.org/2010/03/26/march-of-freedom-continues-in-speechnoworg-v-fec.

187. *SpeechNow.org*, 599 F.3d at 696 ("Instead, we return to what we have said before: because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations. No matter which standard of review governs contribution limits, the limits on contributions to SpeechNow cannot stand.").

188. *Id.*

189. Warren E. Buffett, *The Billionaire's Buyout Plan*, N.Y. TIMES (Sept. 10, 2000), http://www.nytimes.com/2000/09/10/opinion/the-billionaire-s-buyout-plan.html.

190. *See infra* Part III.A–E.

191. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658 (1990) ("The State contends that the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption."); *see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 348 (2010) ("[T]he Government notes the antidistortion rationale on which *Austin* and its progeny rest in part . . . .").

192. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 143 (2003) ("The Government defends § 323(a)'s ban on national parties' involvement with soft money as necessary to prevent the actual and apparent corruption of federal candidates and officeholders.").

193. *Citizens United*, 558 U.S. at 356 ("[T]he Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance."); *id.* at 348.

194. Ayres & Bulow, *supra* note 8, at 844.

A. Quid Pro Quo Corruption

Quid pro quo corruption is the trading of money by wealthy donors to campaigns for specific benefits in return.[195] This corruption can happen in multiple ways.[196] Politicians can engage in "rent extraction," where politicians threaten negative treatment of the corporation or its business unless a contribution is made to their campaign.[197] This is political speech that is akin to extortion.[198] Corporations have no choice but to pay for a seat at the table or they will end up on the menu.[199] Implicit deals can also be made where the donor performs by donating money and expects performance by the politician later on.[200]

This is corruption in its classic form.[201] This is plain bribery that, if found to be the fruit of coordinated efforts, results in criminal charges.[202] These transgressions are not new to Washington.[203] For example, Congressmen Randy "Duke" Cunningham and William J. Jefferson were both convicted on corruption charges.[204] Cunningham (R-Cal.; 1991-2005) was sentenced to eight years and four months in prison for giving out government defense contracts in exchange for cash totaling $2.4 million.[205] Jefferson (D-La.; 1991-2009) was sentenced to thirteen years in prison because of his abuse of his position on the House Ways and Means Committee to seek hundreds of thousands of dollars in bribes from oil, sugar, and communications businesses.[206] This type of activity can be prosecuted through bribery statutes.[207] However, the often implicit nature of these transactions[208] makes it very hard to prove.[209]

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195. *Id.*

196. LESSIG, *supra* note 5, at 228.

197. Ayres & Bulow, *supra* note 8, at 846.

198. *Id.* at 846-47.

199. *Big Pharma's ObamaCare Reward*, *supra* note 32 ("Remember the business line, circa 2009, that if you weren't at the ObamaCare table you were on the menu? Well, Big Pharma sat at the table, gave Mr. Obama what he wanted, and is now back on the menu as the cheese course.").

200. Ayres & Bulow, *supra* note 8, at 845.

201. LESSIG, *supra* note 5, at 226-27.

202. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 259 (2003) (Scalia, J., dissenting) ("Any *quid-pro-quo* agreements for votes would of course violate criminal law."); LESSIG, *supra* note 5, at 226-27.

203. *See* LESSIG, *supra* note 5, at 226-27.

204. *Id.*

205. *Id.* at 226.

206. David Stout, *Ex-Louisiana Congressman Sentenced to 13 Years*, N.Y. TIMES (Nov. 13, 2009), http://www.nytimes.com/2009/11/14/us/politics/14jefferson.html.

207. LESSIG, *supra* note 5, at 228.

208. Ayres & Bulow, *supra* note 8, at 845.

209. Paul A. Engelmayer, *Proving Bribery Isn't Easy*, WALL ST. J. (Mar. 2, 2001), https://www.wsj.com/articles/SB983494389378921301.

B. Influence and Access Corruption

> "Anytime someone, whether a person or a PAC, gives you a large sum of money, you can't help but feel the need to give them extra attention, whether it is access to your time or, subconsciously, the obligation to vote with them."
> —Rep. John Bryant (D-Tex.; 1983-1997)[210]

Influence corruption is a transaction in which donors make contributions to candidates in order to influence the candidate's deliberation in executing her duties as a representative.[211] This may seem like quid pro quo corruption, but it can be distinguished.[212] Where quid pro quo corruption involves specifically "[t]aking this in exchange for that,"[213] influence corruption encompasses a more tenuous transaction where donors seek to influence the independence of the politician's decision-making while in office.[214] These transactions depend on a basic trust that the donation will be reciprocated at a time when it is appropriate.[215] This corruption manifests itself as either an attempt to influence the discretion of the politician pertaining to certain issues before them[216] or unequal access to the politician in favor of the donor.[217]

Although the connection between donations and government action seems tenuous given the lack of coordination, these donations yield a very high return on investment.[218] Another reason this type of agreement

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210. LARRY J. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 126 (1984).

211. Ayres & Bulow, *supra* note 8, at 849.

212. LESSIG, *supra* note 5, at 231.

213. *Id.* at 226.

214. *Id.* at 230-31 (describing "dependence corruption" in similar terms as influence corruption); Ayres & Bulow, *supra* note 8, at 844. This corruption manifests itself as a gift economy that is grounded on relationships where actors feel obligated to reciprocate favors for one another. LESSIG, *supra* note 5, at 110. Influential actors later seek to draw upon these relationships to achieve the economic policy ends they seek. *Id.*

215. DAN CLAWSON, ALAN NEUSTADTL & DENISE SCOTT, MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 79 (1992).

216. SABATO, *supra* note 210, at 127 ("[S]ome legislators confess that PAC dollars affect their judgment on the issues before them.").

