TOO LATE FOR CAMPAIGN FINANCE REFORM:

A HOW-TO GUIDE TO GOVERNMENT SANCTIONED CORRUPTION

By

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Abstract

In a world dominated by Quid-pro-quo dealing, it is natural to wonder what people are receiving when they contribute to campaigns. Certainly, they are trying to influence the outcome of elections. While this paper does propose solutions to curtail ‘buying influence,’ in light of the recent events, such as the *Citizens United* Supreme Court decision, it looks like reform/limitation is not the direction our nation is heading. The following pages will provide a discussion of the history of campaign finance, and an explanation of recent events that have impacted the country’s current trajectory with regard to campaign finance laws. In addition, it will answer questions relating to what campaign contributors can expect to receive in exchange for their ‘donations,’ and how you, too, (assuming you can afford it,) can buy your own friendly, neighborhood politician.
Introduction

Nobel Prize winning economist Gary Becker wrote in the mid-70s, that everything we do can be explained by assuming that we calculate costs and benefits, he referred to ‘shadow prices’--the imaginary prices said to be implicit in the alternatives we face and the choices we make.¹ For example, when a person decides to stay married rather than get a divorce, no prices are posted; rather, the person considers the implicit price of a breakup--the financial price and the emotional price--and decides the benefits aren’t worth it.

Much has changed since the seventies. Michael Sandel begins his book What Money Can’t Buy . . . .² by saying, “There are some things money can’t buy, but these days, not many. Today, almost everything is up for sale.” He then goes on to provide a few examples: A prison cell upgrade, access to the car pool lane while driving solo, the services of an Indian surrogate-mother to carry a pregnancy, the right to immigrate to the United States, the right to shoot an endangered black rhino, the cell phone number of your doctor, the right to emit a ton of carbon into the atmosphere, and admission of your child to a prestigious university.

Few, if any of the above listed items could have been procured when Becker first argued that the line between human relations and market relations was an artificial one. Today, we have

moved significantly toward a market driven society. “By putting an actual, explicit price on activities far removed from material pursuits, (the incentive schemes that abound today) take Becker’s shadow prices out of the shadows and make them real. They enact his suggestion that all human relations are, ultimately, market relations.”\(^3\) If we accept the notion that free markets establish equilibrium between price and benefit in an unbiased unemotional way, then under what circumstance would it be proper and appropriate to intercede in these markets to prevent them from reaching their fair market results?

We begin our analysis, accepting the notion that human relations are market transactions. Quid-pro-quo transactions are so ingrained and so much a part of our day-to-day lives that they are something that we don’t often think about. In fact, economists often tell us that such behavior is healthy and leads to efficient outcomes.

There is a line, however, that divides influence that we believe is fair from that which we consider wrong or corrupt. Sandel’s book\(^4\) encourages the reader to consider where they would place the line by posing a number of scenarios. He suggests, for example, that while it may be generally accepted to pay a scalper for front row seats to a Broadway musical, it seems less appropriate to pay a “line-stander” to obtain limited seating at a Congressional Hearing or tickets

\(^3\) *Ibid.*
to what is supposed to be a free concert (donated by the artist—Bruce Springsteen in the example).

While Sandel encourages us to examine our own moral compass and consider what behaviors we place on which side of the line and why, there is another line or boundary created by legislation to define that which is expressly impermissible. Under the law, paying a politician for a vote or a judge for a ruling is considered corrupt and is, in fact, it is illegal.

In a world dominated by Quid-pro-quo dealing, it is natural to wonder what people are receiving when they contribute to campaigns. Certainly, they are trying to influence the outcome of elections. Casino billionaire, Sheldon Adelson told Forbes Magazine, “I’m against very wealthy people attempting to or influencing elections. But as long as it’s doable I’m going to do it. Because I know that guys like Soros have been doing it for years, if not decades.”

The original premise behind this thesis was to provide insights into changes that could be made to curtail the massive influence of the very wealthy and potentially even foreign interests on our election results. However, in light of the recent events, such as the *Citizens United* Supreme Court decision, it looks like reform/limitation is not the direction our nation is heading.


Therefore, the focus of this paper has been shifted. The following pages will provide a discussion of the history of campaign finance, and an explanation of recent events that have impacted the country’s current trajectory with regard to campaign finance laws. In addition, it will answer questions relating to what campaign contributors can expect to receive in exchange for their ‘donations,’ and how you, too, (assuming you can afford it,) can buy your own friendly, neighborhood politician.

**Should This Be a Real Concern, or is it Much Ado About Nothing?**

Politicians justify campaign contributions with claims that you cannot buy votes; instead you can contribute money to help like-minded individuals get into office, as those people will vote to preserve your interests, regardless of your contributions. While it is difficult to definitively prove that outright vote buying occurring, the influence that donors have is apparent. For example, Damon M Cann in *Justice for Sale? Campaign Contributions and Judicial Decisionmaking* presents a compelling statistical analysis that concludes that at least in the case of one very small high court in the state of Georgia “campaign contributions are substantively significant with a contribution of $2000 essentially securing the outcome of the case, assuming the other side contributed no more than the average contribution (approximately $260 for the
Certainly, we should object to the notion that campaign contribution can influence or control judicial outcomes on moral grounds. Our courts were established for the purpose of serving as impartial arbiters; it seems, however, that, at least in some cases, there is opportunity and perhaps even motivation for bias.

