

ARE WE DOOMED?: THE CURRENT STATE OF FEDERAL ELECTION REGULATION

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As the 2016 election approaches, commentators and pundits complain that elections no longer belong to the people but are instead run by special interests and huge donors. However, this is not a new trend. A sense of paranoia that elections are unfair and that “something must be done” has become an integral part of the narrative surrounding modern elections. The United States voting populace has grown accustomed to living with this fear, almost getting pleasure out of fretting about their rights being taken advantage of. After all, this country was built on beating the big man in the tower for the sake of the rights of the little guy. That big man has evolved from a tyrannical monarch and parliament, to the wealthy in smoke-filled rooms, to large corporations and their rich CEOs contributing to large political organizations. Americans root for the underdog, whether it is a political party, a particular candidate, or a specific ideology. When one of these underdogs rises to power, it often loses the characteristics that Americans champion, and a new underdog must be anointed to take its predecessor’s place. In modern elections, the “big man in the tower” is the big donor or the corporation, who feeds money into campaigns so that certain candidates will win that best suit the donor’s or corporation’s interests.

Money has driven elections for much longer than the past few election cycles, but now the speed at which people’s fears can spread has increased, and the networks available to share these fears have grown tremendously. The American voting public is, by its very nature, suspicious of its rights being compromised by some sort of tyrannical entity, so there will always be something or someone to blame and some sort of change desired. Since the 1970s, election regulations have been the key for combating oppression of the little guy. And since then, when one foe is vanquished, another rears its ugly head and is able to rely on the spoils that its predecessor did not lose. This sense of paranoia is so deeply rooted in the American public that when something is over the line and moving towards tyrannical, there may be too much noise to pinpoint it and combat it. I have pinpointed three culprits of unfairness in this cycle of worry and fear of tyranny: 1) the Supreme Court’s deregulation of election donations; 2) the rise of Political Action Committees (“PACs”) and Super PACs; and 3) the Federal Election Committee’s (“FEC”) inability to enforce election laws.

However, these alleged causes of unfairness in elections may not be causing the unfairness that commentators attribute to them. The Supreme

Court has made changes recently to legislation regulating campaign financing, but these changes do not warrant outcry given that they have not resulted in extreme shifts in behavior by candidates or their donors. Additionally, the FEC has been criticized for being toothless and unable to make decisions due to constant gridlock, yet the agency does not seem to be operating any less efficiently than it did many years ago. Therefore, the landscape of federal elections may not be scorched in untamable flames of unfairness, corruption, and greed, but may actually be operating as best it can, not warranting the doomsday commentary that currently exists.

I. THE EVOLUTION OF CAMPAIGN FINANCE RIGHTS THROUGH THE COURTS

Since the passage of the Federal Election Campaign Act (“FECA”) in 1972, the laws controlling spending in campaigns for federal elections have conflicted with the rights afforded to candidates and those wishing to donate to candidates.¹ This historic tension between the desire to give to candidates to affect the political process and Congress’s goals of limiting corruption and keeping elections fair boils down to some of the most fundamental rights in American politics: the rights of freedom of speech, association, and expression protected by the First Amendment.²

A. ANALYSIS OF BUCKLEY V. VALEO

Although a fight was brewing, the Supreme Court attempted to stay out of it, allowing Congress the power to prevent corruption and keep elections fair.³ The fight between the First Amendment and the need to regulate election campaigns came to the main stage in the Supreme Court’s decision of *Buckley v. Valeo*, which was decided on January 30, 1976, just a few short years after the passage of FECA.⁴

At the time of its decision, *Buckley v. Valeo* was considered “unprecedented,”⁵ a holding that “significantly altered the function of the regulatory scheme established by the federal election laws.”⁶ Very quickly after the decision came down, Congress amended FECA to remove the

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¹ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–456 (1994)).

² William C. Oldaker, *Of Philosophers, Foxes, and Finances: Can the Federal Election Commission Ever Do an Adequate Job?*, 486 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 133 (1986).

³ Albert J. Rosenthal, *The Constitution and Campaign Finance Regulation after Buckley v. Valeo*, 425 ANNALS AM. ACAD. POL. & SOC. SCI. 124, 125 (1976).

⁴ *Id.*

⁵ *Id.* at 124.

⁶ Comment, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955, 956 (1981).

unconstitutional sections, while still attempting to limit the rights that the Court granted by its ruling.⁷ The major issues that the Court grappled with in *Buckley* were FECA's limitations on contributions and expenditures, its disclosure provisions, and the appointment procedures for the commissioners of the Federal Election Commission.⁸ FECA was amended to include limitations on independent expenditures, the amount of money that people could contribute to candidates, and required disclosure of political contributions.⁹

1. Contribution Limits

In the interest of preventing corruption and the appearance thereof, the Supreme Court upheld the contribution limits in FECA.¹⁰ In the interest of eliminating the opportunity for large contributors to “secure political quid pro quo’s from current and potential office holders,” the \$1,000 limit (anything more would be a “large” contribution) on how much a person could give to a candidate was deemed beneficial.¹¹

Although the plaintiffs argued that there were other anti-corruption and bribery laws in place that could take the place of these contribution limits, the Court ruled that these laws are insufficient because they only could make a difference in the most “blatant and specific” efforts to promote specific agendas through contributions to political officials.¹²

Because the \$1,000 limit was considered to only combat “large” contributions, it was narrow enough to meet the judicial level of scrutiny required to overcome a First Amendment challenge, strict scrutiny—which requires a narrow and specific policy to achieve a compelling governmental interest by the least restrictive means.¹³ It did not limit other forms of political association, such as volunteering, that could contribute just as much to a campaign and the political process as money ever could.¹⁴ Although the right to give money as a means of political expression is important, even considering that it has major First Amendment implications, the Supreme Court stated that corruption could have more negative effects than any positive effects associated with political expression through donations. Limiting corruption allows for the political process to be “fairer,” in a way, equalizing the playing field of influence. Therefore, by limiting the amount of money that people can contribute directly to candidates, the interests of the collective will have a greater chance of being represented. In the Court’s eyes, this quasi “equal protection interest,” which levels the playing field in terms of political influence, is more important than the interest in political expression.

⁷ *Id.* at 956–957.

⁸ *Buckley v. Valeo*, 424 U.S. 1, 7 (1975).

⁹ Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976).

¹⁰ *Buckley*, 424 U.S. at 29.

¹¹ *Id.* at 26.

¹² *Id.* at 27.

¹³ *Id.* at 29.

¹⁴ *Id.* at 28.

2. *Independent Expenditure Limits*

Although the Court recognized the importance of the contribution limits in FECA, it held unconstitutional the independent expenditure limitations, which regulate communications expressly advocating the election or defeat of a candidate made NOT in cooperation with a candidate.¹⁵ The Court distinguished the limitations on independent expenditures from those on contributions because the expenditure limits more directly restrained the freedom of expression protected by the First Amendment.¹⁶ The language of FECA at issue is a limitation on independent expenditures “relative to a clearly identified candidate,” which the Court viewed as constitutionally vague, given that the phrase “relative to” could mean advocating for a specific candidate, or, more broadly, the discussion of issues.¹⁷ The Court notes, “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”¹⁸

More importantly, the Supreme Court balanced the independent expenditure interests with the rights of free expression and association protected by the First Amendment.¹⁹ Although it was argued that this provision in FECA was merely a loophole-closing provision meant to combat parallel campaigns and efforts to expand contribution limits by making them as independent expenditures, the Supreme Court deemed the independent expenditure limits as infringing on First Amendment freedoms more than the contribution limits.²⁰ As spending money is an extremely effective means of communicating political ideas in elections, FECA’s limitations on independent expenditures eliminate a valuable means of expressing one’s support for and association with a particular candidate, party, or issue.²¹ Although the interests of preventing corruption and the appearance of corruption also applied to the independent expenditures, here, FECA was not exacting enough to meet this interest.²² If the limitation was upheld, those advocating for a candidate using independent expenditures could do so in a way that does not seem to be actually advocating for the election or defeat of a “clearly identified candidate,” thus showing that this provision of FECA was not meeting the government interest supposedly promoted to overcome the First Amendment challenge.²³

Also, the Court notes that large independent expenditures do not contribute to corruption or apparent corruption to the same extent that

15 *Id.* at 42, 51.

