

An Analysis of the History of Campaign Finance Reform Laws and the Impact of the *Citizens United v. Federal Election Commission* on Campaign Financing

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Introduction

The methodology of funding elections for public office has been a contentious issue which traces its history back to the 1800s. In January of 1837, Representative John Bell of Tennessee introduced a bill which prohibited congressional assessments (donations), and effectively created the first federal campaign finance bill¹. With the introduction of outsider interests into the American political system, campaign finance laws were enacted in order to curtail the potential influence of political donations. Although there has been a plethora of campaign finance laws in effect for decades, recent Supreme Court rulings and instances of political corruption have brought into question their effectiveness. One large contributor to the controversy behind modern campaign finance has been the recent ruling of the *Citizens United v. Federal Election Commission*². In this case, the majority justices agreed that the ability for a corporation or labor union to donate political expenditures should not be limited by a certain amount, and that they are protected by the free speech clause of the first amendment to donate unlimited amounts of money just like ordinary individuals³.

¹ *Congressional Globe*, 24th Cong., 2d sess., 1837, 124.

² *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

³ *Id.*

The ruling expanded political power and access to non-profit groups and corporations, which has in turn seen an increase in the amount of money being involved in political elections. Ultimately, this influx in private interest donations and involvement has resulted in the effectiveness of campaign finance laws being undermined.

The History and Evolution of Campaign Finance

In the 1837, John Bell formed the precedent for campaign finance laws with his bill against congressional assessments (donations)⁴, which would pave the way for modern day campaign finance laws. During the time, “assessments were created explicitly to finance party organization”⁵ and considered to have an influence in how policymakers voted. While the possibility for corruption was considered a problem at the time, campaign contributions were not seen as a prevalent influence of policy. Seemingly, campaign finance remained an insignificant issue for decades, and was not brought back into the public sphere of attention until around the 1970s.

With the formation of Political Action Committees (PACs), collective groups were able to contribute up to \$5,000 per year to political candidates⁶ and to mobilize their political interests. Accordingly, “PACs have given nearly \$3 billion to congressional

⁴ Mutch, Robert E., *The First Federal Campaign Finance Bills*, *Journal of Policy History* 14.01 (2002): 30-48.

⁵ *Id.*

⁶ Clayton D. Peoples., *Campaign Finance and Policymaking: PACs, Campaign Contributions, and Interest Group Influence in Congress*, *Sociology Compass* 7.11 (2013): 900-13.

candidates over the past 20 years (1991-2010).”⁷ The large number of donations from PACs alone has demonstrated their effectiveness in mobilizing support for a certain issue, and how collective resources can be used to influence new ideas. PACs also have an effect on the amount of contact ordinary citizens have with legislators, shifting the majority of access to lobbying groups and political donors.

For instance, “research shows that PACs and lobbyists that are in frequent contact with lawmakers are much more successful in getting their message across.”⁸ Although it cannot be said for certain that the money donated through PACs is directly influencing policymakers’ decisions, it can be noted that PACs have allowed for seemingly ordinary individuals to have a greater amount of access to those in power in the political sphere.

While this tactic might seem beneficial to those involved in PACs, the concept of having to buy “access” from politicians in order to be heard makes politicians envoys for those who have donated money to or are involved with PACs. Although PACs have provided for an easy and efficient way to have monetary influence in the political system, early American politicians were weary of allowing money to be involved in elections, and tried to regulate against it. For instance, while the introduction of monetary donations in the American political system was not a foreign concept, yet both sides of the political spectrum decried ‘the use of money’ in elections, which suggests awareness of something new in the way campaigns were to be financed.⁹

⁷ Id.

⁸ Id.

⁹ Id.

Although both sides decried “the use of money” in politics, what that term meant was never clearly established. Those in power in 1840 did not fully comprehend the implications of the influence of outsider money in the political system, but they were wary enough to realize that there were some potential negative implications, noted by their vague terminology. Had the framers of the original finance reform laws not used such vague terminology in regards to “the use of money in elections,”¹⁰ stricter laws might have existed which could have resulted in a drastically different country.

As a result of the vague wording used by the founders of campaign finance laws, vague laws were implemented regarding how campaign finance was handled. The opportunities for early strict campaign finance laws were lost in vague terminology, and the problem has grown incrementally worse. Currently, PACs are not allowed to coordinate with candidates and they have annual limits on the amount of money which can be donated per year. The vague definitions have enabled new alternatives to emerge as facets of the American political system. Groups, such as Super PACs and non-profits have become the method of choice for obtaining political “access” in a post *Citizens United*¹¹ America, and have even fewer restrictions than regular PACs.