The framers of our Constitution established a system where justices were appointed by the executive branch, approved by the legislative, and are entitled, (absent extreme and unusual circumstances,) to serve for life. Cann found no discernible bias when examining the decisions of Wisconsin Supreme court justices. The primary differences, between the selection process in Georgia and that in Wisconsin (beyond differences in political culture) are that Wisconsin judges have longer terms (10 years as opposed to 6 years) and that those running in Wisconsin are eligible for partial public funding, while those in Georgia are not. In other words, judges running for positions on the Georgia Supreme Court were virtually unelectable without the benefit of significant campaign contributions. Statistical analysis combined with Becker’s theories would suggest that Supreme Court judges in Georgia, (in at least some cases) are willing to compromise their judgment in order to obtain or retain something they regard as more valuable, namely, their position on the Georgia Supreme Court.

8 Ibid.
While the Georgia Court is very small (7 members), Cann’s findings suggest the need to examine additional situations. Moreover, his findings support the common sense notion that if all human relations are indeed market transactions, that some will view the value of a moral outcome to be less than the value of some other aspect of the interaction such as a campaign contribution. In other words, if we create or allow conflicts of interest to occur, we should expect that at least some (and perhaps many) will accept the benefits offered for choosing the wrong or less moral side.

While we expect our legislators to behave in a moral and ethical fashion, we do not expect them to exhibit impartiality of the kind we look for from our judges. To the contrary, legislators are advocates. They advocate for the state or region they represent; they advocate for their political party; they advocate for their personal agenda and beliefs; they meet frequently and openly with constituents and lobbyists who are attempting to influence the legislators’ opinions and behavior. We live in a society in which almost everything is for sale. When it comes to political influence, it is not a matter of ‘if,’ but rather a matter of ‘how much?’

**The History of Campaign Finance: Let the Games Begin**

According to the Federal Election Commission, campaign financing in the United States got its start in 1791, when opposing groups funded rival newspapers with the intention of
influencing the electorate. These types of fairly minor practices and expenditures set the standard for campaign finance for the next forty years.⁹

Significant change was seen during the 1832 Presidential campaign, when President Andrew Jackson opposed renewing the charter of the Bank of the United States. The Bank threw considerable financial support behind opposing candidate, Henry Clay, who supported the renewal of the charter. The Bank, however, was unsuccessful, when Jackson fired back, depicting the Bank as a ‘money monster’ and was reelected.¹⁰ ¹¹

In hopes of securing the presidency in the 1896 election, Republican candidate William McKinley sought help from businessman Mark Hanna.¹² Hanna raised campaign funds by soliciting contributions from “corporations, railroads, banks, and other businesses” asking them “each to contribute $50,000 at a minimum. This $50,000 entry fee was

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a figure that ‘represent[ed] their share in the nation’s prosperity.’”13 The “Democrats, unable to match the Republicans in collecting corporate dollars, portrayed the 1896 campaign as a battle between the plutocrats and the people—a theme and a strategy that would reappear again and again throughout the 20th century.”14

In 1904, accusations alleging that corporations donated to President Theodore Roosevelt’s campaign in order to buy influence prompted an outcry for campaign finance legislation.15 A response came in 1907, when Congress passed in Tillman Act, which prohibited federal campaign contributions from corporations and national banks.16


- Limit contributions to ensure that wealthy individuals and special interest groups did not have a disproportionate influence on federal elections;
- Prohibit certain sources of funds for federal campaign purposes;
- Control campaign spending, which tends to fuel reliance on contributors and fundraisers; and
- Require public disclosure of campaign finances to deter abuse and to educate the electorate. 17

These laws, however, failed to establish a framework for effective administration and

14 Money and Politics: The Oldest Connection supra note 12.
15 The Supply and Demand of Campaign Finance Reform supra note 13.
16 Thirty Year Report supra note 9.
17 Ibid.
enforcement of the new campaign finance provisions, and, therefore, the laws were often ignored. In an effort to address the failures of prior legislation, Congress passed the Federal Election Campaign Act of 1971 (FECA), and the Revenue Act of 1971. The new legislation required that all campaign contributions and expenditures be reported in full, and set limits on the amount of money that could be spent on advertising, and the amount of personal money a candidate could spend on his/her own campaign.\(^\text{18}\)

While direct contributions by corporations and labor unions were banned under previous legislation, FECA created an exception. It provided guidelines for corporations and labor unions to establish ‘separate segregated funds,’ commonly referred to as PACs (political action committees). Corporations and unions were then able to solicit donations for their PACs, and then use those donations to help fund federal campaigns. The Revenue Act introduced a program in which citizens could choose to allow the federal government to use one dollar of from their taxes to fund presidential campaigns, allowing for publically funded campaigns. In 1974, FECA was amended, and established the Federal Election Commission (FEC), which “was given jurisdiction in civil enforcement matters, authority to write regulations, and responsibility for

\(^{18}\text{Ibid.}\)
monitoring compliance with FECA.”¹⁹ Provisions in FECA were challenged in the Supreme Court case *Buckley v. Valeo.*²⁰

In *Buckley,*²¹ the Court “held that spending money on politics was a form of speech and, therefore, subject to strict scrutiny. While recognizing that the government had a compelling interest in regulating money in politics to prevent government corruption or the appearance of corruption, the Court”²² upheld contribution limits, but struck down expenditure limits for candidates who were not funded with tax dollars, meaning that candidates (whose campaigns were not publically funded) were able to contribute unlimited amounts of their personal money to their campaigns.²³ *Buckley*²⁴ created a distinction between contributions and expenditures, which allowed wealthy candidates and donors to dominate the political process.²⁵ ²⁶ These campaign