217. *Id.* ("Political analysts have long agreed that access is the principal goal of most interest groups, and lobbyists have always recognized that access is the key to persuasion.").

218. CLAWSON, NEUSTADTL & SCOTT, *supra* note 215, at 98.

> Because of the tax loopholes enacted by Congress over the years, a single company (AT&T) was able to earn nearly $25 billion in profits from 1982 through 1985 without paying one penny of taxes—in fact, the government actually paid AT&T $635 million in tax rebates. The company's tax savings totaled more than $12 billion.
> AT&T has had a number of PACs. From 1979 through 1986, those PACs contributed nearly $1.4 million to congressional candidates, mainly incumbents. So an officer or director of AT&T might calculate that on the $12.1 billion tax saving alone, the nearly

is favored is because of the social ramifications of quid pro quo politics.[219] In addition to being illegal, explicit buying of government action in the form of donations can push politicians away.[220] Authors Dan Clawson, Alan Neustadtl, and Denise Scott posit the idea that donors paying politicians for specific votes is a myth.[221] The authors claim that money does not buy votes specifically, but it creates influence over the politician's behavior where politicians are "eager to do favors for corporations" and "do not need to be forced."[222] Corporate donors also understand that highly visible issues are insulated from donor influence.[223] This is because politicians cannot stray too far from their constituents' will when the public is aware of the issue.[224] It is the low-visibility issues where a donor's influence can take hold—since the public is largely unaware.[225] Access-oriented PACs do not focus on major legislation, instead, these PACs dwell in the spheres of influence concerning the wording of smaller legislation.[226] For instance, in a piece of tax legislation, a PAC is to be sure that the law has built-in loopholes that protect the corporation.[227] Lawrence Lessig sheds light on instances where this type of conflict of discretion occurs in judicial elections.[228] A judge's discretion is influenced if her decision-making is in conflict between the rule of law and the politics of running an election.[229]

A crucial goal for the PAC is also to get access to members of Congress.[230] Access allows PAC officials to vent their concerns to

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$1.4 million given by the company PAC netted a return of 867,145 percent. *Id.*

219. *Id.* at 110.

220. BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 105 (1988).

> For [Tony] Coelho [D-Calif. and chair of the Democratic Congressional Campaign Committee], . . . he became offended only when the donor suggested an explicit entitlement to official favors. "There is a fine line," Coelho explained. "I don't mind [donors] bringing up that they have a problem [with the government]. But don't ever try to create the impression with me, or ever say it—if you say it, it's all over—that your money has bought you something. It hasn't. There's a real delicate line there . . . .

Id.

221. CLAWSON, NEUSTADTL & SCOTT, *supra* note 215, at 88-89.

222. *Id.* at 89.

223. *Id.*

224. *Id.*

225. *Id.* at 96 ("Companies not only receive what amount to large government handouts, but these are rarely discussed and exposed.").

226. *See id.* at 91-92.

227. *Id.*

228. LESSIG, *supra* note 5, at 229-30.

229. *Id.*

230. CLAWSON, NEUSTADTL & SCOTT, *supra* note 215, at 101.

politicians in a much more personal manner.[231] PAC officials view their ability to meet with a member of Congress as a right, not a privilege.[232] Some academics argue that the size and economic influence of these corporations alone should yield success in accessing members of Congress;[233] however, a PAC director himself argues to the contrary:

> Interviewer: So does the PAC really change anything? Suppose you didn't have a PAC? You'd still have 2,000 employees and a $5 million payroll. . . .
> PAC Director: I wouldn't have the access, and it may sound like bullshit, but I'm telling you very sincerely, I wouldn't know Governor X to the degree that we know the governor and his staff; we wouldn't know Bob Y, the local Congressman, as well as we know him; and we wouldn't know the junior senator as well.[234]

This type of corruption jeopardizes one of the most fundamental intentions of the framers: independence.[235] The framers intended the legislative and judicial branches to be independent in that they depend "upon the People alone."[236] But because of the money that has been donated, that independence is corrupted and it influences the elected official's ability to serve the interests of the people.[237]

C. The Appearance of Corruption

Eliminating the appearance of corruption is an important interest of the government[238] and has been for many years prior to the *Citizens United* ruling.[239] The appearance of corruption is a problem because of its effect on the public's trust.[240] When there is evidence of the appearance of corruption, the public believes that the politician's focus

231. *Id.* at 103 ("When corporate lobbyists meet with a member or key staffer, they feel they must have full and complete information, present it honestly, explain why their alternative proposal is reasonable, and make a case it constitutes better policy.").

232. *Id.* at 101-02.

233. *Id.* at 101.

234. *Id.* at 101-02.

235. LESSIG, *supra* note 5, at 230-31.

236. *Id.*

237. Benson, *supra* note 11, at 740.

238. David Axelman, Note, Citizens United*: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents*, 65 U. MIAMI L. REV. 293, 311-12 (2010) ("The interest in preventing corruption, or the appearance thereof, is the most longstanding and widely accepted government interest in campaign finance regulation.").

239. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010) ("In *Buckley,* the Court found this interest 'sufficiently important' to allow limits on contributions but did not extend that reasoning to expenditure limits.").