16 Rosenthal, *supra* note 3, at 128.

17 *Buckley*, 424 U.S. at 41–42.

18 *Id.* at 42.

19 *Id.* at 44.

20 *Id.*

21 *Id.* at 19–20, 44.

22 *Id.* at 45.

23 *Id.*

contributions do.²⁴ The Court states that if there seems to be apparent “coordination” between an independent expenditure and a candidate’s campaign, that it will be considered a contribution, held to the limitation that they upheld.²⁵ However, the Court did not specifically define “coordination,” leaving a rather large loophole that those wishing to make illegal contributions masquerading as independent expenditures can take advantage of. Congress, in amending FECA, added language explaining that expenditures made in “cooperation, consultation, or concert, with, or at request” of a candidate will be considered a contribution rather than an independent expenditure,²⁶ but this is still quite difficult to show. Indeed, the FEC, which is meant to enforce campaign laws and reprimand violators, further defined what types of expenditures are NOT considered independent.²⁷ However, lower courts have not followed the FEC’s definition of “independent,”²⁸ opening the door for the independent expenditures loophole to grow.

Although independent expenditures may not cause as much political corruption or apparent corruption as contributions, they can be construed in a way to be seemingly independent, while actually running parallel to candidate campaigns. After *Buckley v. Valeo*, legal and political commentators highlighted this loophole as possibly creating a major issue in the future, noting that “for practical purposes, [there is] no limit on how richly financed . . . campaigns may be.”²⁹ It was also predicted that FECA provisions which were upheld in *Buckley* could possibly be deemed unconstitutional later, and that the decision also figuratively limited the innovative power of the legislature to further regulate elections.³⁰ While the Court appropriately protected the First Amendment rights of political association and expression through donations, by not narrowing or clearly defining what it was protecting with the independent expenditures, and not tackling the loophole problem, the Court opened the floodgates for bolder spending in campaigns.

3. Disclosure Requirements

The Supreme Court also narrowed the disclosure requirements of FECA, balancing the interest of reducing corruption with the possible infringement on First Amendment rights.³¹ Specifically, the Court found that requiring certain disclosures of expenditures would infringe on the “privacy of association and belief” which is protected by the First Amendment.³² The Court did not, however, completely eliminate disclosure

24 *Id.* at 46.

25 *Id.* at 46–47.

26 FECA, 2 U.S.C. § 441(a)(7)(B)(i) (2012).

27 Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 598 (2000).

28 *Id.* at 599.

29 Rosenthal, *supra* note 3, at 131.

30 *Id.* at 133.

31 *Buckley v. Valeo*, 424 U.S. 1, 64, 66–68 (1975).

32 *Id.* at 64.

requirements because they do offer great benefits in diminishing corruption and the appearance of corruption, while also providing information to voters.³³ Knowing the identity of financial contributors provides the electorate with great insight into a candidate's interests, motivations, and influences. Therefore, the Court narrowed FECA's disclosure requirements for individuals and groups for contributions "earmarked" for political purposes or requested by a candidate to be contributed to another candidate or political committee. The Court also narrowed the disclosure requirements for expenditures for communications that "expressly advocate" for or against a "clearly identified candidate."³⁴

However, the Court did not define what sorts of communications would constitute "express advocacy" for purposes of independent expenditures, once again leaving a large loophole that those making "independent" expenditures could take advantage of. The Court did identify a few "magic words" that would constitute "express advocacy" such as "vote for," "elect," and "support," to name a few.³⁵ So, individuals, corporations, and even foreign nationals could make unlimited expenditures supporting a particular candidate without disclosure provided they purchase a thesaurus to avoid using certain words and phrases.³⁶ Not only could this increase the possibility of corruption, but some of the most influential contributors—with their contributions actually being categorized as independent expenditures—could use a synonym of "elect" in communications supporting a candidate, and the electorate would be none the wiser, since the communication would not contain a "magic word," and thus would not be considered "express advocacy" subject to FECA's disclosure requirements.

Since *Buckley* was the Supreme Court's first major decision regarding modern election law, it presented the potential for a major shift in candidate and electorate behavior. It also offered an opening for the Court to be emboldened in future decisions, using the powerful rights protected by the First Amendment as a means to further restrict election regulation. However, these "restrictions" may not have had the dire effect that commentators postulated. Although *Buckley* left open many loopholes, this does not necessarily mean that major shifts in behavior occurred during subsequent campaigning that led to further corruption.

B. ANALYSIS OF CITIZENS UNITED V. FEC

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which included provisions to affect corporation and union election behavior by prohibiting the use of general treasury funds for "electioneering communications" within specified time frames.³⁷ These

33 *Id.* at 68.

34 *Id.* at 13.

35 Thomas & Bowman, *supra* note 27, at 594.

36 *Id.* at 596.

37 *Citizens United v. FEC*, 558 U.S. 310, 320–21 (2010).

“electioneering communications” included “broadcast, cable, or satellite communication” that targeted the electorate within a timeframe close to an election, and included commercials that were broadcast in these mediums.³⁸ Citizens United, a non-profit corporation, produced a documentary called “Hillary: The Movie” and sought to advertise the movie, which would then be aired through Video-On-Demand on DirectTV, around the same time as primary elections that then-Senator Clinton would be participating in.³⁹ In anticipation of the release of their documentary, Citizens United sued the FEC to enjoin enforcement of the BCRA, which could prohibit the release of the film.⁴⁰

Again, similar to *Buckley*, the tension between the First Amendment rights of freedom of speech and association and the interest of keeping elections fair was center stage before the Supreme Court. The Court ruled that this ban on political speech was a clear violation of the First Amendment, regardless of the type of speaker at issue.⁴¹ The majority stated, “[w]ere the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process.”⁴² Although corporations had been treated differently in the past in cases, like *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*, the Court in *Citizens United* ruled that associations of individuals (like corporations or other groups) deserve the same First Amendment freedoms as individual speakers participating in the political process.⁴³ The Court cleverly set corporations free by stating that the “identity” of the speaker does not matter for First Amendment protection, whether that identity is of a certain race or religion, or if the speaker is, in fact, a corporation.⁴⁴

The Court deviated from its holding in *Austin v. Michigan Chamber of Commerce*, in which limitations on the First Amendment rights of corporations were held valid because corporate funding of elections through treasury funds had created a “distortion” effect.⁴⁵ After all, corporations are faceless entities with very specific interests that vast, unlimited expenditures could entice politicians to align with. However, in *Citizens United*, the Court overruled its previous holding favoring the anti-distortion interest, as upholding First Amendment limitations would curb political speech of all major entities that had the potential to “distort” the election environment, including mass media corporations.⁴⁶ The *Austin* decision also covered the not-so-wealthy corporations such as non-profits

38 Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 8 (2012).

39 *Citizens United*, 558 U.S. at 319–21.

