

**The Effective Impact of *Citizens United v. FEC* on American
Electoral Politics: An Analysis**

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These regulatory structures are like great hydraulic systems: there is constant pressure on the system from the liquid it contains – money flows as well as talks – and leaks and ruptures occur as a result of both weaknesses in the wall and pressure in the fluid.

~ Frank J. Sorauf

Money, like water, will always find an outlet.

*~Majority Opinion, *McConnell v. FEC**

On the morning of January 21st, 2010, the Supreme Court of the United States rendered a decision widely touted as an “instant landmark” in *Citizens United v. Federal Election Commission*. What had originally began as a relatively unassuming technical case regarding the application of a specific provision of the Bipartisan Campaign Reform Act of 2002 instead turned into an opportunity for the Court to reassess many of the principles underlying modern American campaign finance laws.¹ A majority of the Court ultimately overturned both fairly recent precedents and long-standing legislation by holding that regulations which prohibit non-party organizations (such as for-profit corporations and unions) from engaging in independent explicit political advocacy are unconstitutional abridgements of the First Amendment right to free speech.

The popular reaction to *Citizens United* was exceptionally intense and far-reaching, with prevailing public opinion overwhelmingly leaning towards a negative view of the decision’s potential consequences on American political life. The crux of most non-legally oriented criticisms was that *Citizens United* would enable so-called “corporate interests” to dominate electoral politics with massive amounts of money and crowd out more “legitimate” sources of

¹ The Bipartisan Campaign Reform Act is (perhaps more popularly) also known as the McCain-Feingold Act, named after its two chief sponsors in the Senate.

influence (i.e. individuals and grassroots organizations). For example, the New York Times' editorial on the case unequivocally embraced this pessimistic viewpoint, stating:

With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century. Disingenuously waving the flag of the First Amendment, the court's conservative majority has paved the way for corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding. Congress must act immediately to limit the damage of this radical decision, which strikes at the heart of democracy. As a result of Thursday's ruling, corporations have been unleashed from the longstanding ban against their spending directly on political campaigns and will be free to spend as much money as they want to elect and defeat candidates. If a member of Congress tries to stand up to a wealthy special interest, its lobbyists can credibly threaten: We'll spend whatever it takes to defeat you.²

A significantly higher-profile instance of such criticism came five days after the decision's release, when President Obama famously rebuked the Court during his inaugural State of the Union address:

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. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.³

Clearly, the significant changes in American campaign finance law which *Citizens United* portended were cause for major concern in many influential quarters. Anxiety over the potentially destabilizing effects of allowing non-party organizations with massive financial resources into American elections was (and still is) widespread.

² Editorial, *The Court's Blow to Democracy*, New York Times, 01/21/10, <http://www.nytimes.com/2010/01/22/opinion/22fri1.html?_r=1&scp=31&sq=citizens%20united&st=cse>. The Times has been quite consistent in their opinion of the case, as shown by the conclusion to another editorial from March 23rd, 2009, when *Citizens United* was first heard by the Court: "If Citizens United prevails, it would create an enormous loophole in the law and allow corporate money to flood into partisan politics in ways it has not in many decades. It also would seriously erode the disclosure rules for campaign contributions." Editorial, *Corporate Money and Campaigns*, New York Times, 03/23/09, <<http://www.nytimes.com/2009/03/24/opinion/24tue2.html?scp=33&sq=citizens%20united&st=cse>>.

³ The full tension of the moment is mostly lost in the transcript; in context, the entire Supreme Court (as per long-established custom) attends the State of the Union Address, and the justices were sitting directly in front of President Obama at the time. Replays of the Justices' reactions to the President's criticism famously showed Justice Samuel Alito silently mouthing what appear to be the words "Not true" in response.

Is this, however, a logical assessment of *Citizens United*'s realistic potential impact? The issue-area of campaign finance is a particularly complex one within the American legal system, where a patchwork of often ill-defined, vague and downright contradictory regulations cumulatively form the basis of the legal superstructure behind American electoral politics. This complexity masks a legal regime which is less a system of clear absolutes than one with predominantly gray areas and loopholes open to effective exploitation by independent political interests. Careful consideration of the considerable shortcomings of post-BCRA campaign finance law provides reason to pause when considering the true realistic implications of the *Citizens United* decision.

Given this context, this paper will take a contrary position to the aforementioned popular opinions as to *Citizens United*'s probable consequences. While the landmark Supreme Court decision in *Citizens United* certainly upended the legal status quo in the American system of campaign finance, the realities of pre-*Citizens United* campaign finance suggest that the practical impact upon electoral politics will be relatively minimal. The crux of this argument will center on an analysis of the pre-*Citizens United* campaign finance framework, positing that third-party organizations already had multiple avenues with which to effectively influence both elections and candidates. Since such a state of affairs necessarily implied that the political arena was not actually closed to third-party organizations, the range of possibilities for political participation for such organizations has not been tremendously expanded.

The argument will be presented in three parts. Part One will offer a short summary of American campaign finance law in effect prior to *Citizens United*, paying special attention to the regulations governing such political participations vehicles such as Political Action Committees (PACs), 527s, and 501(c) organizations, as well as the motivations underlying periods of major

reform. Part Two will analyze the majority opinion of the *Citizens United* decision and determine precisely which parts of the legal status quo it altered. Part Three will synthesize the contextual information from the previous two parts to explain why the pre and post-*Citizens United* campaign finance landscapes are likely to function similarly in effect, while Part Four concludes.

Part One: The pre-*Citizens United* Campaign Finance Legal Framework

The history of American campaign finance law in the 20th century and beyond is characterized by intermittent periods of major change and restructuring. The question of what are the appropriate (and the actual) roles of both independent individuals and third-party organizations in electoral politics has been a particularly contentious one throughout modern American history. A cursory examination of the circumstances underlying major campaign finance reforms in the past century indicates that, for the most part, they tend to be reactive rather than proactive in nature.⁴ Moreover, the most comprehensive and recent reforms seem to have been primarily motivated by efforts to address prominent failings and omissions of previous legislation rather than by major ideological shifts in popular opinion as to the proper role of various actors in electoral politics. In this brief historical survey of campaign finance regulations in effect prior to *Citizens United*, the reforms relevant to the topic at hand include the Tillman, Smith-Connally and Taft-Hartley Acts, the Federal Elections Campaign Act (FECA), and the Bipartisan Campaign Reform Act (BCRA). Each of these Acts, which together comprise the major foundation of pre-*Citizens United* campaign finance law, features significant provisions

⁴ The Federal Corrupt Practices Act of 1910 (aka the Publicity Act) is widely considered to be the first instance of a “modern” campaign finance reform. Other instances of major modern reforms include (but are not limited to) the Tillman Act, the Smith-Connally Act, the Federal Corrupt Practices Act of 1925, the Hatch Act, the Federal Elections Campaign Act (and its subsequent amendments), and the Bipartisan Campaign Reform Act of 2002.

which were affected by the decision's holding. Special emphasis will be placed upon highlighting the relevant practical weaknesses of each key piece of legislation.

The Tillman, Smith-Connally and Taft-Hartley Acts

The Tillman (1907), Smith-Connally (1943) and Taft-Hartley (1946) Acts together form the basis for what was one of the major tenets of pre-*Citizens United* campaign finance law, the ban on both direct contributions to federal election campaigns and express independent advocacy expenditures from corporations and unions.

Enacted near the turn of the 20th century, the Tillman Act stands as one of the very first modern campaign finance reforms. Previously, there were no regulations dealing with direct corporate contributions to campaigns; any corporation was at liberty to donate any amount it desired to a party committee or candidate, and had no obligation to disclose any information about its support. With the Pendleton Act of 1883 bringing about the demise of the assessment system and formal patronage, both major pillars of financial support for political parties, solicitation of corporate donations became a major source of funding in campaigns at all levels of government.^{5 6} The attention of the powerful Progressive movement began to turn to the issue of campaign finance in the wake of well-publicized and unseemly accusations against President Theodore Roosevelt after his 1904 victory, which alleged the acceptance of significant corporate

⁵ Kurt Hohenstein, *Coining Corruption: The Making of the American Campaign Finance System*, Northern Illinois University Press – DeKalb, 2007. The patronage and assessment systems were the primary method of both ensuring individual members' loyalty to their party and financing party activities and electoral campaigns. In this example of a classic *quid pro quo* system, patronage led to the appointment of party loyalists to civil service positions whenever their party was in control of the government, who were then formally expected to repay the show of good faith by donating a specified percentage of their salary (an "assessment") to the party. pg. 19.