240. LESSIG, *supra* note 5, at 243.

is not in line with the electorate.[241] The public can see that once the campaign is over, the lobbyists and special interests move in.[242]

The problem with voters losing faith in the process is that it discourages voter participation.[243] One of the primary goals of the founding fathers was to foster citizen participation in the democratic process.[244] Decreased voter participation leads to decreased accountability of elected officials.[245] Not all Justices share this view that the appearance of corruption will cause the electorate to lose faith in democracy.[246] However, Justices Breyer and Souter have expressed their concern over voter cynicism.[247] Justice Stevens acknowledged the fear that voters may lose faith in their ability to influence public policy if they see that government has been captured by corporate interests.[248] Breyer went further in saying that the government has an interest in preserving this faith.[249]

Justice Kennedy is of the opinion that voters do not lose faith in democracy in the face of large independent expenditures.[250] His reasoning highlights that independent expenditures are not coordinated, so the electorate knows that this does not lead to corruption.[251] Kennedy's reasoning is undermined in the face of insider testimony indicating that coordination is unnecessary when influencers have "understandings."[252] Contrast Kennedy's statement about voters with a 2002 survey that found that seventy-six percent of Americans said they

241. *Id.* at 243, 245.

242. *Id.* at 243.

243. Benson, *supra* note 11, at 734 ("Several studies suggest that such participation is dampened if the public perceives that the undue influence of a small number of wealthy interests will drown out their own influence.").

244. *Id.*

245. *Id.* ("Voter engagement promotes accountability, enabling citizens to communicate their preferences to their representatives.").

246. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010) (Justice Kennedy writing for the majority: "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.").

247. Benson, *supra* note 11, at 736.

248. *Citizens United*, 558 U.S. at 470-71 (Stevens, J., dissenting) (discussing the government potentially being unresponsive to voter needs: "The predictable result is cynicism and disenchantment: an increased perception that large spenders call the tune and a reduced willingness of voters to take part in democratic governance." (internal quotations omitted)).

249. Benson, *supra* note 11, at 736.

250. *Citizens United*, 558 U.S. at 360.

251. *Id.*

252. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 147 (2003) ("In my experience, overt words are rarely exchanged about contributions, but people do have understandings." (quoting Declaration of Robert Rozen at 5, McConnell v. Fed. Election Comm'n (D.C. Cir. 2002) (No. 02-0582)).

believed campaign contributions influenced judicial decisions.[253] A *New York Times* article backed up some of these beliefs when it stated that, over a twelve-year period, Ohio judges held in favor of their contributors more than seventy percent of the time.[254] Additionally, forty-six percent of state judges polled in a 2002 survey said that "contributions have at least a little influence."[255] This perceived influence of campaign spenders on politicians weakens the fairness of the system and then, in turn, weakens public trust.[256]

D. Antidistortion

The decision in *Austin* to allow the government to restrict campaign contributions was rooted in the idea that the government has an interest in preventing the distorting effects that these contributions had on political discourse.[257] Some of the Justices on the Supreme Court, particularly in the liberal wing, hold the view that the antidistortion interest of the government is the same as an anticorruption interest.[258] While other Justices, primarily in the conservative wing, maintain the antidistortion interest as completely separate.[259]

The distortion problem in American politics is the idea that through immense aggregations of wealth, corporations can distort the political landscape with ideas that have little or no correlation to public support.[260] In explaining how this works, Justice Stevens first points out the important differences between the public and corporations.[261] Corporations have limited liability for their owners and managers, perpetual life, and favorable treatment of the accumulation and distribution of assets that enhance their ability to raise capital.[262] Corporations have the responsibility of ensuring society's economic welfare and the resources in their treasury "are not an indication of

253. LESSIG, *supra* note 5, at 229.

254. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Oct. 1, 2006), http://www.nytimes.com/2006/10/01/us/01judges.html.

255. LESSIG, *supra* note 5, at 229.

256. *Id.* at 230.

257. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

258. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 464 (2010) (Stevens, J., dissenting) ("Austin's antidistortion rationale is itself an anticorruption rationale.").

259. *Austin*, 494 U.S. at 703-04 (Kennedy, J., dissenting) ("We have said: 'Corruption is a subversion of the political process' whereby '[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain . . . .' In contrast, the interest touted by the majority is the impermissible one of altering political debate by muting the impact of certain speakers.").

260. *Id.* at 660.

261. *Citizens United*, 558 U.S. at 465 (Stevens, J., dissenting).

262. *Id.*

popular support for the corporation's political ideas."[263] A corporation's resources, instead, reflect "economically motivated decisions of investors and consumers."[264] Justice Stevens goes on to say that the opinions of the voting public may be marginalized[265] because corporations, with their amassed financial resources that only a few individuals can match,[266] can flood the market with advocacy that bears little or no correlation to the ideas of natural persons.[267] Overall, Stevens sees the antidistortion interest as a way to protect the electoral marketplace of ideas in which the nation chooses how it will govern itself.[268] Unfortunately, the most important development in the overturning of the antidistortion rationale was the government's failure to defend this argument.[269]

Consequently, Scalia and the conservative wing of the Court were of the opinion that the American people are capable of distinguishing the substance of speech from its source.[270] In defending corporate speech, Scalia uses a justification similar to Stevens' justification for the opposing view.[271] Both sides fear that someone's voice will be muted if the other side is to prevail.[272]

E. Corruption is Problematic

With politicians beholden not to their constituents but to special interest contributors,[273] why should politicians concern themselves with the positions of their constituents?[274] Considering the better-financed