40 Kang, *supra* note 38, at 8.

41 *Citizens United*, 558 U.S. at 341.

42 *Id.* at 339.

43 *Id.* at 343.

44 *Id.* at 342–43.

45 Kang, *supra* note 38, at 10.

46 Richard L. Hasen, “*Citizens United*” and the Illusion of Coherence, 109 MICH. L. REV. 581, 595 (2011).

who posed little “distortion” threat.⁴⁷ Although anti-corruption interests are very important, the Court realized that the law was too far reaching. Then, taking into consideration that First Amendment protections do not change based on one’s identity, the Court had no other choice but to rule that the limitations on corporate expenditures in the BCRA were unconstitutional.

1. *Effects of Citizens United*

The public and politicians alike scorned the *Citizens United* decision, fearing that it “opened the floodgates” for corporations to take over elections.⁴⁸ Now that corporations were no longer regulated in terms of their political expenditures, they could spend massive amounts of money on elections, promoting their limited interests that may be outside the public good.⁴⁹

However, *Citizens United* did not have this doomsday effect that commentators predicted. In a prior decision, *Wisconsin Right to Life II*, the Court ruled that BCRA’s prohibition on electioneering communications by corporations could only extend to those communications that advocate a specific candidate, and not to issue communications that may or may not mention a candidate or group of candidates.⁵⁰ Therefore, corporations were already able to spend what they wanted on election communications prior to *Citizens United*, so long as they were framed in a way to comment on an issue rather than a candidate. Corporations were able to “avoid BCRA by doing exactly what they did before BCRA and doing exactly what BCRA was designed to prevent.”⁵¹ The only change that *Citizens United* made was that corporations were able to expressly advocate for candidates, rather than having to hide their advocacy in issue advertisements.⁵² Although this may seem to allow corporations to run away with elections unregulated, they must still comply with the disclosure requirements should they choose to “expressly advocate” for or against a particular candidate, a valuable check on the alleged imbalance that *Citizens United* created by allowing corporations to have the same identity protections as individuals under the First Amendment.

While corporations were “given” the right to make unlimited independent expenditures in *Citizens United*, many major corporations did not change their election behavior after the decision came down.⁵³ In fact, there were no amicus briefs filed by any for-profit corporations in *Citizens United* advocating the First Amendment rights of corporations to participate in political speech in the manner ruled upon by the Court.⁵⁴ Corporations are in the business of making money, not spending large sums

47 *Id.* at 595–96.

48 Kang, *supra* note 38, at 14.

49 *Id.*

50 *Id.* at 17.

51 *Id.*

52 *Id.* at 18.

53 *Id.* at 15.

54 *Id.*

of money to effect federal elections. Participating in dicey political discourse can be quite risky, especially for large companies with many diverse shareholders, so corporations are likely to steer clear of spending corporate dollars on political speech.⁵⁵

In fact, corporations may not consider *Citizens United* a grant of unusable rights, but a dangerous tool for politicians to manipulate corporations into spending money advocating their election, or suffer from legislation against a corporation's interest.⁵⁶ This is an unorthodox corruption fear, but it nonetheless was considered by many leading for-profit corporations when they supported the corporate electioneering provisions of the BCRA.⁵⁷

Perhaps the public outcry over *Citizens United* is quite misguided, given that corporations were essentially already able to do what the Court granted them through participating in political communications focused on issues rather than candidates. Although the Court granted corporations the right to also expressly advocate for candidates, they will still have to disclose any independent expenditures to the FEC that meet this criteria. Thus, the electorate will still know where the money is coming from and who could potentially influence the candidates that they are considering. The primary business objectives of corporations do not involve affecting federal elections, so they don't have major incentives to use the new rights granted to them by the Supreme Court in *Citizens United*. While the Court may be chipping away at election regulations, the behavior of the actors has stayed fairly constant.

II. POLITICAL ACTION COMMITTEES: A GROWING FOE FROM DEREGULATION?

With each election, the media sheds light on a familiar foe: the Political Action Committee, or, more tactfully, the PAC—triggering images of a pack of beasts gathering to take over an innocent prey. With headlines screaming: “Super PACs are a dangerous new weapon,”⁵⁸ “Super PACs a disaster for democracy,”⁵⁹ and “[Candidate] super PAC spends \$2.5 million on Iowa and South Carolina ads,”⁶⁰ the PAC has become a political actor of its own. As federal election deregulation takes place, PACs seem to be the ultimate culprit for election turmoil, as they take advantage of the growing freedoms that Congress and the courts provide them. But are PACs really

⁵⁵ *Id.*

⁵⁶ *Id.* at 16.

⁵⁷ *Id.*

⁵⁸ Ruth Marcus, Super PACs are a dangerous new weapon, WASH. POST (Jan. 3, 2012), https://www.washingtonpost.com/opinions/super-pacs-are-a-dangerous-new-weapon/2012/01/03/gIQAfGVDZP_story.html.

⁵⁹ Fred Wertheimer, Super PACs a disaster for democracy, CNN (Feb. 15, 2012), <http://www.cnn.com/2012/02/15/opinion/wertheimer-super-pacs>.

⁶⁰ Christine Ayala, Cruz super PAC spends \$2.5 million on Iowa and South Carolina ads, DALLAS MORNING NEWS (Jan. 19, 2016), <http://trailblazersblog.dallasnews.com/2016/01/cruz-super-pac-spends-2-5-million-on-iowa-and-south-carolina-ads.html>.

awful creatures responsible for elections being run by rich corporate interests, with deregulation feeding the fire, or are they merely the natural result of interest-driven grouping and organization? Has the most recent election deregulation caused PACs to take over, or have they been in control for a much longer time, suggesting that the deregulation may not be to blame for the flaws in our election system?

A. WHAT IS A POLITICAL ACTION COMMITTEE?

The PAC can trace its roots to the re-election of President Franklin Delano Roosevelt in 1944 when the Congress of Industrial Organizations gathered to raise money through contributions from union members.⁶¹ At the time, unions were not allowed to donate to federal candidates because it would violate the Smith Connally Anti-Strike Act of 1943.⁶² But, by creating this organization of individual, voluntary contributors, the union that supported Franklin D. Roosevelt could contribute without violating the Act.⁶³

Today, PACs are regulated by the FEC, with registration and reporting requirements.⁶⁴ The FEC has separated PACs into two types: Separate Segregated Funds (“SSFs”) and non-connected PACs.⁶⁵ SSFs are PACs “established and administered by corporations, labor unions, membership organizations or trade associations” that can only seek contributions from certain members of their organizations—specifically, in a corporation’s case, the corporation’s stockholders, executive and administrative personnel, and family members of these groups or, in a labor union’s case, union members and their families.⁶⁶ By contrast, non-connected PACs are those that are not connected to one of these organizations and can thus seek political contributions from the public.⁶⁷ SSFs are subject to more stringent restrictions when soliciting their members for contributions, such as disclosure of the political purpose of the organization and the offer to refuse to contribute without threat of force or loss of employment.⁶⁸ Because non-connected PACs are only seeking contributions from the public, they are not held to such strict restrictions, but still must state who is sponsoring the solicitation of the contributions.⁶⁹ Regardless of the type, all PACs are required by the FEC to disclose their receipts and disbursements, to ensure that they are following current federal election laws.⁷⁰ Although PACs make it easier for corporations and other powerful

61 Center for Responsive Politics, *What is a PAC?*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/pacfaq.php> (last visited Sept. 5, 2016) [hereinafter *What is a PAC?*].