Campaign Finance over the past few decades

Beginning in the 1970s, campaign finance reform became a popular issue among the American electorate. As time went on, more regulations were implemented in the hopes of curtailing the corrupting

¹⁰ Id.

¹¹ Id.

influence of money in the political system. Beginning in 1971, the Federal Election Campaign Act¹² sought to disclose campaign contributions and wanted to place a cap on advertising expenditures.¹³ Ironically, this was the same Act which created PACs,¹⁴ which were initially created to curtail large amounts of spending. While the Federal Election Campaign Act (FECA)¹⁵ tried to limit the amount of money in the political system, some believe it did the opposite by laying the foundation for PACs and for their future evolutions, such as Super PACs.

It did not take long for the actions of the FECA to be challenged. In 1974, the case of *Buckley v. Valeo*¹⁶ resulted in the following:

- limitations of independent expenditures were held to violate the 1st amendment,
- the Court struck down spending caps on certain expenditures by candidates, and
- the Court upheld party restrictions between party members and donors.¹⁷

While it only took 2 years for the actions of FECA to be challenged, regulations were heavily implemented on communications between party members and donors, and policies regulating the influence of

¹² 52 U.S.C.A. § 30101 (West).

¹³ Anonymous. *Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance*. Harvard Law Review 124.6 (2011): 1528-49.

¹⁴ Id.

¹⁵ Id.

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

¹⁷ Id.

money in the political system were overall weakened. Though there may be legal regulations which are bound to prevent quid pro quos agreements, it is noted that there is a “Social Model of Contributing,” which essentially states that contributions usually involves years of back and forth favors which eventually culminate into favorable policy implementation.¹⁸

This type of quid pro quo is very subtle and gradual, and is very hard to detect. There doesn’t appear to be any definitive way to prevent this type of favor exchange. But certain cases resulted in findings that there must be definitive limitations and boundaries on campaign donations. In the 1991 case of McCormick v. United States,¹⁹ the court ruled that it is a federal crime to receive campaign contributions and to return an explicit promise or the promise of an official act.²⁰ It was made explicitly illegal to take campaign contributions for blatant favors, but many of those activities were already condemned and punishable by treason and corruption laws.

Rulings in cases such as *McCormick* are essentially rubber stamps on the issue of campaign finance reform, and results in nothing actually being done to fix the amount of money flowing into the political system. Although the efforts of FECA were short lived, a new bill introduced in 2002, the Bipartisan Campaign Reform Act (BCRA),²¹ sought to ban untraceable money into elections and to

¹⁸ Id.

¹⁹ McCormick v. United States (89-1918), 500 U.S. 257 (1991).

²⁰ Id.

²¹ 52 U.S.C.A. § 30125 (West).

minimize these sources of “soft” money.²² The BCRA also forced all federal candidates to submit to the Federal Election Commission (FEC) regulations for campaign financing and banned the airing of attack ads 30 days within a primary and 60 days within a general election.²³ Regulations such as banning political commercials right before an election might seem to violate the First Amendment at first glance, but history exposes those activities as an effort designed to prevent the manipulation of the public by special interest groups. For instance, a political ad with incorrect information might show 30 days before the election and a voter could be swayed by that misinformation. This bill demonstrated that the issue of campaign finance is one that cuts across party lines, and has people on both spectrums of the political scale fighting for common reform.

The policy seemed to be effective at first, much of the soft money was redirected into tax-exempt organizations used to persuade political opinions. These tax exempt organizations were known as “federally focused 527s,” and such groups saw an increase in funding by the 2004 election cycle.²⁴ The supporters against campaign finance reform are very adamant on the interpretation of the First Amendment as precluding the government from restricting or regulating any type of speech, including using money as a tool for speech. But, the supporters of campaign finance reform believe there are other factors which influence anti- campaign finance laws. For instance, it is noted that “the finance, insurance and real estate (or FIRE) sector is the biggest donor

²² Sheila Krumholz, *Campaign Cash and Corruption: Money in Politics, Post-Citizens United*, Social Research: An International Quarterly 80.4 (2013): 1119-134.

²³ Id.

²⁴ Id.

of campaign cash to candidates, PACs, and parties in the United States.”²⁵ Industries such as these rely heavily upon current laws and regulations for their success. They are usually actively involved in the political process in order to ensure that they are in a position to influence policy outcomes which are favorable to their business. While there was tremendous support from both political parties in regard to the issue of campaign finance reform, the inefficiency of these laws demonstrates the significance of the role played by money in the American election process.