⁶ Anthony Corrado, *Money in Politics: A History of Federal Campaign Finance Law*, in *The New Campaign Finance Sourcebook*, Chapter One, Brookings Institution Press, 2005. The author relates that by 1900, the Republican Party had "established a formal system for soliciting contributions from large Wall Street corporations, asking each company to 'pay according to its stake in the general prosperity of the country and according to its special interest in a region in which a large amount of expensive canvassing had to be done.'" pg. 10.

donations in exchange for overt promises to propose advantageous legislation to Congress.⁷

While these particular accusations were not proved, other reported instances of suspicious corporate donations cumulatively aroused sufficient public attention and disapproval to pressure Congress for reform. Eventually, Roosevelt and Congress responded in 1907 by passing the Tillman Act, which prohibited corporate entities from making any donations to campaigns for federal office.^{8 9}

The exceptionally short piece of legislation contained glaring loopholes, not the least of which is the lack of any real enforcement mechanism for its provisions. While the Act itself set penalties for noncompliance (guidelines for fining and imprisonment for offenders), there was no practical way to enforce the law on a large scale, as there was no federal entity with the responsibility to monitor federal elections.¹⁰ In addition, the Act only prohibited corporations from directly contributing to federal campaigns; independent expenditures fully supporting a candidacy (potentially coordinated with the campaigns itself) remained perfectly legal. In essence, then, while in a purely legal sense the Tillman Act represented a major shift in campaign finance regulations, the practical effect was rather limited in comparison.

The Smith-Connally Act (aka the War Labor Disputes Act of 1943) essentially extended the legal changes in the Tillman Act to encompass unions as well. The circumstances leading to

⁷ Corrado pg. 11.

⁸ The relevant text of the Act reads as follows: "Be it enacted, That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator."

⁹ Ann B. Matasar, *Corporate PACs and Federal Campaign Financing Laws: Use or Abuse of Power?*, Quorum Books, 1986. As a federal law, the Tillman Act could not be applied to non-federal elections or primaries. In 1941, the Supreme Court ruling in *United States v. Classic* extended its provisions to encompass primaries as well. pg. 9.

¹⁰ One particularly popular workaround brought up by Hohenstein is the practice of companies effectively forcing executives to contribute to favored campaigns on behalf of the company, with the individual contributions later reimbursed to the executive by way of unannounced extra bonuses.

its passage were remarkably similar to those behind the Tillman Act's passage nearly thirty years earlier: labor unions flourished under President Franklin Roosevelt's New Deal policies, and had become a major source of financial support for Democratic campaigns.¹¹ While not motivated by a shift in the public perception of the role of unions in politics so much as electoral strategy by Congressional opponents of Roosevelt Democrats, the Act nonetheless represented a significant development in campaign finance law. As little more than an extension of the Tillman Act, the Smith-Connally Act suffered from precisely the same structural flaws as its predecessor, as well as its initial status as a temporary measure set to expire at the end of the war (later made permanent by the Taft-Hartley Act).

For the purposes of this analysis, the relevant provisions of the Taft Hartley Act (aka the Labor Management Relations Act of 1946) concern its substantive expansion of the scopes of both the Tillman and Smith-Connally Acts. The Taft-Hartley Act closed the independent expenditure loophole of both of the Acts by prohibiting any expenditure by corporations and unions expressly related to federal elections and primaries.¹² While this new regulation did much to address a significant loophole by essentially forbidding the use of corporate and union treasuries to finance any form of express advocacy in elections, the lack of any defined enforcement mechanism significantly limited such provisions' applicability in practice. In addition, new weaknesses in the law were eventually exposed, as such organizations developed new ways to influence campaigns and elections. Specifically, the rise of the Political Action

¹¹ Corrado pg. 17.

¹² Section 304 of the Taft-Hartley Act is as follows: "It is unlawful...for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee or other person to accept or receive any contribution prohibited by this section."

Committee (PAC), a direct response by unions to the Taft-Hartley Act, would provide a particularly useful outlet for continuing participation in federal elections.¹³

The Federal Elections Campaign Act

First passed in 1971 and subsequently amended in both 1974 and 1979, the Federal Elections Campaign Act was the first truly comprehensive piece of campaign finance legislation in modern American history, substantively addressing major issues such as increasing donor disclosure rules, campaign spending limits, public financing of presidential elections, contribution limits, etc. Of particular topical interest are the regulations which made PACs a particularly appealing vehicle for political advocacy within electoral politics, as well as the establishment of the first true regulatory and enforcement body for elections and campaign finance laws, the Federal Election Commission.

As related previously, Political Action Committees were first established as an innovation by labor unions designed to minimize the impact of the Smith-Connally Act upon unions' political agendas. While corporations and unions were prohibited from using treasury funds to engage in any sort of direct electoral advocacy, it was legal to sponsor attached (but formally separate) entities whose purpose was to raise money for express political advocacy from individuals affiliated with the sponsoring organization.¹⁴ Since PACs themselves were fully funded through individual donors, there were essentially no legal restrictions on participation in any political activities, including (but not limited to) campaign contributions and independent

¹³ PACs, which will be discussed in further detail in the next sub-section, were originally an innovative response by major labor unions to the Smith-Connally Act's prohibition on express political advocacy. Corrado, pg. 18.

¹⁴ For example, a union-affiliated PAC may solicit voluntary donations from members and their (reasonably immediate) families, while corporation-affiliated PACs may ask for donations from its employees, executives, their families, and (if applicable) its shareholders. A formally unaffiliated PAC is at liberty to raise funds from the general public.

express and issue-based advocacy. Thus, while the potentially massive resources of corporate and union general treasuries were a prohibited source of funding, corporations and unions were still able to channel significant funds into influential political vehicles whose agendas and activities they were fully able to control.

While FECA and its subsequent amendments were primarily concerned with other aspects of campaign finance law (individual campaign contribution limits and establishing a public financing system for presidential elections, to be specific), the reforms both directly and indirectly affected the role of PACs. One of the primary goals of the 1974 FECA Amendments was to combat actual and perceived *quid pro quo* corruption in federal elections, a sentiment motivated by widespread and obvious public opinion heavily influenced by the unseemly details of the recent Watergate scandal.¹⁵ The key mechanism for accomplishing this task was the introduction of individual and political committee contribution limits to federal campaigns within a given election cycle, the logic holding that forcibly establishing a more egalitarian distribution for contribution amounts minimizes the opportunities for such direct corruption.¹⁶ Combined with the establishment of the Federal Elections Commission (the first federal body actually tasked with enforcing election laws) and the imposition of regular pre-election disclosure requirement for individuals, political committees and campaigns alike, the era of large donations to federal campaigns was effectively ended.

In the wake of such major changes in the longtime patterns of financing elections, the PAC emerged as an attractive vehicle through which to absorb many of the individual

¹⁵ Corrado pg. 22

¹⁶ The new individual contribution limits could be broken down into two distinct components, one pertaining to individual campaigns (initially set at \$1000) and the other to aggregate annual contributions to campaigns and political committees (initially set at \$25,000). Political committees (effectively reducible to PACs) were allowed to directly contribute \$5000 to a federal campaign, but had no limitations on their aggregate annual contributions to campaigns.

contributions which would have otherwise been predominantly donated directly to specific campaigns, but which were now mostly in excess of the (more or less) reliably enforced contribution limits.¹⁷ These incentives proved convincing to many knowledgeable individual donors, as Corrado reports that already substantial aggregate PAC contributions to candidates increased by approximately eightfold in the decade after the 1976 amendments.¹⁸ The rise in both the influence and financial might of PACs must certainly be regarded as a boon to politically activist corporations and unions, who found their preferred method for influencing electoral politics appreciably more popular and effective.

The Bipartisan Campaign Reform Act

Continuing the pattern of major campaign finance reforms being enacted primarily in response to major failures in the existing regulatory regime, the Bipartisan Campaign Reform Act of 2002 sought to address the shortcomings of FECA that had become apparent after its nearly three decades in effect. The most serious and apparent deficiencies may be separated into two categories; those involving the raising and use of so-called “soft money” in financing campaigns, and the abuse of the legal distinctions and classifications between issue and express advocacy.