263. *Id.*
264. *Id.*
265. *Id.* at 469-70.
266. *Id.* at 469.
267. *Id.* at 470.
268. *Id.* at 473.
269. Richard L. Hasen, Citizens United *and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 997 (2011). The government was perceived to have lacked faith in the antidistortion rationale that propped up the original *Austin* decision. *Id*; *see Citizens United*, 558 U.S. at 385 (Scalia, J., concurring) ("[T]o the extent the Government relies on new arguments—and declines to defend *Austin* on its own terms—we may reasonably infer that it lacks confidence in that decision's original justification.").
270. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 258-59 (2003) (Scalia, J., dissenting).
271. *See Citizens United*, 558 U.S. at 393 (Stevens, J., concurring) ("Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy."); *see also id.* at 470 (Stevens, J., dissenting) (referencing the "immediate drowning out noncorporate voices.").
272. *See Citizens United*, 558 U.S. at 393 (Stevens, J., concurring); *see also id.* at 470 (Stevens, J., dissenting).
273. Perry A. Pirsch, *Blind Trusts as a Model for Campaign Finance Reform*, 4 WM. & MARY POL'Y REV. 213, 214 (2012).
274. Asher Schechter, *Study: Politicians Vote Against the Will of Their Constituents 35 Percent of the Time*, PROMARKET (June 16, 2017), https://promarket.org/study-politicians-vote-

politicians win elections more often,[275] it follows that politicians should focus more time and energy on the will of special interest rather than the will of the voting public.[276] Conversely, the more money you have, the more influence you can exert over the formation of public policy.[277] In terms of results, Christopher Ellis,[278] Jesse Rhodes and Brian Schaffner,[279] and Chris Tausanovitch[280] all found that voting in Congress was more responsive to the preferences of those who are more wealthy.[281] The policies favored by the most affluent are the most likely to be enacted, which results in a government that does not reflect the preferences of the poor or middle class.[282] Naturally, wealthier individuals are much more likely to donate to political campaigns than their lower-class counterparts.[283] Those that do donate also tend to hold much more extreme views on policy than their non-donating counterpart.[284] Whereas the public at large has a bell curve-like distribution along the ideological spectrum, donors tend to fall into a bimodal distribution.[285] The result is a government that implements public policy reflecting the "donor class" at the expense of the rest of the public.[286] Policy outcomes become skewed not in favor of the public majority but rather tailored to fit the desires of the wealthy donors.[287]

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will-constituents-35-percent-time.

275. Wesley Lowery, *91% of the Time the Better-Financed Candidate Wins. Don't Act Surprised.*, WASH. POST (Apr. 4, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/04/04/think-money-doesnt-matter-in-elections-this-chart-says-yourewrong/?utmterm=.8ef74304fae6.

276. Ayres & Bulow, *supra* note 8, at 849.

277. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 259-62 (2016); *see also* Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1468 (2015). Lower-class individuals exert no influence, the middle-class exert some influence, and the upper-class exert large influence over politicians. Stephanopoulos, *supra*, at 1468.

278. Christopher Ellis, *Social Context and Economic Biases in Representation*, 75 J. POL. 773, 779 (2013).

279. Jesse H. Rhodes & Brian F. Schaffner, Economic Inequality and Representation in the U.S. House: A New Approach Using Population-Level Data 28 (Apr. 7, 2013) (unpublished manuscript), https://people.umass.edu/schaffne/Schaffner.Rhodes.MPSA.2013.pdf.

280. Chris Tausanovitch, Income and Representation in the United States Congress 22-23 (2013) (unpublished manuscript), http://www.christausanovitch.com/IncomeRepresentation2013.pdf.

281. Stephanopoulos, *supra* note 277, at 1468-69.

282. *Id.* at 1469-70 (citing MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 81 (2012)).

283. BARTELS, *supra* note 277, at 267; Stephanopoulos, *supra* note 277, at 1474.

284. Stephanopoulos, *supra* note 277, at 1474.

285. *Id.*

286. Benson, *supra* note 11, at 729.

287. *Id.* ("This disproportionate influence yields skewed policy outcomes that favor the members of this 'donor class,' often at the expense of everyone else.").

Creating this system of unequal influence was not manifestly part of the intentions of the framers in their conceiving of the United States.[288] In creating our system of government, the founders were predominantly focused on achieving a democratic republic that was dependent solely upon the public.[289]

IV. SOLUTION

In this Part, this Note argues the merits of an anonymous system for campaign donations.[290] A system wherein candidates are oblivious to who has donated to their campaign will limit the corrupting influence of money in elections.[291] This Part outlines a system similar to the one proposed by Ayres and Bulow; however, the system outlined in this Note will better remove the donors from the candidates for anonymity purposes.[292] This Part employs two trusts, to better conceal the source of donations, akin to money laundering.[293] This Part also outlines potential shortcomings of such a system, as well as its feasibility given the landscape of current Supreme Court precedent.[294]

In light of the previous Part's discussion of the corrupting influence of money in politics,[295] the problem of the current system is not that there is too much money in politics.[296] Ridding our democracy of money would be an impossible task.[297] Money is, to a degree, necessary to run a campaign[298] and can serve a positive purpose of informing the public.[299] The problem that needs confronting and solving is money's ability to influence and buy access to politicians.[300]

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288. Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. 1, 19 (2014).

289. *Id.* ("If the Framers were focused on anything, it was upon how best to craft a republic that was properly dependent upon the people.").

290. *See infra* Part IV.A.1.