62 *Id.*

63 *Id.*

64 Federal Election Commission, *Quick Answers to PAC Questions*, http://www.fec.gov/ans/answers_pac.shtml (last visited Sept. 5, 2016) [hereinafter *Quick Answers*].

65 *Id.*

66 *Id.*; Federal Election Commission, *SSFs and Nonconnected PACs*, <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml> (last visited Sept. 5, 2016).

67 *Quick Answers*, supra note 64.

68 Separate Segregated Funds, 11 C.F.R. § 114.5(a) (2002).

69 Communications; Advertising; Disclaimers, 11 C.F.R. § 110.11(a)(3) (2014).

70 *Quick Answers*, supra note 64.

groups to gather contributions, thus promoting the organization's interests, the FEC's registration and reporting requirements provide a sufficient check on the potentially unruly—and often talked about—pressure that corporations put on politicians.

B. A NEW TYRANT: THE SUPER PAC

After *Citizens United*, a new type of PAC emerged: the Super PAC. Super PACs are not held to the same restrictions as regular PACs because they do not make contributions to candidates, but rather make independent expenditures.⁷¹ Super PACs may make these independent expenditures to expressly support or oppose candidates.⁷² In *SpeechNOW.org v. FEC*, a non-profit organization attempted to accept contributions that exceeded the \$5,000 limit from individual contributors and not register with the FEC as a PAC (thus agreeing to comply with disclosure requirements) because it was not making contributions to individual campaigns but rather was making independent expenditures, arguing that such disclosure would infringe upon its and its donor's First Amendment rights.⁷³ The Court followed the reasoning of *Citizens United* and found that limitations on contributions made to groups who subsequently use the funds as independent expenditures do violate the First Amendment rights of both SpeechNOW and its donors.⁷⁴ The Court's ruling therefore made acceptable what many PACs had already been doing, thus creating a new type of independent expenditure-only committee that could accept unlimited contributions from individuals and then make unlimited independent expenditures. Coupled with *Citizens United*, *SpeechNOW* also allows corporations and labor unions to utilize their First Amendment rights to give unlimited contributions to these independent expenditure-only committees. Although these committees were given more leeway, they must still register with the FEC as a Super PAC and follow the necessary reporting requirements, still allowing the general voting public access to where money comes from in its elections.⁷⁵

C. WHAT DRIVES A PAC?

Although PACs have been given greater latitude to spend money in elections, as Congress diminishes regulation and courts then further break down what Congress passes, the results of this increased spending may not cause the horrendous dangers that media headlines squeal. PACs are at their core simply groupings of like-minded contributors spending money in elections toward a common goal. There are two dominant theories of what

⁷¹ What is a PAC?, supra note 61.

⁷² Wendy L. Hasen et al., *The Effects of Citizens United on Corporate Spending in the 2012 Presidential Election*, 77 J. OF POL. 535, 535 (2015).

⁷³ *SpeechNOW.org v. FEC*, 599 F.3d 686, 689–91 (2010).

⁷⁴ *Id.* at 696. The court did note however that they “only decide these questions as applied to contributions to SpeechNOW, an independent expenditure-only group. [This] holding does not affect...limits on direct contributions to candidates.”

⁷⁵ What is a PAC?, supra note 61.

drives PACs to contribute money to candidates: the “electoral strategy” and the “legislative asset model.”⁷⁶ The “electoral strategy” posits that a PAC gives to candidates from the geographical area of its donors and pushes ideologies onto these candidates that will then aid its specific cause or interest.⁷⁷ Because a candidate is “grateful” for the PAC’s help in getting elected, her ideologies will fall in line with those of the donor who helped get her elected to public office. On the other hand, the “legislative asset model” suggests that PACs focus on finding a candidate that already has the “correct” ideologies that will best serve the PAC’s interests and work to get her elected.⁷⁸ By focusing on ideology rather than someone who is from the PAC’s geographic area, the PAC may have the best chance to have its interests present in the candidate’s policy-making agenda.

Additionally, PACs tend to focus money towards candidates who are electorally vulnerable, because it makes candidates even more indebted to the contributor if there was a chance that they were not going to be elected in the first place. This creates more “wobble-room” in candidates’ base ideologies once they are indeed elected.⁷⁹ If a candidate is in a particularly competitive race, she will be more vulnerable and PACs will likely return to contributing more to a candidate—since it’s better to be sure that the candidate gets into office rather than her opponent who is likely someone unfriendly to the PAC.⁸⁰ When a candidate has more stability, PACs can contribute less money (though not stop contributing completely) while still keeping their interests on the minds of the candidates receiving the funds.⁸¹

D. WHAT DRIVES CORPORATIONS TO GIVE TO PACS?

Certain corporations are more apt to contribute to or even create their own PACs than others. Specifically, when the government is a major client of a corporation, that corporation is much more likely to create or contribute to a PAC that meets its interests.⁸² Also, when a corporation is within an industry that is hotly regulated and tends to expand or contract depending on the political landscape, its PAC activity will likely increase.⁸³ Some corporations consider PAC activity to be necessary to attaining and defending their interests, as policy can strictly determine whether or not they succeed or even survive.⁸⁴ PAC activity also occurs across the entire range of corporations and firms regardless of size.⁸⁵

⁷⁶ Paul D. Jorgensen, *Campaigning on Fruit, Nuts, and Wine*, 63 POL. RES. Q. 16, 17 (2010).

⁷⁷ *Id.*

⁷⁸ *Id.* at 17–18.

⁷⁹ *Id.* at 21.

⁸⁰ *Id.*

⁸¹ *Id.* at 24.

⁸² Marick F. Masters & Barry D. Baysinger, *The Determinants of Funds Raised by Corporate Political Action Committees: An Empirical Examination*, 28 ACAD. OF MGMT. J. 654, 656 (1985).

⁸³ *Id.*

⁸⁴ *Id.* at 662.

⁸⁵ John L. Boies, *Money, Business, and the State: Material Interests, Fortune 500 Corporations, and the Size of Political Action Committees*, 54 AM. SOC. REV. 821, 829 (1989).

Giving to a PAC, while technically visible to the public through FEC disclosure requirements, is much more discreet than lobbying, attending rallies, or publicly endorsing a candidate for election because the average voter is much more likely to see outward attempts to sway policymakers than to research who is giving to a certain PAC.⁸⁶ However, these other types of interest-driven attempts to lean policy in a corporation's favor have not necessarily diminished. Giving to PACs is just an additional tool that corporations may use in order to persuade lawmakers to make favorable regulations. In some cases, when corporations or unions are within a very concentrated industry, expending large amounts of resources for PAC activity could be disadvantageous because competitors and allies alike will feel pressure to do so as well, potentially nullifying any effort made.⁸⁷ As many industries are shrinking in terms of the number of players in the game—with mergers, consolidations, and some corporations even monopolizing—this disadvantage of PAC activity could actually grow, as the potential for influential companies to enter into the political sphere increases.

There are two schools of thought that explain the motivations of corporations to give to PACs and Super PACs. The first school of thought relies on the “agency-theoretic argument,” which states that corporations seek to influence current regulations that will benefit short-term shareholder interests and give a boost to current conditions, regardless of whether or not such action is at the expense of the corporation's long-term prosperity.⁸⁸ Working towards such short-term goals looks extremely good for the decisionmakers of the company and therefore could give them a great incentive to participate in giving to PACs and Super PACs—as it provides a one time contribution that could offer fast results. The second school of thought relies on the “rational value maximizing perspective,” and considers political spending an investment in the interests of the company that benefits shareholders in the long run, but at a cost to the corporation's current bottom line.⁸⁹ These sorts of investments likely will not yield benefits immediately, so they may be considered a loss if the policy the contribution is seeking is slow to change. Therefore, depending on the perspective, giving to PACs can seem extremely beneficial in the short term, or incredibly risky.