The rise of “soft money” as a major source of financing in elections is the direct product of both FECA and the Supreme Court’s landmark 1976 decision in *Buckley v. Valeo*. While FECA established a set of comprehensive limits on the amounts individuals could contribute to campaigns and political committees in any given election cycle, the Supreme Court held in *Buckley* that such limits could only be applied to donations intended to expressly support a

¹⁷ Within 12 years of FECA’s passage, the number of registered PACs had nearly quadrupled. Corrado pg. 31

¹⁸ Corrado pg. 31

specific campaign.¹⁹ Specifically, this meant that political parties were allowed to solicit unlimited contributions from individuals, corporations and unions made with the intent to finance party activities not *directly related* to expressly advocating a particular candidacy. After the FEC issued its post-*Buckley* guidance on what constitute “party building” activities, which qualify under this standard, it became abundantly clear that the range of activities deemed permissible is surprisingly broad, totaling a significant portion of a party’s functions during an election cycle. Recognized instances of “party building” include, but are not limited to: financing voter registration and “get out the vote” drives, covering administrative and overhead costs associated with non-federal party functions, and funding issue-based advocacy and advertising.²⁰

In practice, this mechanism became a progressively more important source of money in electoral politics in the decades following FECA and *Buckley*. The distinction between hard money raised for use in campaign work and subject to FECA caps and unlimited and unregulated soft money used for virtually everything else masks the reality that soft money is essentially little more than a subsidy for hard money activities. Logically, using soft money funding to defray the costs of party activities which would otherwise have to be paid for by hard money funds allows for the excess hard money to instead be used to finance more activities which may only be funded with hard money. Given the open-ended and unlimited nature (in terms of both amounts and potential sources) of soft money, such a subsidy could essentially multiply the real effect of

¹⁹ The Supreme Court in *Buckley v. Valeo* overruled some key statutes of the original FECA bill while keeping others. Of relevant interest to this paper are the Court’s findings of campaign expenditure and individual independent expenditure limits unconstitutional, as well as its finding individual campaign contribution limits constitutional under strict scrutiny. In doing so, the Court’s *per curiam* opinion explicitly equated the right to free speech with the ability to spend money in pursuance of that right: “A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money...”

²⁰ Special Report on Campaign Finance, Washington Post

every dollar of hard money raised by campaigns, serving as a very effective workaround to both the intent and spirit of the FECA contribution limits. The eventual realization of this logic by savvy political actors is obvious in the progressive emergence of soft money donations as a large source of funding for political parties during election years.²¹

The widespread practice of using soft money to help fund issue-advocacy advertising touches upon another major failure of the post-FECA campaign finance regulatory system - the obvious weaknesses of the crucial express vs. issue advocacy dichotomy. *Buckley* and post-*Buckley* FEC administrative rulings formally codified a long-term trend in American campaign finance law leading towards a recognized distinction in forms of political advocacy. While the First Amendment establishes an individual right to free speech, accepted jurisprudence has long held that it is not an *absolute* right, and that there are certain narrowly-defined circumstances where it is constitutional for the government to suppress certain kinds of speech.²² In *Buckley*, the Supreme Court ruled that restrictions on the amounts individuals could donate to campaigns and PACs were constitutional on the basis of their primary purpose being the reduction of both actual and perceived *quid pro quo* corruption, judged a compelling government interest.²³ Any attempt to limit the rights of individuals to engage in uncoordinated and independent express or issue-based political advocacy was, however, ruled as overstepping constitutional boundaries, thus beyond the pale of government interference. On the whole, this landmark decision certainly

²¹ Particularly large increases in soft money donations are apparent in data from the 1990s, when total soft money receipts went from \$88 million in 1992 to \$456 billion by 2000. FEC disclosure records yield two interesting observations: first, during every election cycle from 1992-2002, the Democratic and Republican parties both raised approximately equal amounts of soft money. Second, during this same period of time the ratio of organization to individual soft money donors was approximately 2-2.5:1 for every election cycle. *Soft Money Backgrounder*, Center for Responsive Politics, <<http://www.opensecrets.org/parties/softsource.php>>.

²² Specifically, the Supreme Court almost invariably holds all proposed abridgements to the right of free speech to its "strict scrutiny" test of validity, a particularly strong form of judicial review which demands that any such abridgements be "narrowly tailored" and serve a "compelling government interest."

²³ The same legal rationale motivated the constitutionality of the topically relevant provisions of the Tillman, Smith-Connally and Taft-Hartley Acts.

seemed to establish a legal doctrine which incentivized the systemic promotion of both independent and issue-based political advocacy over campaign-coordinated express advocacy.

The incentives seemed to have a real impact, as issue-advocacy oriented organizations gradually grew into progressively more influential forces in elections at all levels of government. In time, two political action vehicles emerged as particularly popular options for issue-based advocacy: Section 527 and 501(c) groups.²⁴ 501(c) groups, commonly known as “non-profit” organizations, are groups registered with the IRS whose primary purpose is (in some manner) concerned with the promotion of social welfare rather than simply earning a profit.²⁵ The main advantage of 501(c) status is exemption from federal taxes, which is clearly a significant boon for such groups as charities or religious organizations. Since an organization ostensibly committed to promoting its version of social welfare may logically hold an opinion on certain relevant political issues, a 501(c) group is permitted to engage in issue, but not express, political advocacy.²⁶ The only additional stipulation for 501(c) groups interested in engaging in such political advocacy is that the political activity cannot “constitute the organization’s primary activity.”²⁷ Given these characteristics, a 501(c) group is not considered a primarily political organization, and is thus outside the regulatory purview of the FEC. Similarly, 527 organizations are also a tax-exempt entity with their legal basis rooted in the Internal Revenue Code, registered

²⁴ In the interest of brevity, this paper uses the term 501(c) as a catch-all encompassing any organization registered as a 501(c)4, 501(c)5, or 501(c)6 with the Internal Revenue Service.

²⁵ The term 501(c) alludes to the legal establishment of such groups through section 501(c) of the massive Internal Revenue Code.

²⁶ More information on the specific regulations underlying 501(c) group participation in political advocacy, as well as the proper sub-section of section 501(c) in which a particular organization should be registered, may be found in the IRS’ 2003 guidance instructions on the issue for registered 501(c) groups, “Political Campaign and Lobbying Activities of IRC 501(c)4, (c)5, and (c)6 Organizations,” <<http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>>.

²⁷ Additionally, the IRS’ guidance instructions state that 501(c) organizations are permitted to indirectly engage in similar forms of political issue advocacy by way of donations to registered 527 organizations, an alternative course of action permissible only if such donations do not constitute its “primary activity”.

with the IRS, and generally not subject to regulation by the FEC.²⁸ A 527 is a political organization whose primary function is “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization.”²⁹ In practice, the FEC interprets the law as implying that a 527 group is allowed to engage in unlimited amounts of issue-based political advocacy, provided that it does not also engage in any express advocacy and does not coordinate its actions with campaigns. Three characteristics of both 501(c) and 527 organizations which make them practically appealing as political action vehicles are the fact that such groups are able to engage in essentially unlimited issue advocacy, may raise funds from both corporations and unions, and have relatively lax donor disclosure requirements.³⁰

While the proliferation of 527 and politically-active 501(c) organizations marked an increase in the prominence of issue-based advocacy in electoral politics, the expected effect of a decrease in the levels of actual and perceived *quid pro quo* corruption proved fleeting. The main problem was centered upon the unfortunate fact that the supposed distinction between express and issue advocacy was uncomfortably narrow, and often non-existent, in practice. Though the idea that certain forms of political advocacy may be correctly identified as truly issue-based

²⁸ The use of the term “generally” merits explication. As Corrado explains, “Section 527 of the tax code exempts “political organizations” from income taxes. The exemption originally was intended to cover political party committees, candidate committees, and state and federal political committees that are registered with and report to the FEC...changes in Internal Revenue Service (IRS) advice and court rulings in the area of issue advocacy made it possible for section 527 groups to engage in political activity without having to register with either the FEC or state campaign finance authorities. The IRS determined that an organization may engage in activities that seek ‘to influence the outcome of federal elections’ without being subject to FECA restrictions or disclosure requirements provided that it does not “expressly advocate” the election or defeat of federal candidates.” pg. 34. For the purposes of this paper, further mention of 527 organizations should be understood as referencing groups registered as such with the IRS but otherwise with an activities profile which does not require that it be regulated by the FEC.