***Citizens United* and its Impact on Campaign Finance**

Being one of the most controversial Supreme Court cases ever decided, *Citizens United v. Federal Election Commission*²⁶ changed the methods of giving and receiving political contributions. Krumholz, author of *Campaign Cash and Corruption: Money in Politics, Post-Citizens United*, describes the *Citizens United* case as follows;

- “*Citizens United v. FEC* is a January 2010 Supreme Court case in which the court ruled 5 to 4 to allow corporations and unions to use their general treasuries to pay for independent expenditures, including political advertisements that expressly call for the election or defeat of a candidate, and electioneering communications immediately before an election”²⁷

As a result of *Citizens United*, corporations and unions were given greater resources to express their political ideologies, and had the same

²⁵ Id.

²⁶ Id.

²⁷ Id.

freedoms and rights as individual human beings. Accordingly, “the biggest increases in spending came from nonparty groups making independent expenditures.”²⁸

The findings suggest that although the ruling was not meant to create such a great influx in spending, it achieved its goal of allowing more citizens the opportunity to become politically active. While being considered politically active is usually viewed in a positive light by society, political activism can also be used to further advance individual motives. For instance, it is noted that in 2012, the total (spending) hit \$6.3 billion, a 19 percent increase over 2008 and a 188 percent increase over a decade,²⁹ and that the effect which the *Citizens United*³⁰ ruling had in the amount of money being channeled into the political system was ultimately negative (although technically, a net positive).

Not only does the loosening of finance reform laws allow for corporations to have greater access into the American political system, it allows them to have a greater voting power and more influence than an average citizen, which creates a clear and distinct dichotomy between the two worlds. Another contrast which has arisen from the outcome of *Citizens United* is regarding the increased advocacy towards super PACs and 501(c)(4) organizations. 501(c)(4) organizations are non-profit, charity groups which can participate in the election process, but does not have to be officially registered with the FEC.³¹

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

The increase of 501(c)(4) groups signifies that even larger amounts of money are being funneled into the political system, and that the money is becoming more difficult to track. For instance, since 501(c)(4) groups do not have to register with the FEC, where they receive their funding from does not have to be disclosed. This means that multinational corporations and wealthy individuals have a means to fund their preferred candidate or party, while simultaneously remaining anonymous. There exists various methods for donors to conceal their trail of money, but some action has been taken to fight against trails of “soft” (untraceable) money. For instance, the DISCLOSE Act sought to require corporations to disclose political spending it associates with any election cycles.³² While this act was meant to limit the powers granted to corporations in the *Citizens United* ruling, its use of the words “in association” give a broader interpretation to the text.³³ If a judge were to interpret a case regarding the DISCLOSE Act, he (or the jury) would have to decide that the actions of a corporation were deliberate in order to hide their political expenditures.

Laws like these resemble the effectiveness (or lack thereof) of the *McCormick*³⁴ case, which proved that vague policies and laws can only be effective if they are actively enforced. Although the policies mentioned before could succeed as implemented, the time and effort required to make sure that the rules are being followed would be too costly and constant enforcement would require too much effort. Although many cases sought to limit the effects of the *Citizens United* case, there were others which bolstered its effects. In the spring of

³² Id.

³³ Id.

³⁴ Id.

2010, following the *Citizens United* ruling, *SpeechNow.org v. FEC*³⁵ was presented to the Supreme Court. *SpeechNow.org v. FEC* dealt with a “527” organization, and resulted in the court determining that non-profit organizations have the same constitutional rights as individuals, and that it could aggregate unlimited amounts of contributions for limitless political expenditures.³⁶ This ruling had the complete opposite effect of the *McCormick* case and the DISCLOSE Act, and ultimately displayed the power which non-profit groups and corporations have gained as a result of the *Citizens United* ruling.

Conclusion

Ultimately, while there has been many instances of laws enacted to limit the effects of the *Citizens United* ruling, campaign finance laws have been historically ineffective in combating the problem of excessive campaign contributions. The implementation of vague standards and lack of willingness to change current laws demonstrate how the current political system is structured in a way which favors relaxed campaign finance laws. Since the Supreme Court’s ruling in *Citizens United v. Federal Election Commission* that corporations and unions have the same voting and speech rights as individuals, there has been a significant increase in non-profit organizations and Political Action Committees which have sought to influence voters towards certain political parties and ideologies. Overall, campaign finance laws have been undermined by the *Citizens United* ruling, and a fundamental re-evaluation of how elections are funded in the United States is required.

³⁵ *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

³⁶ *Id.*