291. Ayres & Bulow, *supra* note 8, at 849. ("Mandated anonymity would reduce the corrupting influence of contributions on candidates' behavior by reducing both the candidates' feedback about how particular positions affect giving and the willingness of donors to make large donations to influence candidate behavior.").

292. *See infra* Part IV.A.2.

293. *See infra* Part IV.A.2.

294. *See infra* Part IV.B.

295. *See supra* Part III.

296. Soros, *supra* note 16; Zócalo Public Square, *supra* note 16.

297. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224 (2003) ("We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.").

298. *See* Ayres & Bulow, *supra* note 8, at 876; Soros, *supra* note 16.

299. *See* Zócalo Public Square, *supra* note 16; *see also* Ayres & Bulow, *supra* note 8, at 877.

300. Ayres & Bulow, *supra* note 8, at 848-49; Benson, *supra* note 11, at 740.

A. Double-Trust System

Subpart A advocates for anonymity as the best strategy for expelling the corruption identified in the previous section.[301] This Subpart also illustrates the logistics of implementing a double-trust system and why it is the proper format for an anonymous donation framework.[302]

1. Anonymity

A system of mandated anonymity between the donor and donee would reduce the corrupting influence of money because of the candidate's inability to make policy decisions in favor of their donors once elected.[303] In this anonymous system, the candidates would not know to whom they should give unequal access because they are unaware of their benefactors' identities.[304] In disposing with a system wherein private interest groups make donations and have the full expectation that the favor will be reciprocated, a more independent civic leadership may emerge.[305] As stated earlier, a government that is not independent cannot perform its intended purpose of, according to the framers, serving the interests of the people.[306]

The oft-cited complaint that there is "too much money in politics" fails to recognize that, although election spending has increased over the years, money is a necessary component of a functioning electoral system.[307] Politicians need to gain name recognition amongst voters and

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301. *See infra* Part IV.A.1.

302. *See infra* Part IV.A.2.

303. Ayres & Bulow, *supra* note 8, at 849.

304. CLAWSON, NEUSTADTL & SCOTT, *supra* note 215, at 87; Bertram J. Levine & Michael Johnston, *Campaign Contributions Should Be Anonymous*, WASH. POST (Sept. 4, 2014), https://www.washingtonpost.com/opinions/making-campaign-contributions-anonymous/2014/09/04/65f2b8d8-2e39-11e4-9b98-848790384093_story.html?utm_term=.47f87b36a1e8. If politicians do not know the sources of contributions to their "war chests," they cannot thank their benefactors with policy "favors." Bertram J. Levine & Michael Johnston, *supra*.

305. Ayres & Bulow, *supra* note 8, at 850.

306. Benson, *supra* note 11, at 727.

307. Chris Palko, *Why Money In Politics Is So Important*, CAMPAIGNS & ELECTIONS (July 26, 2012), https://www.campaignsandelections.com/campaign-insider/why-money-in-politics-is-so-important; *see* Smith, *supra* note 19, at 1058-62.

> One often hears that too much money is spent on political campaigns. The language in which campaigns are described in the general press constantly reinforces that perception. Candidates "amass war chests" with the help of "special interests" that "pour" their "millions" into campaigns. "Obscene" expenditures "careen" out of control or "skyrocket" upwards. This language notwithstanding, there is actually good cause to believe that we do not spend *enough* on campaigns.

Smith, *supra* note 19, at 1058-59.

they accomplish this by airing advertisements.[308] Americans who do not have the time to do their own research would be unable to glean the most basic information about an election, such as who is running, without such advertisements.[309] This is why simply eliminating money from politics overall is not an apt solution.[310] Money is a necessary evil.[311]

Another tactic used to solve the problem of corruption in campaign finance is increased disclosure of each candidate's fundraising sources.[312] The rationale behind disclosure is that a voting public with knowledge of campaign contributions could use their voting power to punish those candidates who have taken money from big corporations.[313] However, this rationale is flawed because this requires research on the part of the electorate that is not always feasible[314] and it is difficult to infer appropriate influence when only the facts of contributions are available.[315] Additionally, disclosure does little to stamp out the corruption concerns identified herein.[316] No direct limitations on contributions are put in place when employing a disclosure model; it is up to the voting public to hold politicians accountable for their campaign fundraising tactics.[317] Disclosure also normalizes the corruption dynamic at play.[318] With an endless stream of newspaper articles documenting the

308. Palko, *supra* note 307.

309. *Id.*

310. *See* Smith, *supra* note 19, at 1072-75.

311. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 329 (1989).

312. Benson, *supra* note 11, at 746 ("[S]ome experts have gone so far as to suggest that disclosure is 'one of the only tools that reformers have to reduce corruption.'" (quoting Nicholas Bamman, *Campaign Finance: Public Funding After* Bennett, 27 J.L. & POL. 323, 330 (2012))); Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 100-01 (2010); Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 388 (2013). The current system predicated upon public disclosure of donations is essential to our campaign finance system in the United States and is widely recognized as fundamental. Potter & Morgan, *supra*, at 388.

313. Ayres & Bulow, *supra* note 8, at 844.

314. Palko, *supra* note 307.

315. Ayres & Bulow, *supra* note 8, at 844. Considering some donors give to both sides or put pressure on a candidate by donating to their opponent, the true story behind the donations may be hidden from public view if the public is merely armed with the data on its face. *See* LESSIG, *supra* note 5, at 258-59; Marcos Chamon & Ethan Kaplan, *The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior*, 5 AM. ECON. J.: ECON. POL'Y 1, 3 (2013).