²⁹ Section 527, United States Internal Revenue Code

³⁰ Part Three will contain a prominent and detailed review and discussion of the importance of comparative disclosure requirements in shaping the form of modern American electoral politics.

through the application of a uniform legal standard is an appealing one, in reality the standard used by government agencies seems quite flawed. The long-established and prevailing legal standard espoused by the FEC in differentiating issue-based from express advocacy is the so-called “Eight Magic Words Doctrine;” if any of the phrases enumerated by Footnote 52 of the *per curiam* majority opinion in *Buckley v. Valeo* are not used, then the advocacy is almost always presumed to be issue-based.³¹ The structural incompleteness of this standard hardly requires explanation; since formal legal recognition of a political action as issue-based advocacy hinged upon simply avoiding the use of any of the eight phrases suggested by Footnote 52, subtle forms of effectively express advocacy could easily pass such a weak litmus test. From the time it became apparent that this would be the default classification system under the federal government, examples of highly questionable forms of “issue” advocacy in electoral politics have abounded.³²

The Bipartisan Campaign Reform Act was the eventual response to these two highly visible failures of the campaign finance system. Motivated by public disapproval of recently exposed (but perfectly legal) soft money fundraising efforts by the Democratic Party as well as spirited public advocacy by soft-money opponents such as Senators John McCain and Russ Feingold, BCRA in its final form was a comprehensive overhaul of campaign finance regulations in the mold of FECA.³³ Hohenstein summarizes its similarly-comprehensive scope:

³¹ Footnote 52 reads as follows: “This construction would restrict the application [of classification as express advocacy] to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”

³² Some particularly (in)famous examples of *faux* issue-based advocacy will be analyzed in Part Three.

³³ While most of the public pressure for reform was focused on eliminating or reducing the prominent role of soft money contributions in elections, BCRA ultimately wound up addressing issue advocacy regulations as well because “They [lawmakers] knew that a ban on soft money and greater regulation of party spending would provide a strong incentive for donors to shift their contributions to PACs or other organized political groups, which would be able to use unregulated funds for issue advocacy advertising campaigns.” Corrado, pg. 42.

BCRA made three main changes to the campaign finance scheme of FECA. BCRA increased the amount of some individual contribution limits...increased the individual contribution to national parties...and raised the individual aggregate annual contribution limit. Second, BCRA defined and regulated a new category of ‘electioneering communication’ (limited to broadcast advertising) intended to plug the issue advocacy loophole, and provided a bright-line limit on spending by certain independent groups sixty days before a primary and thirty days before a general election. Finally, BCRA severely restricted the ability of federal, state, and local parties to receive soft money...³⁴

Of relevant interest are the second and third categories of reform, those dealing with the “issue advocacy loophole” and new restrictions on the raising and use of soft money. The latter’s effect is relatively straightforward; BCRA essentially abolished soft money contributions at the federal level, prohibiting parties and candidates from soliciting, accepting or using any funds from unregulated and unlimited sources (in practice, any funds which did not fit under the previous standard for hard money). BCRA’s impact on issue-based advocacy, however, is appreciably more complex.

The writers of BCRA, recognizing the aforementioned difficulty of crafting an effective uniform standard for consistently separating actual from faux issue advocacy, took a somewhat more indirect approach to narrowing the loophole. It established a new regulated category of political advertising called “electioneering communications,” which are defined as:

... any broadcast, cable, or satellite communications referring to a clearly identified federal candidate that are made within sixty days of a general election or thirty days of a primary election and that target the electorate of the candidate. The law also contains an alternative standard that includes any broadcast, cable, or satellite communication that promotes or supports—or attacks or opposes—a federal candidate (regardless of whether it expressly advocates a vote for or against a candidate) and suggests no plausible interpretation other than as an exhortation to vote for or against a candidate.³⁵

In a technical sense, this is a major redefinition of the prevailing standard for distinguishing issue-based from express advocacy in television advertising. The bar for classification of

³⁴ Hohenstein, pg. 245

³⁵ Corrado, pg. 42

television advertisements as issue-based forms of advocacy is considerably raised compared to the “Eight Magic Words Doctrine,” as now any advertisement which so much as *names* a candidate for federal election within the defined “electioneering” timeframe prior to primaries and elections is considered *de facto* express advocacy and accordingly subject to regulation (and the associated limitations). Of course, since some organizations which engage in questionable forms of issue advocacy that fail to meet this new standard are funded in part by corporate and/or union sponsors, these organizations would then be prohibited from proceeding with that advocacy (as corporations and unions are prohibited from directly participating in or funding express advocacy) during the prohibited “electioneering” windows. In theory, then, this construction severely limits the scope and proliferation of ostensibly issue-based, but subtly express, advocacy during key periods in the federal election cycle.

Logically, however, BCRA’s “electioneering” regulations represent a kind of capitulation to the problem of defining a suitable standard for defining real issue advocacy. The blunt approach of automatically regarding as suspect any mention of a registered candidate for federal office during certain arbitrary portions of the election cycle seems an effective method for stamping out subtle express advocacy in the guise of issue advocacy; it also, however, necessarily inhibits instances of genuine issue advocacy which may have cause to reference candidates in an innocuous manner. The alternative standard is also suggestive of legislators’ resignation to the challenges of creating a workable and consistent standard, as it is essentially little more than a mechanism which calls for case-by-case classification based on the advertisement’s characteristics and context.³⁶

³⁶ Another possible way on interpreting the inclusion of such a vague alternative standard is that lawmakers may have wanted it to serve as a kind of “appeals mechanism” for cases where an advertisement technically runs afoul of the first standard’s provisions, but is on its face an instance of genuine issue-based political advocacy. On the other hand, Cornell Law School’s Legal Information Institute claims that one of the central purposes behind the

Regardless of construction or internal logic, BCRA has fostered significant change in the way electoral politics are financed. This is not to say, however, that shortcomings are not apparent (particularly in its attempt to close oft-used loopholes in the use of issue advocacy advertising). Corrado succinctly lists some of the more obvious weaknesses of the current legal framework:

Even with these new provisions, BCRA leaves a number of areas of interest group electioneering unregulated. No new restrictions are placed on any interest group communications that occur outside of the sixty- or thirty-day windows; independent, non-express advocacy advertising done during the pre-window period, even if it features a federal candidate, can be financed with unregulated monies, just as it could before BCRA was adopted. Furthermore, this expanded sphere of regulation does not include other communications, including voter guides, direct mail, Internet communications, or telephone calls. The new law places no new restrictions on the financing of such communications.³⁷

After the Supreme Court ultimately held the vast majority of BCRA's substantive provisions to be constitutional in 2003's *McConnell v. FEC* (the case being BCRA opponents' primary legal challenge), its provisions and structural weaknesses remained operative and the basis for all major campaign finance regulations until the release of *Citizens United* in 2010.

Part Two: Analyzing *Citizens United*

In order to analyze the potential substantive effect of the *Citizens United* decision on American electoral politics, it is vital to understand exactly what the holding calls for and what it specifically changes in existing campaign finance law. This section will summarize both the facts of the case and the operative parts of the Supreme Court's holding, as well as show which existing regulatory provisions are altered as a result.

inclusion of the alternative standard was to serve as a "backup definition" Bipartisan Campaign Reform Act of 2002: An Overview, Cornell University Law School Legal Information Institute, <<http://topics.law.cornell.edu/wex/bcra>>.

³⁷ Corrado pg. 43

The appellant is a registered non-profit organization named Citizens United, an ideologically conservative political action group which is (according to its motto) “dedicated to restoring our government to citizen’s control.”³⁸ In the run-up to the first primaries of the 2008 presidential election, Citizens United released a self-produced feature film called *Hillary: The Movie*, a work unflatteringly profiling Senator Hillary Clinton, then a candidate for the Democratic Party’s presidential nomination.³⁹ The movie was designed to raise public awareness of issues which Citizens United believed “the Clintons want America to forget,” such as “the Clinton scandals of past and present” as recounted by a cast of notable political pundits including Dick Morris, Ann Coulter, and Newt Gingrich.⁴⁰ Citizens United intended to make the film available to viewers through cable providers’ video-on-demand services, supporting the release with promotional advertisements on broadcast television. The film’s expected release date (as well as the broadcast timeline for promotional advertising) fell within the pre-primaries “electioneering communications” window as established by BCRA. As the feature’s main topic explicitly dealt with a candidate for federal office, the probability of the film’s standing muster as a permissible form of issue advocacy under the BCRA “electioneering communications” standard appeared extremely remote. Since at least part of group’s funding is derived from

³⁸ On its website, Citizens United describes itself as “...an organization dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security [emphasis added]. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.” *Who We Are*, Citizens United Official Website, <<http://www.citizensunited.org/who-we-are.aspx>>.