E. PAC POWER THROUGHOUT HISTORY: TODAY'S WOES MAY NOT BE NEW

With each election, it seems that the number of complaints surrounding PACs and their negative effects on elections grows exponentially, with candidates scorned for utilizing them, even though they may just be a necessary evil of the federal campaign framework. Even the most liberal

86 Masters & Baysinger, *supra* note 82, at 661.

87 *Id.*

88 Hasen et al., *supra* note 72, at 536.

89 *Id.*

candidates who brandish the use of these funds as “corrupt and undermining American democracy” must rely on these funds to have any competitive edge.⁹⁰ But then, these candidates are ripped apart for relying on this source of campaign resources and it has become a race to see who is using the most of this sinful but succulent fountain of campaign money. These grievances related to PACs are not new, but have been proclaimed for decades. In the 1980s, PACs were a popular topic for academics in many different fields, who equated them to buying access to lawmakers and therefore influencing them through heavily influencing elections.⁹¹ Corporate and labor PACs have been considered the most successful at organizing and influencing policymaking because they are extremely reliant on regulations and have historically been linked to influencing lawmakers, even before the advent of the PAC.⁹²

Many of the criticisms that exist now have existed for years. Sandra Davis points to three distinct complaints about PACs that were prevalent in the late 1980s: 1) that PACs are only after access, giving to someone they know will win and then lobbying winners who can benefit them; 2) that PACs do not follow the interests of their members and donors, but rather solicit donors aimlessly and then do what they must to promote the PAC’s interest; and 3) that PACs take attention away from and weaken the traditional political parties by raising money and taking volunteers away from parties who have historically fundraised for candidates and led campaign initiatives to get members of the party elected.⁹³

With another important player to please, and the increased cost of winning elections, candidates have shied away from traditional campaigning and have focused on a “‘money chase,’ where candidates pay increasing attention to raising money rather than making campaign speeches or personal appearances.”⁹⁴ Because PACs were already so powerful, they took attention away from candidates’ attention to the issues and made elections more about money. However, a broken or corrupt system is only bad if people feed into it. As PACs grew in power, so did voters. Soley, Craig, and Cherrif found that “monies contributed by [PACs] to promote candidacies are significantly and positively related to the votes that candidates receive. Candidates have become dependent on these contributions, suggesting that PACs have potentially more influence on elected officials than may be good for our system of government.”⁹⁵ As PACs grew in their ability to influence elections, voters turned out more for

90 Nicholas Confessore, *Bernie Sanders Tops His Rivals in Use of Outside Money*, N.Y. TIMES (Jan. 28, 2016), http://www.nytimes.com/2016/01/29/us/politics/bernie-sanders-is-democrats-top-beneficiary-of-outside-spending-like-it-or-not.html?_r=0.

91 Masters & Baysinger, *supra* note 82, at 654-55.

92 Linda L. Johnson, *The Effectiveness of Savings and Loan Political Action Committees*, 46 PUB. CHOICE 289, 300 (1985).

93 Sandra Davis, *Goals & Strategies of Political Action Committees*, 21 POLITY 167, 167 (1988).

94 Lawrence C. Soley, Robert L. Craig & Samir Cherif, *Promotional Expenditures in Congressional Elections; Turnout, Political Action Committees and Asymmetry Effects*, 17 J. OF ADVERT. 36, 37 (1988).

95 *Id.* at 43.

candidates, and candidates began to realize that these committees could offer them an easier and more direct route to office than the traditional method of campaigning or putting faith into the political parties.

F. POST *CITIZENS UNITED* AND BCRA

In 2010, after *Citizens United* and other subsequent cases, corporations had the ability to greatly influence the federal policies that govern them by giving unlimited contributions to Super PACs. President Obama stated that *Citizens United* reversed “a century of law to open the floodgates for special interest . . . to spend without limit in our elections,” and indeed the lack of limits led to \$1 billion spent in the 2012 presidential election (a 594% increase from the previous presidential election).⁹⁶

However, in a fascinating turn of events, corporations are not the guilty parties leading to this extreme increase in political spending. According to Wendy L. Hasen, Michael S. Rocca, and Brittany Leigh Ortiz, the increases in regular PAC spending between the 2008 and 2012 presidential elections were only slight increases—not statistically significant—compared to previous election cycles.⁹⁷ More interesting still, no *Fortune* corporations spent money toward electioneering and issue advocacy paid for through their general treasuries, and only ten contributed to Super PACs.⁹⁸ Because corporations are beholden to both their shareholders and their customers, who have varied interests, corporations are quite weary of spending company money on a contribution to a Super PAC. Hasen, Rocca, and Ortiz point to individuals as the culprits for such large amounts of money being contributed to and spent by PACs in the 2012 presidential election.⁹⁹

Wealthy individuals are more of a threat to Super PACs controlling elections than corporations ever could be because their motivations are much more direct. The major incentive for corporations to contribute money to affect policy-making is simple: make profit for the corporation’s shareholders. However, the reality is much more complicated, as shareholders’ interests expand further than just making money. For a publicly traded company, stock must be increasingly attractive to current and potential shareholders, so taking a stand on a particularly contentious issue by giving to a Super PAC may turn many off, plummeting the stock price of the corporation. Thus, President Obama’s fears that the floodgates are open for special interests only seems to be partly true. Yes, individuals can now contribute as much as they want to Super PACs and this will make a difference in elections, as a few wealthy individuals can potentially make waves in coming elections. However, corporations, the typical special interest that people fear, are not giving to Super PACs in droves, or much at all; thus, showing that *Citizens United* did not cause the disastrous effects that the media and opponents touted.

⁹⁶ Hasen et al., *supra* note 72, at 535.

⁹⁷ *Id.* at 539.

⁹⁸ *Id.* at 541.

⁹⁹ *Id.* at 543.

Although corporations are not giving to Super PACs as many feared, opponents of the relaxed regulations related to corporations influencing elections through spending in PACs suggest that there should be legislation that requires corporations to get shareholder approval before funds can be contributed to a candidate or Super PAC.¹⁰⁰ This will likely be difficult as shareholder approvals are only required in limited circumstances, including voting for directors, amending important corporate documents, and fundamental transactions.¹⁰¹ Further, from a practical standpoint, getting shareholder approval every time a corporation spends corporate money to influence policy would be a logistical nightmare as shareholders can be very difficult to be in contact with, and even more difficult to get a response from. Therefore, such legislation would essentially nullify the Supreme Court's decision to allow corporations First Amendment rights and deem *Citizens United* void.

G. CORPORATIONS ARE STILL IN THE GAME

The major barriers for corporations preventing them from contributing to PACs and Super PACs are the FEC disclosure requirements and potential shareholder responses as discussed above. However, corporations do still have a means of affecting elections and policy without the general public knowing how much they are spending or where the money is going. There exists an incredible loophole that corporations can and do take advantage of: giving to non-profit organizations, such as 501(c)(4) social welfare organizations and 501(c)(6) trade associations, which are exempt from disclosing their donors.¹⁰² Opponents of these types of contributions argue that “these companies seek to influence voters—and ultimately the composition of our government—yet avoid democratic accountability by keeping their political spending in the dark.”¹⁰³

There are laws in place and IRS regulations that prevent non-profit organizations from being overtly political, as such practice abuses their tax-exempt status. However, many argue that these rules are not being enforced, but rather the Internal Revenue Service (IRS) is getting sloppy in its regulation of non-profit organizations.¹⁰⁴ By giving to these organizations, corporations can essentially hide from the disclosure requirements associated with other political entities and even potentially write off their contributions as donations.