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²⁰ *Buckley v. Valeo, 424 U.S. 1 (1976)*
²³ Thirty Year Report *supra* note 9.
²⁴ *Buckley supra* note 20.
²⁵ Democracy at Stake *supra* note 22.
expenditures were permitted because the Court determined that campaign spending was a form of free speech, and thus, constitutionally protected by the First Amendment.\textsuperscript{27}

While \textit{Buckley}\textsuperscript{28} allowed billionaires to spend unlimited amounts of their personal fortunes in pursuit of a political office, the decision still left some flexibility for future campaign finance regulation. Ultimately, \textit{Buckley}\textsuperscript{29} lent support for rules on disclosure, retained the established ban on corporate treasury spending in elections, and “did not impose a final and narrow definition of corruption.”\textsuperscript{30} In 1976, FECA was amended to be consistent with \textit{Buckley},\textsuperscript{31} and limitations were put on PAC fundraising abilities (i.e. regulations regarding who could be solicited, and how solicitations were to be conducted were established).\textsuperscript{32}

Little change occurred until the early 1990s, when “lawyers and strategists exploited a loophole created by the FEC in the late 1970s.”\textsuperscript{33} This loophole allowed “funds to be raised

\textsuperscript{27} U.S. Const. amend. I.
\textsuperscript{28} Democracy at Stake \textit{supra} note 22.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid.
\textsuperscript{31} \textit{Buckley supra} note 20.
\textsuperscript{32} Thirty Year Report \textit{supra} note 9.
outside of the limits and prohibitions of federal law.” 34 These funds were “known as non-federal or ‘soft’ money.” 35 Within this system, politicians were able to solicit massive, unregulated amounts of money from the same corporations that had legislation (over which the politicians have influence) pending. “Both [predominant] parties were guilty. By the peak of the 2002 cycle, combined soft money raised from both Republican and Democratic committees reached nearly $500,000,000.” 36 While soft money could not be contributed directly to individual candidates, it was used to fund advertisements, or ‘issue ads,’ which are designed to sway the vote by portraying a specific candidate in either a positive or negative light. 37

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), more commonly referred to as the McCain-Feingold Act. This piece of legislature was “designed ‘to purge national politics of what [is] conceived to be the pernicious influence of ‘big money’ campaign contributions.’” 38 Its purpose was to combat “the increased importance of ‘soft money,’ [and] the proliferation of ‘issue ads.’” 39 Since the BCRA was enacted in 2002, the US

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34 Thirty Year Report supra note 9.
35 Ibid.
36 The Money Crisis supra note 33.
37 Ibid.
39 Ibid.
Supreme Court has heard four cases in which the constitutionality of the Act was brought into question. The most significant of which, was Citizens United.

**Citizens United**

*Citizens United* was brought to the Supreme Court by a conservative nonprofit organization (a 501(c)(4)), called Citizens United. They sought to make their political documentary, *Hillary: The Movie*, available to viewers through the ‘on demand’ feature of a cable network. The Federal Election Commission prohibited them from doing so, as the FEC regarded “‘Hillary’ and commercials for it as an ‘electioneering communication’—that is, as ‘speech expressly advocating the election or defeat of a candidate.’” Under the Bipartisan Campaign Reform Act, airing electioneering communication during the thirty days before a primary election (and 60 days before general elections) was prohibited.

Theodore Olson, the lawyer for Citizens United, argued that the BCRA only applied to television commercials, not documentaries. He maintained that, “This sort of communication

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41 *Citizens United supra* note 6.
44 *Citizens United supra* note 6.
was not something that Congress intended to prohibit.” In accordance with this rationale, the question before the Court was one relating to statute applicability, not constitutionality. The focus shifted, however, during the oral arguments of Malcolm Stewart, the Deputy Solicitor General (representation for the Government).

We can see where the Government lost its footing in this excerpt from the cases’ oral arguments:

Justice Alito: *Do you think the Constitution required Congress to draw the line where it did, limiting this to broadcast and cable and so forth? What's your answer to Mr. Olson's point that there isn't any constitutional difference between the distribution of this movie on video demand and providing access on the Internet, providing DVDs, either through a commercial service or maybe in a public library, providing the same thing in a book? Would the Constitution permit the restriction of all of those as well?*

Malcolm Stewart: *I think the Constitution would have permitted Congress to apply the electioneering communication restrictions to the extent that they were otherwise constitutional under Wisconsin Right to Life*. Those could have been applied to additional media as well.

*And it's worth remembering that the preexisting Federal Election Campaign Act restrictions on corporate electioneering which have been limited by this Court's decisions to express advocacy.*

Justice Alito: *That's pretty incredible. You think that if -- if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?*

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46 Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007). This case created a stricter criteria for ads that would be considered electioneering communication under the BCRA.
Malcolm Stewart: *I'm not saying it could be banned. I'm saying that Congress could prohibit the use of corporate treasury funds and could require a corporation to publish it using its* –

Justice Alito: *Well, most publishers are corporations. And a publisher that is a corporation could be prohibited from selling a book?*

Malcolm Stewart: *Well, of course the statute contains its own media exemption or media* –

Justice Alito: *I'm not asking what the statute says. The government's position is that the First Amendment allows the banning of a book if it's published by a corporation?*

Chief Justice Roberts then posed a hypothetical question about a 500-page book that endorsed a candidate by having a line on the last page that said “Vote For X.” Stewart took the stance that, under certain conditions, Congress could ban the publication of that book. This is how, in just a few minutes, *Citizens United* transitioned from being a case about the applicability of a statute to one about censorship. Malcolm Stewart took the position that, under the Bipartisan Campaign Reform Act, there exists some scenario in which Congress would be permitted to ban the printing of a book. This censorship argument is how freedom of speech and the First Amendment became a point of issue for the Court.