³⁹ Some representative lines from interview footage featured in *Hillary: The Movie*'s trailer include: “She is steeped in controversy, she is steeped in sleaze, that’s why they don’t want us to look at her record...”, “I think it’s worth remembering that after her health care fiasco, the Clinton team put her to the side...”, “She’s deceitful - she’ll make up any story, lie about anything, as long as it serves her purpose at the moment...”, “I can’t think of any other politician in history who has shown such disrespect and a contempt for the Constitution and the rule of law as Hillary...I knew Richard Nixon, and I’ll tell you something – she’s no Richard Nixon, she’s worse!”. In addition, phrases such as “As First Lady she was plagued by scandals” and “As a presidential candidate, she’s...a mystery,” are intermittently imposed on screen.

⁴⁰ “*About the Film*,” *Hillary: The Movie* Official Website, <<http://www.hillarythemovie.com/about.html>>.

corporate sources banned from engaging in express advocacy, there was a strong possibility that such a finding would prohibit *Hillary: The Movie* from being aired until after the primary season, when its efficacy may have been severely diminished. As a result, Citizens United decided to take a proactive approach in preemptively bringing the matter to federal court before releasing *Hillary: The Movie* and risking the penalties associated with a likely FEC inquiry.

The legal history of *Citizens United v. FEC* is a rather unusual one, since what began as a fairly routine plea for a preliminary injunction against enforcement eventually became a significant constitutional matter for the Supreme Court. At first Citizens United's legal strategy was to claim that *Hillary: The Movie* could not constitutionally be deemed an "electioneering communication" by dint of its exclusive release as an on-demand broadcast, as advocacy enacted through such a channel is not "publicly distributed" and hence not within the purview of the BCRA standard. While the federal courts denied Citizens United the injunction necessary to air the film prior to the primaries, the case presented an argument which proved sufficiently interesting to eventually make its way to the Supreme Court, though it was indeed little more than a technical matter involving BCRA's scope. The nature of the case, however, would change drastically:

On June 29, 2009, rather than issuing a decision in the case, the Supreme Court ordered additional argument and directed parties to file supplemental briefs addressing the question of whether, to resolve this case, it is necessary to overturn either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a regulation on corporate treasury fund spending in Michigan state elections, and the part of *McConnell v. Federal Election Commission (FEC)*, 540 U.S. 93 (2003), which upheld the "electioneering communications" section of BCRA.^{41 42}

⁴¹ *Citizens United v. FEC – Background*, Brennan Center for Justice at New York University School of Law, <http://www.brennancenter.org/content/resource/citizens_united_v_fec/>. For the Supreme Court to forgo issuing a decision and instead ask counsel to re-argue the merits of the case on different legal grounds is an exceedingly rare occurrence.

⁴² *Austin v. Michigan Chamber of Commerce* involved a constitutional challenge to the provision of the Michigan Campaign Finance Act, a Michigan state law, which prohibited corporations from spending general treasury funds

The Court's decision to have the case re-argued on such grounds signaled its willingness to reconsider the constitutionality of prohibitions on express advocacy by corporations and unions, a highly improbable and astounding development. A decision which challenged any aspect of such long-entrenched and accepted fundamental principles of American campaign finance law would vault *Citizens United v. FEC* into rare "instant landmark" status. The substance of the decision would indeed merit such "instant landmark" status, as in a five to four split decision, a majority of the Court ruled that government efforts to totally restrict the right to freedom of political speech based on the speaker's corporate or union identity *per se* unconstitutional.

In approaching the constitutional question, the Court applied the "strict scrutiny" standard, which necessitates that any law which abridges a fundamental constitutional right must both serve a "compelling government interest" and be sufficiently "narrowly tailored" in its construction to be deemed legal. Given that the issue at hand concerned the right to free expression of political interests, which without a doubt qualifies as a fundamental right guaranteed by the First Amendment, the operative portion of the question in this case was whether the federal government's rationale for instituting a blanket ban on direct participation in express political advocacy upon corporations and unions constitutes a sufficiently vital public interest.

This was not a new question before the Court, as effectively the same analysis had been conducted in *Austin v. Michigan Chamber of Commerce*. In judging the merits of a provision in state law which also prohibited corporations from engaging in direct express political advocacy in state elections, the Court had found that the law passed under a strict scrutiny standard due to

for express political advocacy in state elections. Essentially, the provision reproduced the federal Tillman and Taft-Hartley Act's ban on corporate spending on express advocacy in federal elections. The Court found the act to be constitutional, as is described later.

the compelling state interest in reducing the incidence of *quid pro quo* corruption in electoral politics. Protecting the institutional integrity of the electoral process is vital to the health of a vibrant and successful democracy, the Court reasoned, and the potential for the comparatively massive resources of corporate general treasuries to foster not only genuine corruption, but also the perception of corruption, presented a significant threat to that integrity. Given the appreciable public interest in taking measures to counter this threat, the state's solution in banning the use of corporate treasury funds in any form of express political advocacy in state elections was also deemed a reasonable and sufficiently narrow mechanism with which to attain this goal. Thus, this state law, which is effectively an almost exact analogue to federal regulations for federal elections, is constitutional.⁴³

In applying the same standard for constitutional analysis of the same substantive issue, the *Citizens United* Court comes to the opposite conclusion. While it recognizes that preventing actual and perceived *quid pro quo* corruption in electoral politics is of crucial institutional interest for the government, it concludes that a comprehensive ban on independent political advocacy for corporate and union entities during BCRA's "electioneering communications" windows is too broad an infringement on their constitutional right to freedom of political speech to pass strict scrutiny.⁴⁴ Such a broad measure has an unacceptable "chilling effect" upon the political process, as it detracts from the public discourse on electoral politics by obtrusively

⁴³ Another recent, and even more salient, example of this logic is in *McConnell v. FEC*, where a mere seven years earlier the Court had upheld most portions of BCRA, including the "electioneering communications" standard at issue in *Citizens United*. The Court's rationale for upholding this portion of BCRA mirrors that of *Austin*, holding that the "electioneering communications" standard was a narrowly constructed mechanism for preventing corporate and union funds from participating in what is effectively express advocacy, which is related to the important governmental interest in reducing the perception of corruption in electoral politics.

⁴⁴ It is vital to note that while *Citizens United* holds that comprehensive bans on independent express advocacy by corporations and unions is unconstitutional, this does not mean that the same logic applies to non-independent express advocacy. *Citizens United* contains no substantive holding on the issue of corporate and union contributions to campaigns or coordinated advocacy, meaning that the *status quo* of corporations and unions being barred from engaging in non-independent political advocacy is undisturbed in the wake of the decision.

discriminating against certain actors on the basis of their special financial advantages over others. The full benefit of First Amendment speech protection, the Court notes, is not dependent upon the speaker's "financial ability to engage in public discussion:" furthermore,

...Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt...the appearance of influence or access will not cause the electorate to lose faith in this democracy.

Thus, the Citizens United Court invalidated BCRA's "electioneering communications" provision, a prohibition on corporate and union independent express advocacy, as a measure too broad to pass strict scrutiny, since the law abridges the fundamental constitutional right of corporations and unions to exercise freedom of speech in electoral politics. Since this legal rationale is valid for time periods outside of BCRA's "electioneering communications" windows as well, this finding meant that corporations and unions were now freed to engage in independent express political advocacy at any time.

Another key, but often discounted or overlooked, substantive aspect of the *Citizens United* holding is its affirmation of the constitutionality of significant disclosure requirements for independent express advocacy. Unlike the blanket prohibition on independent express advocacy by corporations and unions, the Court found that the provisions of BCRA which require transparent and highly visible disclosure of the sponsors of "electioneering communications," or independent express advocacy, to stand muster under strict scrutiny. The rationale is that government has a compelling interest in providing the public with information about sources of funding in electoral politics, and that requiring the financial backers of political advocacy to reveal themselves is a reasonably narrow and effective mechanism which doesn't unduly infringe upon sponsors' constitutional right to free speech. This finding essentially ensured that the well-

established legal regime for donor disclosure for independent express advocacy in American electoral politics would be allowed to continue post-*Citizens United*.