316. *See* Noveck, *supra* note 312, at 103.

317. *Id.*

318. LESSIG, *supra* note 5, at 258 ("But a detailed record of contributions in a system that depends fundamentally upon an endless stream of contributions will not on its own produce the reform we need. . . . For, perversely, the system simply normalizes dependence rather than enabling independence. There's no shame in the dance. There's no embarrassment from being on the list.

donations without proof of actual corruption, American cynicism grows and leads to emotion without understanding.[319] Transparency alone cannot achieve the reform needed.[320]

Increasing restrictions on campaign contributions is another strategy that has been used in the past[321] and has garnered some support.[322] Limits on contributions, though, do not come without serious negative ramifications.[323] For instance, incumbent politicians enjoy advantages over their insurgent counterparts that result in incumbents winning reelection at high rates.[324] Contribution limits tend to entrench this advantage.[325] When contribution limits are put in place, it becomes more difficult for candidates to raise money as a result of the need to reach a wider pool of donors.[326] This exigency helps the incumbent because the incumbent can draw from an already-existing support structure.[327]

There is instead an endless stream of 'gotcha' journalism linking a decision to a contributor, with almost no integrity on either side. That 'gotcha' in turn feeds the already profound cynicism that Americans have.").

319. *Id.*

320. *Id.*

321. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 115-19 (2003). The *McConnell* Court mentions several points in history whereby the American government sought to prohibit campaign contributions such as in the Federal Corrupt Practices Act of 1925, the Taft-Hartley Act of 1947, the Federal Election Campaign Act of 1972 and its 1974 amendments, and the Bipartisan Campaign Reform Act of 2002. *Id.*

322. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1711-12 (1999) ("[T]he reform strategy requires displacing *Buckley* with a fuller regulatory regime covering expenditures as well as contributions . . . ."); Marlene Arnold Nicholson, *Continuing the Dialogue on Campaign Finance Reform: A Response to Roy Schotland*, 21 CAP. U. L. REV. 463, 473 (1992); Fred Wertheimer & Susan W. Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1149 (1994) ("Substantial public campaign resources and reasonable spending limits for congressional races are essential in order to allow candidates to run for Congress without being dependent on special-interest campaign contributions and to provide challengers with a fair chance to compete.").

323. Smith, *supra* note 19, at 1084.

324. Chris Cillizza, *People Hate Congress. But Most Incumbents Get Re-elected. What Gives?*, WASH. POST (May 9, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/05/09/people-hate-congress-but-most-incumbents-get-re-elected-what-gives/?utm_term=.d6cc4b4d7d94 ("In 2012, . . . 90 percent of House Members and 91 percent of Senators who sought re-election won, ..."); Smith, *supra* note 307, at 1072-75 (citing incumbents' advantages in fundraising ability, name recognition, and franking privileges).

325. Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 798 (2012) (citing PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM 43 (2009)); Stephen E. Gottlieb, *Fleshing Out the Right of Association: The Problem of the Contribution Limits of the Federal Election Campaign Act*, 49 ALB. L. REV. 825, 849 (1985).

326. Smith, *supra* note 307, at 1072.

327. *Id.* This includes a "database" of past contributors, an already-made campaign, and an existing PAC. *Id.*

Contribution limits also reinforce the incentives for donors to influence candidates with their donations, rather than donating to legislators who are sympathetic to their legislative goals.[328] Contributors are faced with employing either an "electoral strategy" of donating to like-minded legislators to increase their chance of winning or a "legislative strategy" of donating to whichever candidate the donor thinks is most likely to win in the hopes of influencing the candidate later on.[329] Because, even in close races, it is unlikely that a single limited contribution will swing the odds of a victory, the low-risk option is to donate to the candidate most likely to win and hope to influence that legislator's voting behavior later on.[330]

Placing restrictions on contributions also has the adverse effect of limiting the pool of potential candidates to those that are already wealthy.[331] While the Supreme Court held that Congress may not prohibit candidates from spending money on their own campaigns,[332] if this is coupled with a restriction on raising outside money, then independently-wealthy candidates have a decided advantage.[333] Limiting voter choice has the negative consequence of denying voters the chance to vote for someone that represents their interests.[334]

In weighing these different approaches to campaign finance reform, a system of anonymity limits money's ability to corrupt the campaign process[335] while there are significant drawbacks to increased disclosure[336] and contribution limits.[337]

328. *Id.* at 1075.

329. Lowenstein, *supra* note 311, at 308 (1989).

330. Smith, *supra* note 307, at 1075-76.

331. *Id.* at 1081-82.

332. Buckley v. Valeo, 424 U.S. 1, 52-53 (1976) ("Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."). In two separate bids for the United States Senate, Linda McMahon spent close to $100 million of her own money in a three-year period. Peter Applebome, *Personal Cost for 2 Senate Bids: $100 Million*, N.Y. TIMES (Nov. 2, 2012), http://www.nytimes.com/2012/11/03/nyregion/linda-e-mcmahon-has-spent-nearly-100-million-in-senate-races.html.

333. Smith, *supra* note 307, at 1081-82.

334. Michael Feinstein, *What Isn't on California's Ballot Today: Real Choice*, L.A. TIMES (Nov. 8, 2016, 11:02 AM), http://www.latimes.com/opinion/opinion-la/la-ol-top-two-voting-blowback-20161108-story.html.

335. Levine & Johnston, *supra* note 304.

336. *See* Noveck, *supra* note 312, at 103.