47 Oral Arguments *supra note* 4 Pg 26 Ln 17, Pg 28 Ln 3.
48 *Ibid* at Pg 30 Ln 12-16.
50 *Citizens United supra note* 6.
51 Amend. I *supra note* 27.
It has been argued that Stewart answered incorrectly. The BCRA applicable to television advertisements, the rationale being that they are somehow unavoidable, and that they can sway the opinions of their audience, thereby affecting the outcome of electoral politics. Books can be differentiated, as they do not operate in the same way. Books must be acquired, and individuals must choose to read them. Congress has no right to ban a book.

Stewart’s critics...said that he had no obligation to try to answer an absurdly far-fetched hypothetical involving the censorship of books. By doing so...Stewart wasn’t being honest—he was being foolish. He should have asserted that the federal government had neither the obligation nor the right to stop the publication of a book. Like most arguments about the quality of advocacy, this one had no clear resolution. Evidently, though, the damage to the government’s case had been profound.  

Following the oral arguments, the judicial opinions were written. The majority opinion, by Justice Kennedy, was said to have considered issues beyond of the question of statute applicability, instead, deciding on the Constitutionality of the BCRA. According to Jeffery Toobin’s piece in the New Yorker, Justice Souter wrote a dissent that “accused the Chief Justice of violating the Court’s own procedures to engineer the result he wanted.” Allegations of this kind could threaten the Court’s credibility. Perhaps that is why the opinions were withdrawn, the Questions Presented to the Court redefined, and the case scheduled to be reargued in September.

52 Money Unlimited supra note 43.
53 Ibid.
54 Ibid.
55 Ibid.
of the next term. Parties were to draw up supplemental briefs, and prepare arguments for this new question, “For the proper disposition of this case, should the Court overrule either or both Austin v. Michigan Chamber of Commerce56 [which upheld restrictions on corporate spending to support or oppose political candidates.] and the part of McConnell v. Federal Election Comm'n57 which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002?”58

When the new court term began, Elena Kagan, (now a member of the Supreme Court herself,) represented the Government in Stewart’s stead. When asked about her colleague’s previous assertion that the Congress had the power to ban books, Kagan answered, “[t]he government’s position has changed.”59 She did what she could to mitigate the prior damage, but the five60 justices who, (according to reports,)61 originally found in favor of Citizens United remained, and she was unable to change their minds. In addition, the Appellant had already restructured his case, tailoring his argument to suit the new question proposed by the judges.

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57 McConnell supra note 38.
59 Citizens United v. Federal Election Commission, Supreme Court Case No. 08-205. Oral Arguments (Reargued) Transcript at Pg 64, Ln 24-25.
60 Roberts, Scalia, Kennedy, Thomas, and Alito
61 Money Unlimited supra note 43.
This time, instead of presenting the Court with a statutory argument, Olson argued that unions and “corporations are persons entitled to protection under the first amendment.”

In light of the new, broader questions presented for re-arguments, the Court shifted the scope of the case, and was now within their right to overrule prevailing campaign finance laws. The Court overruled Austin\(^6\) and portions of McConnell,\(^4\) and declared the sections of the BCRA that prohibited electioneering communications by corporations to be inconsistent with the Constitution. “Having held that BCRA’s restriction was a full ban on speech, and not just partially speech-restrictive, Justice Kennedy, [author of the majority opinion,] reasoned that BCRA’s ban on corporate speech violated the principle of First National Bank of Boston v. Bellotti,\(^5\) that ‘The First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.’” Kennedy accused the Government of hindering the free-flow of information available to the public, “by suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.” The Court’s decision, in an effort to remedy the wrongs apparent of the BCRA and the judicial

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\(^5\) Oral Arguments (Reargued) Transcript supra note 59. Pg 4, Ln 19-20.
\(^6\) Austin supra note 56.
\(^4\) McConnell supra note 38.
\(^6\) COMMENTS supra note 58.
\(^6\) Citizens United supra note 6.
precedent, allows corporations to spend unlimited amounts of money in support of political candidates (the 30/60 day restriction has been lifted). Corporations may not, however, give directly to the candidate they support. The removal of contribution limits, and the ability for corporations to contribute unlimited funds (direct from their treasury), is what transformed the PAC into the Super PAC.

Why All That Background Information?

While it may have been simpler to merely provide a concise summary of the *Citizens United* decision, it is important to understand that it deviates from precedent, and that it is a drastic shift. Whether you support the decision or not, it undoubtedly changes how the political game is played. Conservatives often criticize liberal judges for approaching the Constitution as a ‘living document,’ or ‘legislating from the bench,’ but it is difficult not to classify *Citizens United* as judicial activism.

In his opinion, Justice Stevens was critical of his colleagues for overstepping their roles and departing from precedent, and, as he put it, ‘common sense.’ “Five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law… At bottom, the Court’s opinion is thus a rejection of the

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68 Ibid.
69 Ibid.
common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.”