To summarize, *Citizens United v. FEC* held that BCRA's ban on independent express political advocacy funded by corporations and unions during the defined "electioneering communications" window to be unconstitutional infringements upon such entities' right to freedom of speech. Since the legal logic underlying this holding is applicable outside of the BCRA-defined "electioneering communications" windows, this allowed corporations and unions to engage in independent express advocacy year-round for the first time since the passage of the Taft-Hartley Act in 1946. The *Citizens United* decision logic did not, however, address the issue of restrictions on corporate and union contributions to and coordination with campaigns, which meant that corporations and unions are still prohibited from engaging in these forms of express advocacy. In addition, existing disclosure requirements as to the sponsors of independent express political advocacy were reaffirmed by the Court and remain unchanged.

Part Three: The Practical Impact of *Citizens United* on Electoral Politics

With a firm grasp of how the pre-*Citizens United* American campaign finance system was regulated and what exactly the *Citizens United* holding changes in the legal structure underlying such regulations, it is now possible to critically assess the probable substantive impact of the decision on political life. An objective and rational analysis which considers the realities of pre-*Citizens United* electoral politics in their proper context strongly suggests that its effect upon actual electoral politics is likely to be fairly minimal.

The rationale underlying this hypothesis may be separated into three mutually-supportive lines of reasoning. The first line holds that while *Citizens United* heralded significant changes in

both the structure and principles of American campaign finance law, from a practical standpoint the decision contributed little to the “toolbox” of advocacy mechanisms available to politically active corporations and unions. Essentially, this logic claims that the newly-granted ability of such entities to engage in independent express advocacy is substantively insignificant when they could already engage in *effectively express* advocacy with little to no additional costs or obstacles. The second line argues that the differential disclosure rules pertaining to independent express advocacy and the already-existing mechanisms for *effectively express* advocacy incentivizes the use of the latter for those corporations and unions which seek to participate in electoral politics but desire relative anonymity. This rationale is the basis for the expectation that the forms which corporate and union influence will take in campaigns and the public electoral discourse will remain largely unchanged in the wake of *Citizens United*. The third line of reasoning demonstrates that the decision does practically nothing to change the decision-making process of corporations and unions considering whether or not to become involved in political advocacy in the first place and how much to spend on any such efforts.

The Minor Substantive Changes from Citizens United

Citizens United's substantive holding that any attempts to restrict instances of independent express advocacy by corporations and unions are unconstitutional heralded a major shift in the guiding principles of modern campaign finance regulations. Such restrictions had been firmly entrenched in federal law since the Taft-Hartley Act in 1946 imposed a blanket ban on such independent express advocacy supported by corporate and union general treasury funds, a prohibition now rendered wholly inoperative. In a legal sense, this significant and unexpected reversal of course in a highly sensitive and controversial area of federal law certainly qualified *Citizens United* as a true landmark decision

Distinction as a legal landmark, however, does not necessarily imply major substantive impact, and *Citizens United* is certainly demonstrative of this fact. While the decision indeed allows corporations and unions to freely engage in a major category of political advocacy for the first time since 1946, the lifting of this restriction represents a relatively minor change in the *status quo* for those that choose to participate in electoral politics, as it merely signals the legal formalization of an erstwhile informal and common practice. The structure of pre-*Citizens United* campaign finance regulations allowed for multiple legal methods in which interested corporations and unions could engage in *effectively express* advocacy, often supported with general treasury funds. Since these methods entail few, if any, additional costs or implementation barriers compared to actual independent express advocacy, it is clear that such organizations were in practice not truly excluded from the political arena. Given this *status quo*, *Citizens United*'s actual substantive impact is merely the legalization of a new mechanism which corporations and unions may consider using to participate in express electoral politics.

Post-BCRA, corporations and unions had three viable vehicles through which to engage in political advocacy: affiliated PACs, and contributions to both 527 and 501(c) organizations. Ostensibly, each of these political action organizations has fundamental legal limitations which characterize them as distinct, inferior alternatives to unlimited independent express advocacy. Affiliated PACs may solicit capped contributions from individuals who are reasonably associated with the PAC's attached corporate or union sponsor, but not from the sponsoring organization itself; in addition, while a PAC may engage in unlimited amounts of independent express advocacy, it is only allowed to donate a maximum of \$5000 per campaign in any given election cycle. A 527 organization is allowed to accept unlimited contributions from corporate and union donors, but is barred from express advocacy and instead may only participate in

unlimited amounts of issue-based advocacy. Similarly, a 501(c) organization may also solicit unlimited amounts of funding from corporate and union contributors and engage in unlimited issue advocacy, but not express advocacy; in addition, political advocacy may not comprise the “primary” activity of a 501(c) organization, or else it risks the revocation of its tax-exempt status. With these constraints (ostensibly) reliably enforced by the FEC and IRS, at first blush it would seem that none of these means for participation in electoral politics may reasonably compare in terms of directness or efficacy to engaging in unlimited independent express advocacy.

In fact, significant weaknesses in campaign finance regulations make it possible for corporations and unions to engage in what is for all intents and purposes express advocacy, and in the case of 527s and 501(c) organizations do so without any source or amount funding limits. For instance, while PACs cannot receive any general treasury funding from corporations or unions, the affiliated sponsor of the PAC is free to set its political philosophy and agenda, including the determination of which campaigns receive direct donations and support from the PAC’s independent express advocacy efforts. Thus, a politically active corporation or union is permitted to establish and maintain what is an often significant conduit for both direct campaign contributions and for supporting independent express advocacy efforts.^{45 46} In the case of 527s and 501(c) organizations, their effectiveness lies in their ability to legally accept unlimited financial support from all American sources, including corporations and unions; in turn, these

⁴⁵ In addition, since PACs are wholly funded by FEC-regulated contributions from individuals, any independent express advocacy advertisements financed by a PAC are allowed to air during the BCRA “electioneering communications” window before primaries and general elections.

⁴⁶ An example of a major corporate-affiliated PAC is KochPAC, sponsored by Koch Industries (whose owners, the Koch brothers, are particularly prominent supporters of pro-business, conservative causes). KochPAC raised and spent over \$2.5 million during the 2008 election cycle, with nearly all of the money being disbursed amongst Republican federal and non-federal candidates and campaign committees. *Koch Industries Information Page*, Center for Responsive Politics, <<http://www.opensecrets.org/pacs/lookup2.php?cycle=2008&strID=C00236489>>.

funds may be used to exploit the campaign finance system's "issue advocacy loophole" by producing mass media advertisements which are often ill-disguised forms of express advocacy.

The "issue advocacy loophole" plays a crucial role in the validity of this argument, as the FEC's standard for discriminating amongst regulated forms of express advocacy and effectively unregulated issue-based advocacy is the chief obstacle for corporations and unions who desire to use the significant financial might of their general treasuries to influence electoral politics. The pre-*Citizens United* standard, guided by the *Buckley*-inspired "Eight Magic Words Doctrine" and the BCRA "electioneering communications" window, was in practice a remarkably exploitable rule: any broadcast media advertisement which did not use any variation of eight specific phrases and did not specifically refer to a candidate for federal office during the "electioneering communications" window was considered a *per se* form of issue-based advocacy for regulatory purposes. The nature of many of the advertising campaigns which were able to clear this obviously low hurdle for issue advocacy classification, and which were thus eligible for unlimited and unregulated sources of financing, was such that they were clearly and cogently able to promote one federal candidate while denigrating that candidate's opponent without using any of the eight prohibited phrases.