¹⁰⁰ Adam Loiz & Liz Kennedy, *Democracy at Stake: Political Equality in the Super PAC Era*, 39 *HUM. RTS.* 15, 20 (2012).

¹⁰¹ See Model Business Corporation Act §§ 8.03, 10.03, 10.20, 11.04, 12.02, 14.02 (Am. Bar Found. 2003).

¹⁰² Loiz & Kennedy, *supra* note 100, at 16.

¹⁰³ *Id.* at 17.

¹⁰⁴ *Id.* at 20.

H. CURRENT NEWS REGARDING PACS

Although campaigns do rely heavily on PACs, individual contributors still can make a difference in elections, and in the recent race for president in 2016, individual donors were on the rise. Senator Bernie Sanders of Vermont, who ran as a Democrat in the 2016 presidential election, received small donations from 1.3 million donors, totaling \$20 million alone in January, as he geared up for the Iowa Caucuses.¹⁰⁵ Although critics have said that the new election fundraising de-regulation has the potential to discourage individual donors because of their perceived lack of influence and limited means compared to huge, wealthy donors, if a candidate inspires the public enough, they will in turn reach into their pockets and give for a future they believe in.

However, in this race, no one candidate is only relying on individual donors, for it would be nearly impossible to get any traction and be a real front-runner in the race. Bernie Sanders, who bashed the *Citizens United* decision and ran on a platform to overturn the Court's ruling and reverse the dangerous de-regulation of campaign finance, was supported by a very successful and generous union, National Nurses United.¹⁰⁶ By January of 2016, the union's Super PAC had spent over one million dollars supporting Bernie Sanders, and apparently, more Super PAC money had been spent in support of Sanders up to that point than for his establishment opponent Hillary Clinton.¹⁰⁷ National Nurses United Super PAC took advantage of a right for unions to have First Amendment rights like corporations from *Citizens United* and financed its spending by mandatory and voluntary dues from the organization's 185,000 members.¹⁰⁸

While Bernie Sanders received sizeable support from Super PACs, he was not in direct contact with these supporters and did not synchronize his campaign with their efforts. However, Hillary Clinton's campaign coordinated directly with a heavy hitting Super PAC called Correct the Record, which had raised two million dollars by the end of 2015 and continued to acquire funds to work with Clinton's campaign.¹⁰⁹ As noted earlier, organizations making unlimited independent expenditures may not coordinate directly with a candidate's campaign or their spending will be deemed contributions. However, the Correct the Record Super PAC only utilized "content posted online for free, such as blogs" and thus they were able to take advantage of a 2006 FEC ruling that stated that such content is off limits to the typical regulation scheme.¹¹⁰ Clinton and Sanders were neck and neck in their fundraising efforts, having raised astounding

¹⁰⁵ Matea Gold et al., *Donations, big and small, continue to pour into 2016 race*, WASH. POST (Feb. 1, 2016), https://www.washingtonpost.com/politics/billionaires-and-small-donors-help-pour-millions-into-2016-race/2016/01/31/c5d2d63c-c85e-11e5-88ff-e2d1b4289c2f_story.html.

¹⁰⁶ Confessore, *supra* note 90.

¹⁰⁷ *Id.*

¹⁰⁸ Gold et al., *supra* note 105.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

amounts of money even before the election year began: a collective \$70 million in the final quarter of 2015.¹¹¹

Republicans in the 2016 presidential race did not follow Sanders's reliance on individual donations making up significant portions of their campaign fundraising. In the final quarter of 2015, the twelve Republican candidates raised \$90 million in total, with Ben Carson leading the pack and Senator Ted Cruz right behind him.¹¹² By the end of 2015, Ted Cruz had already raised \$47 million on his own and PACs and other independent groups raised a whopping \$41.9 million on his behalf.¹¹³ Wealthy individuals played a major role in fundraising for Republican candidates; for example a Super PAC supporting Jeb Bush received ten million dollars from financial executive Maurice Greenburg.¹¹⁴ Republicans are also receiving massive funds through "dark money" sources, which include the nonprofit organizations that do not disclose donors discussed above.¹¹⁵

III. THE FEDERAL ELECTION COMMISSION: NO GRIDLOCK DESPITE DIFFERENCES OF OPINION

In the wake of the Watergate scandal, Congress realized that major campaign reform was required since the attempts to regulate up until that point had created an atmosphere of back-room deals and under the table financing.¹¹⁶ To combat the obvious corruption that existed, Congress attempted to create "a single effective enforcement mechanism or agency charged with the task of policing the election law."¹¹⁷ In 1974, Congress created their first version of the FEC, an interesting mix of eight commissioners from different branches of the government: two non-voting members consisting of the secretary of the Senate and the clerk of the House, two voting members selected by the Senate's president pro tempore, two voting members selected by the Speaker of the House, and two voting members selected by the President, with three of the voting members being Republicans and three Democrats.¹¹⁸

Although this could be seen as progress, the makeup of the FEC still consisted of six members that were essentially controlled by Congress—the very people that it was supposed to be regulating. Prior to the FEC being created, this self-regulation model did not work, so it seemed unlikely that this new commission would do anything differently. To make matters even more problematic, Congress also created a "backdoor" in case they did not

111 *Id.*

112 *Id.*

113 Aaron Blake, *Winners and losers from the fourth quarter of fundraising*, WASH. POST (Feb. 1, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/01/winners-and-losers-from-the-fourth-quarter-of-fundraising>.

114 Gold et al., *supra* note 105.

115 Peter Stone, *Koch brothers convene donor retreat as dark money spending set to soar*, THE GUARDIAN (London) (Jan. 29, 2016), <http://www.theguardian.com/us-news/2016/jan/29/koch-brothers-donor-retreat-dark-money-2016-election>.

116 Oldaker, *supra* note 2, at 133–34.

117 *Id.*

118 *Id.*

approve of an FEC regulation; creating a veto power for either house.¹¹⁹ Indeed, the Supreme Court eliminated this scheme that allowed for Congress to control the FEC commissioners on separation of powers grounds in *Buckley*, as the commission derives its power from the executive branch.¹²⁰ So, in 1976, Congress amended FECA to incorporate the *Buckley* decision, with the commissioners all appointed by the President with the advice and consent of the Senate, still with three commissioners from each political party.¹²¹

The term of the commissioners is six years, however there are several occasions when commissioners stayed much longer than their statutorily prescribed terms.¹²² Part of the issue, especially in recent years, is that when the President has appointed a potential replacement commissioner, the Senate has routinely rejected the appointment.¹²³ Throughout the history of the commission, there have also been periods when a vacancy exists, leaving the FEC lopsided to one party and giving veto power to commissioners.¹²⁴ Additionally, the statutory scheme involves new commissioners being appointed every two years to allow the commission to have fresh ideas constantly introduced.¹²⁵

However, this framework has definitely not been followed, with some commissioners staying much longer than six years, many years where new faces do not appear, and some years when many more than two commissioners are brought on board.¹²⁶ Specifically, in 2008, the commission experienced an influx of new commissioners, with two new Democratic commissioners and three new Republican commissioners.¹²⁷ Although new commissioners with new ideas are vital to the operation of the FEC, having four veteran commissioners is also vital, as their experience on the commission and with the other commissioners allows for more consistent decision-making.

119 *Id.* at 134–35.