In his State of the Union Address, President Obama expressed his concern for the future in light of the decision:

*With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests — including foreign corporations — to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people.*

Perhaps it is unclear how this decision could cause the ‘floodgates to open,’ as corporations are still prohibited from donating directly to the candidates they support. Before

Citizens United, only individuals could donate to PACs or Political Action Groups, and their donations were capped at $2,500 for PACs associated with a particular candidate, and $5,000 for other PACs. Individuals, and corporations, were, however, free to contribute limitless sums of money to organizations known as ‘527 groups.’ These groups were named for section 527 of the Internal Revenue Code, which allowed them to exist. According to New York Times political correspondent Matt Bai, these ‘527 groups’ were already functioning like today’s Super PACs, and therefore, Citizens United “was more incremental than transformational.” He argued that the decision did affect the procedure relating to campaign finance (corporations now give to PACs rather than 527 groups,) but it was not responsible for a sudden influx of money into the political system, as corporations could always contribute. In his article, Bai summarized a conversation he had with UC Irvine Law’s campaign finance expert Richard Hasen. Hasen quickly responded to Bai’s article, claiming that he had omitted information in his analysis:

As I told Matt, and what’s missing from this piece, is the realization that there was considerable legal risk in giving to a 527 before Citizens United and its aftermath. As one reader to commented to me, “Matt’s article suggests that not much has changed post-Citizens United because even prior to the CU decision, “you would have been free to

(http://www.forbes.com/sites/dougschoen/2012/07/19/no-citizens-united-isnt-the-whole-story-but/).

73 Citizens United supra note 6.
74 Ibid.
write a check for any amount to a 527 . . . .” This is untrue and all three groups Matt cites were determined by the FEC to have violated federal law during the 2004 cycle. ACT paid a $775,000 fine. SwiftVets paid a $299,500 fine. Club for Growth paid a $350,000 fine. Hasen’s position is that billionaires were technically able to give unlimitedly to 527 organizations before Citizens United, but fear of liability, (both monetary and criminal,) barred them from giving huge amounts. While 527 groups did function like Super PACs, technically, they were only allowed to raise money for “issue advocacy,”

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77 Citizens United supra note 6.
meaning they were only permitted to run ads pertaining to issues, not candidates. They often ignored these restrictions, which is why many have been fined, and donors have been threatened with liability. Hasen’s article *The Numbers Don’t Lie*, 79 tracks campaign financing before and after the decision, and notes that “In 2000, total outside spending up to March 8 was $2.6 million. In 2004 and 2008, with the explosion of 527 organizations, total spending to March 8 was $14 million and $37.5 million [respectively].” Through March 8, 2012, total outside spending was over $88 million, which is “234 percent of 2008’s numbers and 628 percent of 2004’s.” 80 Since the *Citizens United* decision was delivered in 2010, the numbers make it very difficult to dispute the decision’s impact.

At this point, much has been said about ‘527 groups’ and ‘Super PACs,’ but very little has been stated about non-profit organizations- except that Citizens United [the organization with *Hilary: The Movie*, not the case] is a non-profit organization. Non-profit organizations are designated with tax code 501(c)(#). 501(c)(4) organizations, also referred to as ‘social welfare groups’, are most relevant to issues of campaign finance. The impact that the *Citizens United* Court ruling had on social welfare groups is that they can now directly engage in express advocacy, meaning they can run electioneering communications.

81 *Citizens United supra* note 6.
Where Does That Leave Us?

Super PACs

Individuals, unions, and corporations can now contribute unlimited amounts to Super PACs without fear of legal repercussions; so, Super PACs have effectively replaced 527 groups. Super PACs can use 100% of their funds for political activity (supporting or opposing any political candidate.) Super PACs (and 527 groups) must disclose their donations/donors. While the individual PAC makes the determination on whether they will disclose monthly or quarterly (which can allow donors to go unidentified for certain periods of time), at some point, donation information will be released.  

Social Welfare Groups

Like Super PACs, social welfare groups can (and always have been able to) receive unlimited contributions from individuals, unions, and corporations. Before Citizens United, these groups were unable to engage, financially, in direct political activity. Since the decision, however, these groups are permitted to use money in this way. There are, however, some limitations.

According to the IRS, social welfare organizations must “be operated exclusively to promote social welfare, an organization must operate primarily to further the common good and

82 The Numbers Don’t Lie supra note 78.
83 Citizens United supra note 6.
general welfare of the people of the community (such as by bringing about civic betterment and social improvements)… The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity.”

This means that more than half of the money raised by 501 (c) groups must be used for something else.

**Does This Really Undermine Equality?**

Let’s, for a moment, put aside the notion that campaign contributors expect something in return from the candidates they support. We are still left with the knowledge that Electioneering Communications, or ‘issue ads’ are designed to influence the voting behavior of their audience. Critics of new campaign finance laws cite the promulgation of inequality as a major concern. It has been argued that the:

*Laws that regulate the role of money in politics are the firewalls that prevent the perhaps warranted inequalities in the economic sphere from becoming unwarranted disparities in the political arena. They are our strongest tool for protecting democratic political equality in a capitalist society and maintaining the critical balance between the fundamental values of liberty and equality… Allowing corporations or wealthy individuals to purchase political outcomes makes a mockery of the principle behind one person, one vote. And it sets off a vicious cycle that undermines the moral legitimacy of both politics and economics in our society. Giving the wealthy a greater voice than average citizens corrupts the process of political decision making. This, in turn, calls into

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question the legitimacy of our economic arrangements, because economic conditions are set or sanctioned in the political arena (where we decide tax policy, regulations, and so forth). This, finally, makes the influence of economics on politics all the worse—completing the cycle. 85

This makes it sound very likely that campaign spending promotes injustice, but it is important to consider that Buckley 86 determined campaign spending to be a form of free speech.