For example, perhaps the most (in)famous post-BCRA example of effectively express advocacy officially regulated as a form of issue-based advocacy is the advertising campaign launched by the 527 organization Swift Boat Veterans for Truth during the 2004 presidential race.⁴⁷ The group's chief purpose was to damage Democratic Senator John Kerry's presidential

⁴⁷ Since the top five donors to Swift Boat Veterans for Truth during the election cycle are wholly composed of corporations and unions [Perry Homes (\$4,450,000), Contran Corp. (\$3,000,000), BP Capital (\$2,000,000), American Financial Group (\$350,000) and United Dairy Farmers (\$260,250)], this example serves to demonstrate a particularly effective instance of exploiting the "issue advocacy loophole" which interested corporations and

campaign by impugning his record of military service during the Vietnam War, which the Kerry campaign had sought to portray as a positive character reference and a counterpoint to Republican opponent George W. Bush's questionable history of service.⁴⁸ Swift Boat Veterans for Truth launched a major television advertising campaign in August 2004 (the month of the high profile Democratic National Convention, and just prior to the start of the BCRA "electioneering communications" window) attacking Kerry's patriotism and leadership qualities, with the advertisements qualifying as instances of issue advocacy by dint of their forbearance in using any of the "eight magic words."⁴⁹ The group's significant funding allowed the advertisements to be aired frequently across the nation prior to the start of the "electioneering communications" window, with polls finding a noticeable negative impact on perceptions of John Kerry in their aftermath.⁵⁰ Clearly, then, such highly dubious forms of "issue" advocacy could certainly be used to make a significant impact on electoral politics.⁵¹

unions were perfectly free to emulate. *Swift Boat Veterans for Truth: Top Contributors, 2004 Cycle*, Center for Responsive Politics, <http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2004&ein=201041228>.

⁴⁸ The group's website claims that "Senator Kerry misrepresented his own actions and those of his fellow officers and men. We believe that some of that misrepresentation resulted in him receiving medals to which he was not entitled...It is a matter of public record that John Kerry lied before Congress when he falsely portrayed his fellow service personnel in Vietnam as rapists and baby killers... Drawing on the credibility of a tour of duty in Vietnam, however abbreviated, John Kerry shaped a false, slanderous image of U.S. military personnel as violent, vicious and brutal... *Having lied to the world about his former comrades, it is our view that Senator Kerry is unfit to command our sons and daughters as Commander-in-Chief* [emphasis added]." *Frequently Asked Questions*, Swift Boat Veterans for Truth Official Website, <<http://horse.he.net/~swiftpow/index.php?topic=FAQ>>.

⁴⁹ Some representative quotes from one such advertisement, which features a large group of Vietnam War veterans of swift boats posing questions for Senator Kerry, include "How can you expect our sons and daughters to follow you when you condemned their fathers and grandfathers?," "How could you accuse us [American Vietnam War veterans] of being war criminals and secretly meet with the enemy in Paris, and promote the enemy's position back home?," and "John Kerry cannot be trusted."

⁵⁰ *Attack Ads May Be Hurting Kerry, LA Times Poll Shows*, Jesse Westbrook and Jonathan D. Salant, Bloomberg News, 08/26/04, <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aASYBT9Pwt4E&refer=us>>.

⁵¹ Two particularly infamous pre-BCRA examples of such questionable issue advocacy, the 1988 Willie Horton and 1996 Bill Yellowtail advertisements, should reinforce this vital point. In the midst of the 1988 presidential election cycle, a conservative PAC named the National Security PAC produced and aired an issue advertisement which effectively attacked Democratic candidate Michael Dukakis' record as Governor of Massachusetts. A transcript of the advertisement's narration reads as follows: "Bush and Dukakis on Crime: Bush supports the death penalty for

In summary, corporate and union donors had a pre-*Citizens United* ability to reliably circumvent the prohibition on independent express political advocacy using multiple means. One option was to establish an affiliated PAC through which to direct significant amounts of individual contributions to favored campaigns and for use in unlimited amounts of independent express advocacy. Another viable option was to donate unlimited amounts of general treasury funds to ideologically similar 527 and 501(c) organizations, which were then permitted to spend unlimited amounts producing and airing “issue advocacy” advertisements that were frequently forms of effectively, but not technically, express advocacy. Given these established pre-*Citizens United* mechanisms for corporations and unions to substantively influence electoral politics, the decision itself doesn’t grant long-awaited access to the political arena for such entities so much as merely legalize another such viable option for effective participation in politics.

Differential Disclosure Rules and the Resulting Incentive Structure

In determining the likely practical effect of *Citizens United* on electoral politics, the next logical step in the analysis is to determine whether the newly-granted ability of corporations and unions to engage in independent express advocacy is likely to displace the existing means these entities already had available for becoming involved in electoral politics. While the established pre-*Citizens United* methods corporations and unions could use to engage in effectively express

first-degree murderers. Dukakis not only opposes the death penalty, he allowed first-degree murderers to have weekend passes from prison. One was Willie Horton, who murdered a boy in a robbery, stabbing him nineteen times. Despite a life sentence, Horton received ten weekend passes from prison. Horton fled, kidnapped a young couple, stabbing the man and repeatedly raping his girlfriend. Weekend prison passes: Dukakis on crime.” During the 1996 election cycle, a 501(c)6 organization named Citizens for Reform sponsored an issue advertisement attacking Democrat Bill Yellowtail’s candidacy for Montana’s lone Congressional seat featuring the following narration: “Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. Yellowtail’s explanation? He only slapped her, but her nose was not broken. He talks law and order, but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail and tell him we don’t approve of his wrongful behavior.” It is important to note that so long as the following advertisements had been aired outside of the BCRA “electioneering communications” window, it appears highly probable that they would have met the post-BCRA standard for classification as issue-based advocacy.

advocacy may be considered fairly similar to independent express advocacy in terms of efficacy in political influence, the former boast a critical advantage in terms of encouraging donor obscurity.

In a technical sense, the same broadcast disclosure requirements apply to most political advertising produced by PACs, 527s, 501(c)s, and by corporations and unions acting through independent express advocacy. Section 311 of BCRA mandates that any advertising which qualifies as an “electioneering communication” must prominently feature a spoken (if a radio advertisement) or displayed (if a television advertisement) disclosure of the sponsor of the ad in a message with the form “[Sponsor] is responsible for the content of this advertising.”⁵² In reality, however, this masks a distinct and significant difference in effective disclosure requirements between independent express advocacy and the legally-separate political action organizations. An “electioneering communication” which is the result of a corporation or union’s independent express advocacy must necessarily feature a prominent disclosure of that corporation or union’s sponsorship of the associated political message. In contrast, while an “electioneering communication” which is produced by a PAC, 527 or 501(c) organization must disclose the group’s sponsorship of the advertisement, it is not required to disclose that organization’s donors *at the exact same time*.

This may seem an unimportant variation in disclosure regulations, but it leads to a critical difference in terms of the degree of anonymity an advertisement’s sponsors may reasonably expect as a result. Any viewer of an “electioneering communication” which is the product of a

⁵² To clarify, *Citizens United* struck down the portion of BCRA’s “electioneering communications” provision which mandated that any advertisement which specifically refers to any candidate for federal office during the “electioneering communications” windows is to automatically be regulated as express advocacy. The decision did, however, maintain the disclosure requirements necessary for any advertisement which would otherwise be classified as an “electioneering communication.”

corporation or union's engagement in independent express advocacy will immediately know from the required disclosure message precisely which entity funded the political advertisement. Viewers of "electioneering communications" which are created by a PAC, 527 or 501(c) group will immediately know exactly which political action group produced the advertisement, but can only hope to learn who the advertisement's true sponsors (the financial backers) really are through further research into the FEC donor disclosure records for such organizations. Since it is difficult to believe that a significant portion of a major political advertisement's viewers are interested in actively researching the identities of the financial contributors, the "electioneering communications" disclosure requirement offers *de facto* significantly greater anonymity to the donors behind advertisements produced by political action organization than those which result from independent express advocacy by individual corporations and unions.

The prospect of effective anonymity for donors who choose to engage in electioneering communication through political action organizations rather than through independent express advocacy may certainly be an attractive incentive for choosing the former route over the latter for many corporations and unions. Such entities may rationally wish to limit the amount of criticism they receive from external sources over its political advocacy and expressed ideology; for example, a retail business may find it advantageous to keep its involvement in electoral politics effectively concealed for fear of causing observant customers with opposing political views to retaliate by defecting to a non-political or ideologically-opposed competitor. Similarly, corporations and unions also may have a reasonable incentive to limit potential internal strife through increased obscurity in their political advocacy; such entities undoubtedly have a vested interest in keeping their ideologically-opposed employees/members from expressing active displeasure with their political activities. Furthermore, corporations and unions may certainly

seek to foster a non-political or non-ideological public brand while still participating in relevant political matters as part of relevant due-diligence efforts. In short, it would seem logical that many (if not the majority) of corporations and unions would have reasons to positively value the prospect of anonymity in their efforts to influence electoral politics, especially when it may be accomplished through means of equal efficacy as independent express advocacy.