337. *See* Smith, *supra* note 307, at 1075-76.

2. Logistics

Where the system advocated for by Ayres and Bulow encompasses a single blind trust per candidate and PAC,[338] this Note advocates for a system of multiple trusts for the donations to travel through.[339] By breaking up the donations and putting them through two accounts, akin to "placing" and "layering" in money laundering schemes,[340] it would hinder the candidate's ability to decode the identity of large scale donors who may donate specific amounts.[341] Anyone seeking the identity of the original donor after the money is transferred between trusts would face great difficulty considering the tremendous number of wire transfers that go on.[342]

These trusts that move money from the donors to the candidates[343] would be managed by the politically insulated FEC.[344] Stamping out any attempts to circumvent the anonymous process is essential to the execution of this system.[345] Although it is foreseeable that the amount of noise stemming from would-be donors attempting to confirm to candidates that they have donated would create too much difficulty for candidates to truly know the identities of their donors,[346] the organization tasked with running these trusts must still be free from political pressure.[347] The FEC is headed by a group of six commissioners, no more than three of whom can belong to the same political party.[348] Though this structure often leads to deadlock

338. Ayres & Bulow, *supra* note 8, at 854 n.63.

339. *See supra* Part IV.A.

340. Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 149-51 (1995). Money launderers developed a method called "structuring" where they would divide large deposits into smaller transactions in order to better evade detection. *Id.* at 155. For our purposes, evading detection by the candidate is necessary to maintain anonymity. Ayres & Bulow, *supra* note 8, at 852. "Layering" involves moving the money through multiple accounts in hopes that the complexity of the multiple transactions shrouds the money in secrecy. Sultzer, *supra*, at 150.

341. Ayres & Bulow, *supra* note 8, at 855.

342. Sultzer, *supra* note 340, at 150.

343. Ayres & Bulow, *supra* note 8, at 854-55.

344. R. SAM GARRETT, CONG. RESEARCH SERV., THE FEDERAL ELECTION COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 6 (2015). The FEC's bipartisan structure and its even-numbered membership serve to insulate the agency. *Id.*

345. *See* Ayres & Bulow, *supra* note 8, at 859.

346. *Id.* at 859-60. ("If nondonors can mimic the signals of donors, then donors will have difficulty *credibly* communicating their contributions.").

347. *Id.* at 852-53. ("For either 'booth' to be effective, we must trust the administrator not (1) to reveal for whom citizens vote or to whom they donate, or (2) to misapply the donation or vote to an unintended candidate.").

348. Potter & Morgan, *supra* note 312, at 473.

on matters of investigation or penalties, the FEC's independence is meaningful.[349]

B. Limitations of Solution

> "If you think this Congress, or any other, is going to set up a system where someone can run against them on equal terms at government expense, you're smoking something that you can't buy at the corner drugstore."
> —U.S. Rep. Richard "Dick" Cheney (R-WY.; 1979-1989)[350]

1. Feasibility

Implementing such a system would require Congress to vote against its interests,[351] something that it loathes to do.[352] A system of anonymity would face significant Congressional opposition because it would mean Congress's access money would dry up.[353] Like any other large shift in constitutional policy, the change is not likely to be made overnight at the federal level.[354] On the state and local level, New York City, Seattle, Arizona, Connecticut, and Maine have adopted lucrative public financing options so that candidates do not have to rely on the influence of private money.[355] Constitutionally, mandated donor anonymity may be struck down because of its impediment to the right of

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349. *Id.*; *see* GARRET, *supra* note 344, at 6.

350. Richard A. Armstrong, *Election Finance and Free Speech*, NEWSWEEK, July 18, 1983, at 11.

351. Ayres & Bulow, *supra* note 8, at 888 ("Cynics will argue that any worthwhile reform has no chance of being enacted. We share this pessimism. Any system that is effective in reducing the current amounts of quid pro quo and monetary influence corruption is bound to gore some political ox.").

352. Craig Holman, *The Truth About Congress and Financial Conflicts*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/opinions/the-truth-about-congress-and-financial-conflicts/2017/10/19/8ea8afd6-b382-11e7-9e58-e6288544af98_story.html?utm_term=.45d191767a84. As with the Stock Act, approved in 2012 and aimed at holding Congressmen accountable for insider trading, it took years of political momentum to finally pass this piece of legislation through a reluctant Congress. *Id.*

353. Ayres & Bulow, *supra* note 8, at 888.

354. In 2015, the Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) declared gay and lesbian couples had a right to marry after thirty-seven states had already passed marriage equality laws. David Cole, *How to Reverse* Citizens United*: What Campaign-Finance Reformers Can Learn From the NRA*, ATLANTIC (Apr. 2016), And in 2008 the Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) recognized the individual's right to bear arms under the Second Amendment after most state constitutions had already done so. *Id.*

355. *Id.* ("New York City, for example, matches small donations six-to-one for those candidates who agree to contribution and spending limits.").

association,[356] but the seemingly insurmountable idea of campaign finance reform may be achievable with time.[357]

Despite the doctrine of *stare decisis* calling for judicial consistency,[358] at the Supreme Court, precedent has not been followed on multiple occasions and campaign finance law trends have been reversed.[359] Although *Citizens United* is the current rule of law,[360] a different view of the issues could make itself felt if the Court realizes that the previous ruling was in clear error.[361] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the majority identifies two instances in which *stare decisis* was abandoned in the face of prior rulings predicated upon faulty assumptions.[362] Similarly, the justification for the *Citizens United* decision can be described as one predicated upon faulty assumptions of independent expenditures and their inherent inability to corrupt.[363]

2. Enforcement

Unfortunately, the FEC could not be completely sure that donors are not exposing themselves as donors to candidates in secret.[364] Hefty penalties would be exacted against violators of the anonymity requirement; however, enforcement and investigation into these

356. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 327 (1998).