To date, the Court has been reluctant to limit free speech, taking a hands-off approach especially when the speech can be considered political. For example, in 2011, the Court heard Snyder v. Phelps, 87 a case involving the infamous Westboro Baptist Church. The case arose as a result of the Westboro Baptist Church’s (lead by Fred Phelps) protest outside the funeral of U.S. Marine Lance Corporal Matthew Snyder, who was killed in a (non-combat related) car accident in Iraq. According to the ‘church,’ the United States is responsible for provoking God’s wrath because the country is becoming increasingly tolerant of homosexuals. Picketers held signs displaying phrases that included: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Priests Rape Boys,” “God hates you,” "Fag troops," "Semper fi fags," and "Thank God for dead soldiers." Phelps and his group abided by laws/police instruction, and members did not use profanity or violence. The Snyder family sued

85 Democracy at Stake supra note 22.
86 Buckley supra note 20.
Phelps for the intentional infliction of emotional distress. A jury of the District Court of Maryland found Phelps’s acts to be ‘outrageous,’ and awarded the Snyder family a total of $10.9 million in damages (later reduced to 5 million). When the decision came before the Supreme Court on appeal, the Court decided 8-1 that the First Amendment’s right to free speech protected Phelps’s acts. Alito, in his lone dissent, took the following position:

Respondents’ outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered. In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent.

The rest of the justices took issue with the interpretation that Alito’s approach would allow for. Justice Roberts (writing for the majority) acknowledged that the speech was hurtful, but stated that “‘outrageousness’… is a highly malleable standard with ‘an inherent subjectiveness about it, which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’” The Court did not wish to allow for this subjectivity, out of fear for unjust and inconsistent results.

While the Court will generally go to great lengths to protect the rights to free speech, those rights are not absolute. For example, the right to free speech does not protect a person’s

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88 One of many claims made against the Phelps.
89 Amend. I supra note 27.
90 Snyder supra note 87.
right to falsely yell ‘fire’ in a crowded theatre. The rationale being that individuals, who believe there actually is a fire, will behave differently than they ordinarily would. The Court determined that falsely making statements that indicate a “clear and present danger…will bring about the substantive evils that Congress has a right to prevent.”

There is a similar argument to be made as it relates to campaign spending. While it may not be constitutional to limit campaign expenditure relating to communicating facts or opinions, when money is used to disseminate false or misleading information with the intent of coaxing individuals into behaving in ways they would not otherwise act, it can be considered akin to falsely yelling ‘fire’ in a crowded theater.

**What Can We Do?**

The Supreme Court has been entrusted with the responsibility of interpreting the Constitution. In *Buckley*, the Court determined campaign spending to be a form of free speech, and thus, protected under the First Amendment. *Citizens United* extended free speech rights to corporations. While some may interpret this as the Court creating rights, the Court is not

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92 *Buckley* supra note 20.
93 Amend. I *supra* note 27.
94 *Citizens United* supra note 6.
permitted to grant rights. They can only tell us what the Constitution requires—whatever rights they find have been there all along. While some may disagree with decisions made by the Court, the Supreme Court has the final word as it relates to interpreting the Constitution; there are no appeals. The other branches of government must act in accordance with the (current) reading/understanding of the Constitution, and no legislation can be passed if it conflicts with the Court’s understanding.

This makes the future of campaign finance reform look pretty bleak, but there are (technically) two ways that change could occur. The first (which, realistically, is not going to happen) is for Congress to amend the Constitution. This would require the support of 2/3 of the Senate and the House of Representatives, and then the amendment would have to be ratified by 3/4 of the states.  

It is much more likely that change will occur by the Court overruling the *Citizens United* decision. As we have seen, the Court can overturn its previous rulings. *McConnell,* which affirmed the Constitutionality of the Bipartisan Campaign Reform Act, was decided in 2003. When Justice O’Conner left the Court in 2004 (replaced by Justice Alito), the ideology of

\[\text{\textsuperscript{95}}\] Democracy at Stake *supra* note 22.
\[\text{\textsuperscript{96}}\] *Citizens United* *supra* note 6.
\[\text{\textsuperscript{97}}\] *McConnell* *supra* note 36.
the court shifted. *Citizens United*\(^{98}\) was decided by a narrow margin, 5-4. If any of the 5 justices who voted with the majority leaves the Court, the new appointee’s ideology could align with the minority, and thus, change the outcome of future Court rulings.

While, at this juncture, we cannot limit the amount of money in the political system, campaign finance reform is not an entirely lost cause. For now, (until the composition of the Court changes), a push can be made to increase the transparency of the contributions. In addition, more stringent safeguards that protect against false or misleading ad campaigns need to be established.

**Transparency**

As previously explained, social welfare groups are allowed to keep the names of their donors secret. While disclosing donors may not limit the influx of money that has entered our political system, knowing who is responsible for advertisements can allow the public to evaluate the credibility of the ad. The shield of anonymity that 501(c) groups can offer their donors is the product of the 1958 Supreme Court Case, *National Association for the Advancement of Colored People (NAACP) v. Alabama.*\(^{99}\) In this case, the Court decided that the NAACP could not be

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\(^{98}\) *Citizens United* supra note 6.

required to disclose membership/donor lists, because disseminating that information to the public could lead to the harassment of their members.

18 years later, in *Buckley*, the Court acknowledged the benefits of disclosure:

*Disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return.*

In addition, the Court found that the disclosure limitations that result from the *NAACP* decision do not supersede campaign finance disclosure requirements:

*The strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved.*

Currently, 501 (c) groups must disclose individual donations that are *expressly* given to fund political advertisements. Any money used for political activity, but not expressly given for it, can be kept secret. These 501 (c) groups, with their built-in cloaking device, are being used to circumvent disclosure laws, and to undermine the Court’s views in the *Buckley* decision. It would seem that a fair solution would allow 501(c) groups to keep their secret donor

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100 *Buckley* supra note 20.
101 *NAACP* supra note 99.
102 *Buckley* supra note 20.
information, so long as they are not partaking in political activity. If they chose to become politically active, they should, in the interest of transparency, forfeit their entitlement to secrecy.