To summarize, a corporation or union which chooses to influence electoral politics using the pre-*Citizens United* means for effectively express advocacy available through PACs, 527 and 501(c) organizations is likely to ultimately find its efforts significantly more anonymous than if it had chosen to engage in independent political advocacy instead. Since it has already been established that the methods which yield effectively express advocacy have roughly the same efficacy in influencing electoral politics as independent express advocacy, the value of the former option's greater prospects for relative anonymity make it a more attractive means of political advocacy for likely the vast majority of politically active corporations and unions.

The Unaltered Incentives for Engaging in Political Advocacy

It has now been established that while *Citizens United's* legalization of corporate and union independent express advocacy did establish a new means through which these organizations could effectively participate in electoral politics, these entities already had several methods available to them to influence campaigns and public opinion. These methods, moreover, have been shown to be the preferable means of political advocacy for most corporations and unions by dint of their approximately equal effectiveness compared to independent express advocacy while providing a greater degree of anonymity, something such donors tend to find highly desirable. The last logical steps in evaluating *Citizens United's* likely practical impact are

to examine whether legalizing corporate and union independent express advocacy is likely to lead to greater corporate and union participation in, and aggregate expenditures on, political advocacy.

The question of the decision's probable effect on corporate and union participation rates in political advocacy seems rather easy to answer. Simple logic would seem to indicate that *Citizens United* does practically nothing to change the underlying incentives for corporations and unions to actually become involved in political advocacy. While the decision does establish a new avenue through which these organizations may participate in electoral politics, one would expect that those corporations and unions which are interested in political advocacy would have already utilized one of the existing pre-*Citizens United* means for becoming involved. It may be reasonably assumed, then, that in the decision-making process of a firm which has thus far decided not to participate in any form of political advocacy, the availability of means through which to effectively engage in electoral politics is not one of the critical considerations. Moreover, the preceding analysis of disclosure requirements established that many corporations and unions are likely to find independent express advocacy a less appealing means of political advocacy than the more anonymity-friendly mechanisms already available before *Citizens United*. Thus, the prospect of being able to engage in independent express advocacy does not seem to hold any inherent persuasive power on its own to convince otherwise politically inactive corporations and unions to change their stance on participation in electoral politics.

The question of whether the decision is likely to encourage greater corporate and union aggregate spending on political advocacy also seems to require only a short logical analysis. Given that a preceding analysis has established that pre-*Citizens United* mechanisms for corporations and unions to engage in effectively express political advocacy were both available

and faced few practical obstacles, it is quite reasonable to assume that organizations which were already active in electoral politics prior to the decision were already spending as much on political advocacy as they were willing to spend. Thus, for *Citizens United* to have a significant positive impact on the aggregate amount of political advocacy spending by corporations and unions, the substantive holding would have to either lead to an increase in the rate of participation in political advocacy by corporations and unions in general and/or foster significant positive change in such organizations' decision-making process for allocating funds for political advocacy.

The first condition has already been eliminated as a possibility, while the second does not appear any more likely than the first. Corporations and unions have many other important uses for their general treasury funds than for political advocacy alone, and generally face real sources of accountability for their spending decisions from within the organization itself.⁵³ Additionally, the fundamental truth that political advocacy functions as a public good is doubtless a significant factor which actively depresses many corporations' and unions' determinations of the proper size of their own individual political advocacy budgets.⁵⁴ Since the substantive holding of *Citizens United* merely establishes another viable method for interested corporations and unions to

⁵³ For example, the shareholders of a public firm may punish profligate board members for using excessive amounts of shareholder capital for political purposes through an adverse proxy vote in their annual meeting. While privately held companies are not accountable to any public shareholders, any firm which needs to access capital markets to fund its operations must not spend too many corporate funds for political advocacy lest wary potential lenders and creditors increase the company's cost of business. Union leadership is accountable to the union's members, who fully expect their often significant union dues will primarily be used to directly improve their terms of work.

⁵⁴ Conceptually, a public good is one which exhibits the characteristics of non-rivalry (the enjoyment of the good's benefit does not preclude others from enjoying the exact same amount of benefit as well) and non-excludability (no single actor may be precluded from enjoying the full benefit of the good). In the context of political advocacy, this means that the benefits of any one actors' spending on political advocacy must accrue equally to all actors. In practice, this disincentivizes an individual actors' spending on political advocacy to at least some degree, as the fact that the benefits of political advocacy spending apply widely encourages an individual actor to spend as little as possible themselves while hoping to accrue the benefits of others' political advocacy spending for no out-of-pocket additional cost.

effectively participate in electoral politics, the decision itself logically does nothing to change the core factors motivating these organizations' decisions on the amount of general treasury funds they are willing to commit to political advocacy. Hence, it is unreasonable to conclude that the *Citizens United* decision on its own will have a positive substantive impact on the amount of corporate and union spending on political advocacy.

To briefly summarize the logic underlying this paper's assertion that *Citizens United*'s effect upon actual electoral politics is likely to be fairly minimal, it has been established that the decision merely legalized a new mechanism which corporations and unions may choose to utilize for participation in electoral politics. In context, this is a rather underwhelming practical development, as these organizations were already able to influence American political life through mechanisms readily available to them prior to *Citizens United*, with these mechanisms allowing for unlimited amounts of effectively express advocacy with almost no real obstacles. In addition, this new method for engaging in political advocacy appears to be a comparatively sub-optimal mechanism for many (arguably most) corporations and unions, as the established pre-*Citizens United* mechanisms offer the often desirable advantage of greater anonymity for financial backers. Finally, the decision's substantive holding does practically nothing to change either non-politically active corporations' and unions' incentives to abstain from political advocacy or alter politically active organizations' decisions on how much to spend on political activities; hence, it is unreasonable to conclude that *Citizens United* itself is likely to lead to either more corporate and union participation in political advocacy or higher expenditures for

such advocacy. Taken holistically, therefore, the landmark legal holding in *Citizens United* is unlikely to precipitate a major change in American electoral politics.⁵⁵

Part Four: Conclusion

This paper has sought to argue that the major changes in the legal principles of campaign finance law precipitated by the “instant landmark” by *Citizens United v. FEC* is likely to result in a fairly minimal substantive impact on the American political life and elections. While the operative portion of the decision’s holding struck down long-established regulations prohibiting corporations and unions from engaging in independent express political advocacy, within the context of actual electoral politics the legalization of this form of advocacy meant comparatively little. Despite the venerable ban, corporations and unions had long been able to circumvent its provisions through the funding of legally-separate political action organizations which are able to take advantage of significant regulatory loopholes that allow for essentially unregulated and unlimited engagement in effectively express political advocacy. These established mechanisms for corporate and union participation in electoral politics continue to prove useful as attractive alternatives to the newly-granted ability to engage in independent express advocacy, primarily due to their desirable promise of *de facto* greater donor anonymity. In addition, the limited

⁵⁵ It is important to note that the structural incentives analysis at the heart of this paper’s thesis does not offer substantive conclusions which may be expected to be permanent. Simply put, analysis of the incentives underlying political advocacy decisions is liable to change in the face of major regulatory shift over time. For example, the external validity of this analysis is currently somewhat questionable in the wake of a number of such significant regulatory changes which occurred after the *Citizens United* decision. Specifically, both the District of Columbia Circuit Court of Appeals’ decision in *SpeechNow.org v. FEC* in March 2010 and a series of new FEC advisory decisions significantly alter the analysis of the impact of disclosure provisions on the choice of which mechanism for political advocacy is the most attractive (there is a new such mechanism nicknamed a “SuperPAC,” which is a tax-exempt vehicle allowed to solicit unlimited contributions from all (American) sources to spend on unlimited independent express political advocacy, while retaining the disclosure advantages enjoyed by a normal PAC). What this paper is meant to analyze is what, if any, are the specific substantive effects of the *Citizens United* decision, and only the *Citizens United* decision, on American electoral politics. While the conclusions of this paper’s logical analysis may currently be somewhat dated in light of post-*Citizens United* developments, the future re-application of the logical framework itself may shed some light on the current state of campaign finance regulations and the associated incentive structures.

substantive holding of *Citizens United* itself does nothing to encourage either greater corporate and union interest in active political advocacy or more corporate and union spending on advocacy. Under rational and objective scrutiny, then, contemporaneous fears that the *Citizens United* decision would cause irreparable substantive harm to American political life appear thoroughly exaggerated and logically unfounded.