357. Cole, *supra* note 354.

358. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

359. Derigan Silver & Dan V. Kozowski, *Preserving the Law's Coherence:* Citizens United v. FEC *and* Stare Decisis, 21 COMM. L. & POL'Y 39, 42 (2016) (citing Hasen, *supra* note 50, at 586).

360. Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 200 (2017) ("In *Citizens United*, however, the Supreme Court decisively disavowed its prior endorsements of corporate independent expenditure limits and adopted a nearly categorical rule that the First Amendment bars restrictions on independent expenditures no matter the source. The Court is unlikely to back away from this rule anytime soon.").

361. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

362. *Id.* at 861-62. In discussing *Lochner v. New York*, 198 U.S. 45 (1905) the Court illustrates how the assumption that an unregulated market could have the capacity to sustain minimal levels of human welfare for all workers was faulty and led to the decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) to overturn *Lochner*. *Id.* The Court then highlights *Plessy v. Ferguson*'s decision resting on a faulty assumption that separate but equal segregation does not inhere discrimination or inferiority. *Id.* at 862-63.

363. Paul S. Ryan, *Two Faulty Assumptions of* Citizens United *and How to Limit the Damage*, 44 U. TOL. L. REV. 583, 585 (2013). ("[T]he Court's assertion that so-called 'independent expenditures' cannot give rise to such corruption or the appearance of such corruption is badly flawed because expenditures meeting the legal definition of 'independent expenditure' are not truly 'independent' in any meaningful sense of the word.").

364. Ayres & Bulow, *supra* note 8, at 860 ("[W]e are under no illusion that our (or any other) system of anonymity would be completely successful in keeping candidates uninformed. Some inventive donors, with the aid of inquiring candidates, will undoubtedly devise methods to signal credibly.").

violations could prove very difficult to undertake.[365] When the imposition of penalties becomes necessary, the FEC's structural deficiencies may succumb to partisan deadlock.[366]

3. Loss of Information

Keeping the public in the dark with regard to which corporations have donated to which campaign may prove problematic for voters.[367] Disclosure is one of the only parts of FECA 1974 that survived the *Buckley* decision.[368] Our current system of disclosure allows for voters to rely on the press to report on these transactions and hold these politicians accountable in an inherently democratic way.[369]

V. CONCLUSION

The campaign finance system of the United States is an institution that is one of dependence upon corruption.[370] This dependence has led Congress, the main player in this system of dependence,[371] to enact legislation on multiple occasions that puts limits on the amount of money that can be contributed to campaigns.[372]

Preventing corruption has been an important governmental interest since the founding of the United States and this is evident from the Framer's view of the Constitution.[373] Reform is necessary[374] considering the unabashed admittance to the corrupting influence of money by the players involved.[375] Reform may also take many years to take hold[376] when faced with Supreme Court precedent that, in the face of a long record of corruption from the *McConnell* case, characterizes this corruption as non-existent as a matter of law.[377]

365. *Id.* at 855.

366. Potter & Morgan, *supra* note 312, at 473.

367. Ayres & Bulow, *supra* note 8, at 877.

368. Noveck, *supra* note 312, at 96; Sullivan, *supra* note 356, at 326.

369. Sullivan, *supra* note 356, at 326.

370. LESSIG, *supra* note 5, at 17.

371. *Id.* at 39.

372. MUTCH, *supra* note 62, at 139. The FECA amendments, enacted in 1974, limited expenditures. *Id.* BCRA, enacted in 2002, put limits on which organizations could donate. Imtanes, *supra* note 108, at 206.

373. Pirsch, *supra* note 273, at 213; *see* Lessig, *supra* note 288, at 19.

374. LESSIG, *supra* note 5, at 249.

375. CLAWSON, NEUSTADTL & SCOTT, *supra* note 215, at 101-02; SABATO, *supra* note 210, at 127 ("[S]ome legislators confess that PAC dollars affect their judgment on the issues before them.").

376. Cole, *supra* note 354.

377. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357 (2010) ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption.").

Anonymity as a response to the problem of corruption is not a novel solution,[378] however, this Note proposes a system wherein an additional degree of separation is used to further shroud the identity of the donors.[379] A system where private interest groups cannot expect favors to be reciprocated from their donations may elect leadership that is less dependent on wealthy donors and more independent.[380] This independence will lead to more accountability and responsiveness to the electorate on the part of our politicians.[381]

*Matthew Murray**

378. LESSIG, *supra* note 5, at 262.

379. *See supra* Part IV.A.2.

380. Ayres & Bulow, *supra* note 8, at 850.

381. Benson, *supra* note 11, at 740.

* J.D. Candidate, 2019, Maurice A. Deane School of Law at Hofstra University; B.A., Political Science, 2015, Queens College. First, I would like to thank my mother, father, and brother for pushing me to challenge myself throughout my life. I would also like to thank Professor James Sample and Omar Abdelkader for their insight and guidance during the Note-writing process. Lastly, publication of this Note would not have been possible without the care of Jenna Dysart, Veronica Pareja, Brendan Catalano, Kayley Sullivan, Hunter Blain, Yaroslav Mankevych, and the rest of Volume 47.