Shell corporations are another way that donors are keeping their identities secret. These kinds of corporations make donations in the company name, and make it difficult to trace the individuals responsible. For example, in 2011, W Spann LLC was formed by an estate tax lawyer. Six weeks later, W Spann made a million dollar donation to Restore Our Future, a conservative Super PAC; it was dissolved two weeks later. Restore Our Future must only report that W Spann made the donation, but the public is left with no insight into the identity of the individuals behind W Spann.\(^\text{104}\) This can get even more convoluted when corporations are layered. For example, ABC LLC could be owned by XYZ LLC, which is owned by DEF LLC, which is a Cayman Island Corporation, and therefore, does not disclose its owners.

It seems fairly obvious that W Spann was created to circumvent current disclosure laws. More stringent disclosure laws must be enacted to prevent shell corporations from hiding the identity of their donors in this way. Disclosure needs to entail disclosing beneficial ownership, meaning that benefactors need to divulge the individuals (or publically traded corporations) that are the actual source of the financial contribution.

**False or Misleading Campaign Advertisements**

While the First Amendment does protect free speech, regardless of if it is fact or opinion, it cannot be used to protect disseminators of false or misleading information. Unfortunately, the public is faced with dishonest campaign advertisements during every election cycle, and both major parties are guilty.

Priorities USA Action (an Obama-aligned Super PAC) released an ad featuring a steelworker named Joe Soptic, who, essentially, blames Romney for his wife losing her health care, and dying of cancer. The actual transcript of the ad is as follows:

_I don’t think Mitt Romney understands what he’s done to people’s lives by closing the plant. I don’t think he realizes that people’s lives completely changed. When Mitt Romney and Bain closed the plant, I lost my health care, and my family lost their health care. And a short time after that my wife became ill. I don’t know how long she was sick, and I think maybe she didn’t say anything because she knew that we couldn’t afford the insurance. And then one day she became ill and I took her up to the Jackson County Hospital and admitted her for pneumonia. And that’s when they found the cancer, and by then it was stage four. It was, there was nothing they could do for her. And she passed away in 22 days._

_I do not think Mitt Romney realizes what he’s done to anyone, and furthermore I do not think Mitt Romney is concerned._

Factcheck.org (which maintains its position as a “nonpartisan, nonprofit ‘consumer advocate’”—but is often criticized for liberal tendencies) has condemned this ad for being misleading on that grounds that

- _Steelworker Joe Soptic’s wife, Ranae, died in 2006 — five years after the plant closed._
She didn’t lose coverage when the plant closed. Mr. Soptic told CNN that she lost her own employer-sponsored coverage a year or two later. She had no coverage after that.  

Not to be out done, the other side ran their own misleading commercial. Romney’s first television ad of the presidential campaign featured a video of Obama stating, “If we keep talking about the economy, we’re going to lose.” What makes this misleading is that it was taken entirely out of context. What Obama actually said was, “Senator McCain’s campaign actually said, and I quote, if we keep talking about the economy, we’re going to lose.” This quote illustrates that Obama has a very different stance on issues of the economy than the advertisement would have the public believe.

Advertisements that mislead the public can be very damaging, and they need to be regulated more strictly. As it stands, promulgating false and misleading advertisements is just a part of playing the political game. These ads are batted back and forth between the parties, watchdog groups call foul, and ultimately, the public is left to their own devices to determine what is fact and what is fiction. While stringent regulation sounds like an easy fix, implementation would be quite a challenge.

A group of people would have to be responsible for screening and assessing advertisements before they would be approved for public viewing. While rules and standards

can be established, subjectivity would likely become an issue. In addition to subjectivity, there is also the issue of imposing meaningful repercussions. Financial penalties can be imposed, but when hundreds of millions of dollars are in play, fines may not be a strong enough deterrent.

Ultimately, these solutions are not perfect, but they do provide some insight on how to approach future reform. Any and all efforts at reform will be met with opposition, but hope is not lost.

**What Do I Get For My Money?**

Creating a blanket assessment of how much money it costs to buy levels of influence is nearly impossible, but a Forbes Magazine article\(^\text{106}\) attempts to do just that. The article, which relies on information from political strategist, and former White House pollster Douglas Schoen, says:

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\text{**$35,000**} \quad \text{“is the minimum ante to be on the radar,” says Schoen. That’s the legal maximum contribution to an election effort—$2,500 each for the primary and general phases to the campaign committee, plus $30,800 to the national party committee. “You get invited to events and somebody will return your call. It used to be that had a bigger impact, but you’re not going to be ignored.”}
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\text{**$100,000 to$150,000**} \quad \text{“makes an impact somewhere,” says Schoen. Approach a super PAC with a single issue and a contribution on that scale, and your concerns will make it to party leadership. “You can make a determinative impact on a particular issue.”}
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$2 million to $3 million is enough to “have a huge impact on the party committees. You can influence a couple of races. You can be a serious player and be seen as one of the more important people in the process,” says Schoen.

$5 million to $10 million makes you an influential figure in five or ten Senate races. “You will be taken seriously in Washington by every player. In traditional philanthropic giving, that’s a valuable contribution, but the president of the university doesn’t have time for you. The President of the United States does have time for you.”

$70 million makes you “as important as anyone in America. You set the agenda. You control the action.”

While this may strike you as a superficial analysis, it is the only (widely available) source that attempts to quantify the cost of influence using hard numbers. This analysis, however, is misleading. Schoen’s quote would have you believe that once you contribute the money, you are in…now a key player in Washington, and setting the agenda. That would be wrong. Last election cycle, for example, casino billionaire Sheldon Adelson contributed $70 million to the Republican cause. Certainly, Adelson is not setting the political agenda for the nation (his side lost). Any analysis of what may have happened if Romney secured the presidency is just speculation.