120 Jamin B. Raskin, “A Complicated and Indirect Encroachment”: Is the Federal Election Commission Unconstitutionally Composed?, 52 ADMIN. L. REV. 609, 612 (2000).

121 Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976).

122 *See* Former FEC Commissioners, <http://www.fec.gov/members/formermembers.shtml> (last visited April 2016).

123 Paul Blumenthal, *FEC Commissioners All Serving Expired Terms Now*, HUFFINGTON POST, (Apr. 30, 2013, 12:57 PM), http://www.huffingtonpost.com/2013/04/30/fec-commissioners-expired-terms_n_3185715.html.

124 *See* Former FEC Commissioners, *supra* note 122.

125 Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

126 *See* Former FEC Commissioners, *supra* note 122.

127 *Id.*

FIGURE 1: TIMELINE OF FEC COMMISSIONERS BEGINNING IN 2008¹²⁸

2008	2009	2010	2011	2012	2013	2014	2015
M. Petersen	M. Petersen	M. Petersen	M. Petersen	M. Petersen	M. Petersen	M. Petersen	M. Petersen
D. McGhan	D. McGahn	D. McGahn	D. McGahn	D. McGahn	D. McGahn L. Goodman	L. Goodman	L. Goodman
D. Mason							
C. Hunter	C. Hunter	C. Hunter	C. Hunter	C. Hunter	C. Hunter	C. Hunter	C. Hunter
C. Bauerly	C. Bauerly	C. Bauerly	C. Bauerly	C. Bauerly	C. Bauerly A. Ravel	A. Ravel	A. Ravel
S. Walther	S. Walther	S. Walther	S. Walther	S. Walther	S. Walther	S. Walther	S. Walther
E. Weintraub	E. Weintraub	E. Weintraub	E. Weintraub	E. Weintraub	E. Weintraub	E. Weintraub	E. Weintraub

In order for any action to be passed in the FEC, there must be a majority vote of four votes.¹²⁹ Given the institutional framework requiring that the commission membership must always be evenly split along party lines, it seems that the grave polarization that exists in today's political landscape¹³⁰ would produce excessive gridlock within the commission and that they would get little done from lack of agreement.

A. CURRENT MUSINGS ABOUT THE FEC

The FEC has recently come under fire because of their supposed inability to enforce election laws, and the failure of the President and the Senate to properly appoint commissioners who will take action to meet the FEC's mission. In 2013, President Obama was criticized because he was unable to nominate a commissioner to replace one of the many commissioners whose terms had expired.¹³¹ He attempted to appoint a

¹²⁸ A cell highlighted in yellow represents a Commissioner's first year in office. Notice that in 2008, there were 5 new commissioners appointed to the FEC.

¹²⁹ Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

¹³⁰ Drew Desilver, *The Polarized Congress of Today has its Roots in the 1970s*, PEW RESEARCH CENTER, (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/>.

¹³¹ Blumenthal, *supra* note 123, at 1.

commissioner in 2010, but the candidate withdrew from the process after failing to obtain the confirmation of the Senate, and the contentious environment only worsened, disincentivizing the President to appoint another.¹³² Also, although the president has the constitutional power to appoint nominees for FEC commissioners based on separation of powers principles, tradition dictates that the Senate majority and minority leaders propose a list of possible nominees to the president who then formally nominates them.¹³³ Obviously, this requires some sort of agreement along party lines, and the political landscape did not support reaching over the aisle, considering the vast differences of opinion about campaign finance reform. Eventually, toward the end of 2013, President Obama replaced one Democrat and one Republican on the Commission,¹³⁴ temporarily quieting critics who were stating that he wasn't doing anything to "fix" the campaign finance system.

The Commission has also recently been reported to have infighting that often became personal, leading to disagreements and paralysis in enforcing election laws.¹³⁵ Major internal problems have occurred within the FEC, with the commissioners disagreeing and employee morale faltering.¹³⁶ Even the commissioners themselves have stated that there are major internal problems within the FEC, with the Chairwoman stating: "[p]eople think the FEC is dysfunctional. It's worse than dysfunctional."¹³⁷ Reports state that the FEC operates in a constant "stalemate" and comes to 3-3 ties on most decisions, unable to break away from their party affiliations and come to agreements.¹³⁸ Democratic members of the FEC think that this gridlock is diminishing the Commission's ability to enforce election laws, while Republican members have stated that the Commission is functioning how it is supposed to and that there is no need for alarm.¹³⁹

However, with the 2016 election looming, commentators and the commissioners themselves worry that election laws will not be followed and the FEC will have no real way to catch and punish violators.¹⁴⁰ For example, Republican candidate Donald Trump may be able to use some of his massive corporate funds to support his run for the Presidency.¹⁴¹

132 *Id.*

133 *Id.*

134 Commissioners of the FEC, <http://www.fec.gov/members/members.shtml> (last visited April 2016).

135 See generally Paul Blumenthal, *Federal Election Commission Members Really Don't Like Each Other*, HUFFINGTON POST (June 18, 2015, 3:42 PM), http://www.huffingtonpost.com/2015/06/18/federal-election-commission_n_7615084.html.

136 Megan R. Wilson, *Watchdog Probes Low Morale at FEC*, THE HILL (Oct. 7, 2015, 10:45 AM), <http://thehill.com/regulation/256187-watchdog-probes-low-morale-at-fec>.

137 Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0.

138 *Id.*

139 *Id.*

140 *Id.*

141 Fredreka Schouten, *Donald Trump's Candidacy Raises Novel Ethics Questions*, USA TODAY (Oct. 6, 2015, 6:56 PM), <http://www.usatoday.com/story/news/politics/elections/2015/10/06/donald-trump-campaign-ethics-questions/73409764/>.

Although corporate funds are not constitutionally allowed to be contributed to a candidate's campaign, there may be legal loopholes that Trump may be able to take advantage of. And because the FEC is "locked in a 3-3 partisan deadlock," it is possible that any use of his corporate funding that violates campaign laws may go un-disciplined because the FEC will fall into the same supposed pattern that it has been operating in.¹⁴² "[O]utside groups" are also raising massive funds for the 2016 election and their potential violations could also fall to the wayside because of the alleged gridlock.¹⁴³ As far as commentators are concerned, federal election laws are unlikely to be enforced in the coming election, as they have not in the past several years due to the FEC's paralysis.

B. RESEARCH METHOD TO TEST LEVEL OF GRIDLOCK

Although the media and even the commissioners are reporting that there is unavoidable gridlock within the FEC, I've decided to let the FEC's track record speak for itself. The FEC does not release that an investigation is underway until they have made a decision, to protect those accused of violating election laws (as accusations are often brought during elections cycles, potentially ruining a candidate's campaign). However, the FEC does release their votes throughout the process of evaluating a matter after the matter has come to a conclusion, showing the disagreements, if any, along the way. Additionally, the FEC also releases their votes for Advisory Opinions ("AOs"). Therefore, there are means to study whether or not the FEC is gridlocked. These records go back as far as 1999 for Matters Under Review ("MUR") and 1975 for AOs.

These AO and MUR reports offer great insight into the actual enforcement activity of the Commission, through its decisions. An AO is an "official response to a question about how federal campaign finance law applies to a specific factual situation."¹⁴⁴ Anyone may request an AO of the FEC with the only requirement being that they are actually affected by the situation represented in the question submitted.¹⁴⁵ MURs are the Commission's decisions when a candidate, individual, or organization is accused of violating an election law.¹⁴⁶ The FEC releases each AO and MUR, which include the votes of the commissioners.