Ibid.

Contributing money to the losing candidate is not money well spent, but ‘buying influence’ is a gamble. There are other people contributing money on the other side, and in a sense, playing against you.

While it is good to be an idealist, and propose solutions to the problems of today, we still have to function in society as it is currently structured. So far, there has been considerable discussion about the opportunity to purchase significant influence through large campaign contributions; the existence of this influence follows logically from the theories of Nobel Prize winning economist Gary Becker who has reduced all behavior to a cost-benefit analysis. When we spend money, it is because whatever we are spending it on is worth more (to us) than the money itself.

If I choose to buy my mother a gift, I may have done it to make her happy, or to influence her to like me more than a sibling, or even to eliminate some illogical feeling of guilt, but whatever my motivation, achieving that result would be more important to me than the money itself. This is also true of people who donate to political campaigns. They may do it for a multitude of reasons, but regardless of their motivation, the perceived opportunity for influence is more important, or valuable, to them than the money they spend.

**Friends in High Places**
Now for the fun stuff…buying your own politician. ‘If you can’t beat ‘em, join ‘em’ is a sentiment that Sheldon Adelson expressed in his Forbes Magazine Profile: “I’m against very wealthy people attempting to or influencing elections. But as long as it’s doable I’m going to do it. Because I know that guys like Soros have been doing it for years, if not decades.”

It seems important to point out that, while many contribute to political campaigns to garner favor with newly elected officials, it is more common for corporations to spend money to secure backing for specific issues, rather than having support from individual candidates. To do this, companies employ lobbyists, who work to ‘educate,’ (code word for influence,) politicians about the companies stance on an issue. If that is what you are looking for, you should go hire a lobbyist. They are helpful in gaining support for seemingly unnecessary causes (such as large farming corporations benefiting from subsidies that were designed to protect the small farmer).

If, however, you are looking to have some influence over specific members of Washington’s elite, you must answer certain questions. First you must determine which candidate to support. It may seem obvious that you would want to contribute to the candidate whose views are most similar to your own, but a strategy employed by many companies is to contribute to the candidates of both parties. By evenly distributing donations, it is possible to build relationships with the winning candidate regardless of the outcome of the election. Once

109 Billionaire Sheldon Adelson supra note 5.
you determine who you will support, you need to decide how much money you would like to contribute, and if you are comfortable disclosing your donation. Once you have made those determinations, you should find a Super PAC, or a 501 (c) group with goals that align with your own. There are benefits to both kinds of organizations: Super PACs can spend all of their funds on political activity, but they have to disclose their donors; 501 (c) groups can legally suppress donor information, but they must spend more than half of their funds to “to further the common good and general welfare of the people of the community,”110 which does not include political activity. If you are unhappy with existing organizations, you are free to form your own Super PAC.

To start a Super PAC, you must file a Statement of Organization, or FEC Form 1, with the Federal Election Commission. In addition, you must send the FEC a cover letter indicating that your committee will be identifying itself as a Super PAC (an FEC approved template is attached to the end of this document.

Once you have made your contribution, the organization will use your money to run advertisements to educate the public about the wonderful things your candidate is doing, or the unspeakable actions of the opposing candidate. These ads can run until Election Day.

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110 IRS supra note 84.
If your candidate was successful in the electoral process, congratulations! He/she could not have done it without loyal supporters like you. You now have an ally in politics. Your contribution (depending on its size) gives you access to the official. Phone calls and meetings can easily be scheduled, so be sure to keep them abreast of your views. While you cannot explicitly buy the votes of your new friend, it is highly likely that your concerns will be on the agenda.

If your candidate did not win: better luck next time. You will not get a very good return on your investment, but I told you, campaign spending is a gamble.
Are you a person?

NO

Yes

(Sigh) No

Pretty secretive

Not so much

Maybe we should have clarified: Are you actually a person?

No

Do you want to help a specific candidate?

Yes

Start a PAC. Post-Citizens United, PACs are the vinyl records of influence peddling—outdated but still good for special occasions. They can't give more than $5,000 to a candidate per election.

No

Form a shell company. It can make donations to super PACs or 501(c)s. Just don't be too obvious about it.

Give to a super PAC. You can spend as much as you want, as long as you disclose your identity (unless you use a shell company). Super PACs can't collaborate with candidates, but it's no secret whom they're supporting.

Give to the candidate. You can give up to $2,500 per election. Pretty disappointing, huh?

Become a bundler! Have your friends and family wire checks to your candidate of choice. Think of it as a rent party, except in this case you'll need to raise tens of thousands of dollars, and the apartment is the US Embassy in the Bahamas.

Give more! You can donate all you want to a candidate's recount fund or inaugural committee. You can give $5,000 to her PAC. You can even give up to $2,000 to her compliance fund, which pays lawyers to make sure the candidate follows fundraising rules. Meta!

How much more?

No, but my pals do

A bit

A BUNCH

A TON

Do you have more money to burn?
Committee Name:

If registered, FEC ID:

Today’s Date:

Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Form 1, Statement of Organization—Unlimited Contributions

To Whom It May Concern:
This committee intends to make independent expenditures, and consistent with the U.S. Court of Appeals for the District of Columbia Circuit decision in SpeechNow v. FEC, it therefore intends to raise funds in unlimited amounts. This committee will not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees.

Respectfully submitted,

Treasurer’s Name:

, Treasurer