To determine whether the FEC is currently operating in complete gridlock, I've compiled data from the votes for MURs and AOs from recently and when the commission was not considered to be operating under intense gridlock. Because the MUR records do not begin until 1999, I first looked at matters closed in 2002, a time when the FEC was not considered to be gridlocked. To illustrate the FEC more recently, I

¹⁴² *Id.*

¹⁴³ Lichtblau, *supra* note 137.

¹⁴⁴ Advisory Opinion Brochure, <http://www.fec.gov/pages/brochures/ao.shtml> (last visited April 2016).

¹⁴⁵ *Id.*

¹⁴⁶ Matters Under Review (MURs), <http://www.fec.gov/em/mur.shtml> (last visited April 2016).

examined cases closed in 2014, as the 2015 data is not yet complete. For the sake of continuity, I also utilized the same years for examining the votes of AOs. Because there are numerous MURs and AOs closed in 2002 and 2014, I sampled the cases rather than reviewing every single case.¹⁴⁷

The votes for each MUR and AO are available through the FEC's query system, and for many MURs there are numerous votes associated with one matter (as the commissioners sometimes do not agree and further action will be required before a case is closed). Therefore, in my analysis each MUR receives a percentage for the number of votes that illustrated a consensus compared to the total number of votes taken for that MUR. These percentages were then compiled and averaged to show the percentage of votes that a majority of the commissioners voted affirmatively.

Another possible indication of gridlock is the timing between a MUR decision and initial complaint. If the FEC is gridlocked and backlogged, this should be evident through longer decision times. Therefore, I utilized the same timing concept that I implemented in the MUR and AO: observing the time to decision recently, that supposedly has resulted in gridlock, compared to the time to decision in a time when the FEC was functioning amicably. If the time taken by the FEC to make a decision greatly increases in recent years, that will indicate the gridlock that the media reports is plaguing the FEC. In order to find the date of complaint in 2002, the "First General Counsel's Report" was the most beneficial document for each matter, as the complaint documents are not widely available for such an early year in the FEC's system. For 2014, most of the matters do have the complaint document, allowing the date to be easily found. The date of the closing is easily accessible through the FEC's query system.

C. RESULTS OF GRIDLOCK ANALYSIS

Between 2002 and 2014, I expected for the percentage of FEC votes with a majority of commissioners voting in the affirmative would dramatically fall based upon the comments of reporters, critics, and the commissioners themselves about the inability of the FEC to come to any real agreement. However, the agency's track record seems to indicate a very different conclusion: that the FEC is operating as efficiently as they did years earlier.

147 I reviewed every other MUR within each year.

FIGURE 2: MATTERS UNDER REVIEW PERCENTAGE OF MAJORITY AFFIRMATIONS

Year	Percentage of Votes with Majority Affirming
2002	89.00%
2014	89.77%

In fact, the votes reported by the FEC for MUR seem to indicate that the agency is operating with the same lack of gridlock that existed many years earlier. Although there were a few instances in these matters where the agency did not vote the required four votes, requiring a later vote, most of the cases closed without this occurring.

FIGURE 3: ADVISORY OPINIONS VOTES IN 2002 AND 2014

Year	Total Number of AOs	Number of AOs Withdrawn	Number of AOs with Majority Affirming	Percentage of Votes with Majority Affirming
2002	15	1	14	93.33%
2014	21	2	19	90.47%

The FEC's AOs indicate a very similar result to the MURs between the years 2002 and 2014. For the most part, the commissioners agreed with each other on the answers to the factual questions submitted to inquire about the legal implications of various situations in elections in keeping with the various campaign laws. In 2002, the FEC came to consensus only slightly more than they did in 2014, when the FEC was supposedly suffering from impossible gridlock.

FIGURE 4: AVERAGE TIME OF DECISION OF MATTERS UNDER REVIEW

Year	Average Time of Decision (Years)
2002	2.46 Years
2014	1.69 Years

Surprisingly, the average amount of time that it takes the FEC to work through a matter from complaint to final vote actually decreased between 2002 and 2014. There were a few cases in 2002 that took the FEC over four years to complete with very large numbers of respondents, possibly

skewing the results to come to a higher average time of decision, however, even discounting these matters, the FEC is not spending outrageous amounts of time on matters in recent years resulting in the gridlock that critics routinely allege.

Although these figures only represent a snapshot of the FEC's operations, they overwhelmingly show that nothing has particularly changed to indicate that there is constant and impossible gridlock within the agency responsible for enforcing election laws. Although the commissioners supposedly despise each other, they are able to agree in many instances both in responding to requests for AOs and in "trying" alleged violators of election laws in their MURs. Either the agency has always operated poorly, and it is operating just as poorly now, or it is acting very similarly to its predecessors who supposedly operated without gridlock and the outcry that the FEC is paralyzed may not be true.

IV. CONCLUSION

Unless some catastrophic event or unexpected act of God occurs, the 2016 Presidential election will be the most expensive American election to date, for money is being donated and spent in extremely large volumes and likely will not cease. This upward trend will likely continue, and it is unclear whether regulations will be changed to make it more difficult to raise money or spend it. However, more money does not necessarily mean more problems, and that elections are becoming less fair, as the American fearful of a tyrannical government may think.

After *Citizen's United*, corporations did not go out and spend heaps of cash in elections to make their interests more favorable to politicians, thus shifting focus from the average voters. The deregulation as it relates to Political Action Committees and now Super PACs is somewhat concerning as individuals are able to make more waves in elections with their deep pocket books by contributing unlimited sums to independent expenditure only organizations. However, these donations still must be reported to the Federal Election Commission and are accessible to both voters and other candidates. If a candidate is particularly troubled by the support of an opponent, this is easily discoverable and can be brought to the public's attention through advertising.

Another troubling result of *Citizens United* is the freedom of unions to now take advantage of First Amendment rights and create their own Super PACs that then can spend buckets of money in support of candidates. Unions seem to be more apt to spend money in this way than corporations, though they have not had the right long enough to determine if the level of spending is dangerous. Although corporations may not be contributing to Super PACs like people have feared after the Supreme Court's decision in 2012, they are contributing to seemingly non-political non-profits who are then spending large sums of money in politics. More regulation may be needed in order to keep this spending fair. Because these non-profit organizations do not have to disclose their donors to the FEC or the IRS,

unlimited “dark money” can be raised and spent in elections, possibly posing a major threat. However, this sort of back-door spending may have always existed in US elections, and this “dark money” may just be another form of the same old story.

Finally, despite harsh criticism, the Federal Election Commission is working as efficiently as it did in less contentious times, dismissing the accusations of gridlock and lack of enforcement of election laws. The FEC still has many mechanisms at its disposal to regulate elections, most importantly the disclosure requirements. Not only do these requirements allow the public to understand where money is flowing in elections, they also disincentivize some of the spending that the public fears, namely from corporations and individuals who do not necessarily want to be affiliated with a political cause or candidate. As more money is spent in each election, these disclosure requirements will be even more important. Perhaps disclosure regulations should even be expanded to allow more transparency in elections, but, as many courts have stated, these interests must be balanced with the fundamental rights protected by the First Amendment.

This political paranoia that exists in the United States is unlikely to disseminate anytime soon, with the media’s power growing every day and the country appearing to become more polarized on the issues surrounding each election. Unfortunately, every single avenue of deregulation has been deemed outlandish and fearsome, so the most important issues may not be given the credit they deserve, and the legitimate fears have been masked. A “boy who cried wolf” situation is occurring in the United States regarding any sort of deregulation and until the dust settles, real change may get stuck in the mud and the tyranny that the American public fears may go about unnoticed.